

Point-of-Sale Retrofit Mandates:

An Ill-Conceived Approach to Remediating Real Deficiencies.

By: John R. Falk

- (1) The point-of-sale** (a.k.a. ‘prior-to-closing escrow’, ‘at or before transfer of title’, ‘prior-to-sale’, ‘at-sale’...) **approach is inherently inefficient.** (P-o-s employs a “shotgun” approach to addressing a problem, using a “hit & miss” methodology that relies upon home sales to catch/capture a needed upgrade/retrofit to properties. Without a logical, programmatic, or systematic plan to deal with an identified deficiency, the needed retrofit is subject to the vagaries of the real estate sales market. This unfocused effort leads to some properties or areas receiving ‘overkill’, with a given home selling two, three, or more times over a brief period thus triggering compliance activities or documentation of prior compliance, while other residences or neighborhoods go unchecked and unmitigated because the homes in question have not entered the ‘for-sale’ market, much less transferred title after a successful sale/transaction. This is not the most productive use of public sector resources, nor is it the most productive use of private sector time and dollars. The housing stock takes some 20+ years to ‘turn-over’ once, while a significant subset of homes will not transfer title even once during that 20 yr. cycle. Ironically, older homes are more likely to be in need of the required retrofit and yet are least likely to have it imposed upon them under a p-o-s structure of compliance.)
- (2) Point-of sale provisions are ultimately ineffective.** (The inefficient nature of such an ill-conceived approach inevitably fails to adequately address the identified concern in a timely fashion. New and newer home sales will most likely already comply with the mandated retrofit, yet they get ‘caught up’ in this indiscriminant at-sale trigger. Additionally, newer homes are more prone to resale, that is to say they have a tendency to turn-over more often than older more well established residences, thus leading to duplication of efforts on already compliant properties, while completely missing those properties most likely to be deficient, namely the older unit. The most ‘unsound’ properties are concurrently the least likely to abate the condition of concern.)
- (3) Point-of-sale methodologies lack equity in application.** (When a p-o-s strategy is deployed it separates two groups or classes of people for differential and unequal treatment, those who are selling their homes and those who are not. How does the governmental entity that imposes such a mandate explain why one person (new owner) has been forced to comply with whatever retrofit provision is required, while the neighbors (existing owners) are allowed to continue/remain in the unsafe or unsound condition just because of ownership tenure? This unequal treatment is not simply related to the action required, but also to the fact that one group is financially burdened [home sellers/buyers] while the other

group experiences no fiscal impact [stable titled owners]. There is no “nexus” between the act of selling one’s home and the need at that point in time for a particular retrofit. The need has either been established or it has not; if it has been demonstrated that a retrofit is indicated then it should be performed, period. If it is not truly needed, then such a retrofit should not encumber those who transfer deed title.)

(4) Contrary to popular prejudiced opinion, the escrow process does not generate a large pool of undedicated funds upon which one can draw to complete a retrofit mandate. (One of the most destructive myths surrounding the sales of residential properties is the erroneous belief that piles of uncommitted funds are lying around just waiting to be tapped into; far from it, many homebuyers are stretching their financial position as far as could prudently be done to qualify for their home purchase. To add this p-o-s financial burden to the transaction can and has done damage to some transactions. Those most vulnerable to such a cost rendering the purchase no longer viable are those first-time homebuyers just entering the market, and even more acutely affecting the lower-income household attempting to secure affordable housing as their first step in the American Dream of homeownership. If one’s objective is to put more working people into homes within the community, then point-of-sale mandates can subvert that much greater good. On the seller’s side of the equation, we often find one of three motivating factors – ‘buying up’ as one’s family grows; looking to reduce the size of one’s home as the nest empties and the older adults are nearing retirement; or in the unfortunate circumstance of a ‘distressed sale’, in which a loss of employment, loss of spouse, medical condition, or other financial crisis leaves the owner unable to afford the mortgage – any of the these general situations should honor, respect, and protect the reasonable expectation to consummate the sale without being ‘blind-sided’ by a back-door tax on property sales via the imposition of a mandated retrofit.)

(5) Escrows can be adversely affected by an ‘at-sale’ mandate. (Escrow is a time-sensitive process, and the addition of duties to perform prior to close of escrow can and does cause some escrows to fall through. Issues associated with the cost and availability of inspectors to come on-site to review and certify a property as compliant in a timely fashion is a major concern. This concern is significantly compounded if actual work on-site is required to bring the property into compliance. Are materials and installers readily available? Are the inspectors once again available to inspect and certify the site after project completion? Do permits have to be drawn from one or more entities such as the city, county, utility... before any work can begin? All of these added costs and delays are imprudent if one relies upon a stable housing market as a core component of the community’s economic viability. In many rural and most resort regions, housing is one of the principle drivers of the area’s economy. Doing damage to, or even just the potential to damage the housing market, must be avoided in a vulnerable economy, and in a region without great economic

diversity. The ripple effect of dampening the housing market would do untold damage to not only the region's economic vitality, but to its very viability. Not to mention the fact that much needed environmental improvements would go unrealized as resources dry up along with the market.)

- (6) The issues associated with items # 4 & 5 are made all the worse if the mandated retrofit is an external/outdoor one.** (All the aforementioned issues associated with on-site inspections, certification, necessary installation work, and cost estimates are compounded by winter weather conditions. Furthermore, escrow 'hold-backs' are increasingly unpopular, to the point of not being allowed/acceptable by many escrow companies, due to the administrative head-aches, liability exposure, and massive cost 'unknowns' that make it difficult-to-impossible to set a fair and reasonable hold-back amount.)
- (7) If the problem/deficiency is of such importance that it requires a mandated retrofit on existing properties, then it would seem difficult to justify the imposition of a program that will take two decades or more to realize the goal.** (This begs the question as to whether the governmental entity imposing the p-o-s retrofit is doing so because it's the right thing to do, or because it's the easy thing to do. If the urgency of the change-out is lacking, then it should not burden the already overly burdened escrow process. If urgency has been identified as a factor, then one cannot in good conscience deploy a methodology known for its elongated timeframe. If the public's health, safety, or general welfare is cited in the findings to impose such a p-o-s retrofit mandate, then it would seem most unwise and shortsighted to utilize such an inefficient tool; these officials might well be exposing themselves and the unit of government over which they preside to claims of liability for failing to protect the population in a timely manner. The same argument can be sustained in relation to an environmental concern that has triggered such a retrofit mandate. If proposed to be accomplished at-sale, the program has the net affect of allowing the majority of the degradation to continue for years, indeed decades.)
- (8) Point-of-sale mandates place real estate professionals in the inappropriate position of have to act in an enforcement capacity (policing) for a governmentally imposed mandate.** (One of the great unspoken reasons that units of government choose p-o-s mandates is that it serves to 'lay-off' a significant amount of the compliance enforcement activity to the private sector. This approach is inappropriate on a number of grounds- First, the real estate professional is not an expert in the technical points of a retrofit requirement, yet is expected to act as such in the service of both the client and the governmental entity that foisted this burden upon them. Second- the state standards for training/education, experience, and testing/examination requirements for licensure as a real estate agent or broker do not include any demonstration of technical proficiency or expertise in areas such as identification of EPA Phase II or better woodstove compliant devices, propane regulator valve

upgrading, the correct and complete installation or maintenance of site-specific erosion control measures [a.k.a. BMPs], recognition and grading/ranking of energy efficiency upgrades, removal of high flow water consumption devices and replacement with compliant low flow fixtures and facilities, and so forth for the many ill-fated point-of-sale retrofit proposals of the past and present. Thus, in imposing a p-o-s mandate one is requiring the real estate licensee to act well outside of their scope of training. Third, this situation exposes the practitioner to a wholly unnecessary and unacceptable increase in liability exposure. Finally, the structural deficiencies/inadequacies of a point-of-sale approach does damage to the real estate practitioner-client relationship; as it does damage to the integrity of the needed retrofit and the governmental entity that elected to deploy such an ill-conceived plan of action/remediation.)

- (9) The issues associated with point-of-sale compliance are further complicated when the property transaction is completed without the assistance/guidance of a real estate professional.** (While for sale by owner-‘FSBO’ transactions are subject to all the same requirements as any other real property transaction, the reality is that certain details are sometimes missed as one attempts to navigate through the minefields related to real property sales. The more localized and unique or technical the requirement, the more likely it is to be overlooked, misunderstood, or even ignored by the non-professional. This situation is made all the more difficult when the buyer, seller, and/or even the escrow agent are out-of-area participants in the sale. A resort home market is ripe for just such out-of-area transaction participants.)
- (10) Real and pressing problems deserve effective and timely redress; a universal requirement for compliance, with a date-certain established at which point it must be demonstrated, or demonstrable, that the fix has been implemented is the solution.** (In those instances where a compelling deficiency exists, backed by strong science, and with a reasonable ‘fix’ available to remediate the situation, then the prudent course of action demands that all affected parties comply with the change-out in a timely manner. If the sheer number of retrofit installations anticipated to be required outstrips the government’s or industry/manufacturer’s ability to meet the need, then phasing is indicated. Often times there is evidence of points or concentrations of greater concern than the overall background population, and when such is the case, the mechanism of choice is multiple trigger dates for compliance based upon geography or some other logical grouping, using a “worst first” approach.)
- (11) Disclosures of material facts related to a property provide a powerful opportunity to both inform buyers and sellers of an issue, condition, law, or improvement/upgrade, as well as to motivate the owner to act well in advance of offering a property for sale.** (A universal requirement serves as the most powerful platform upon which to construct a fair and expedited response by all. In the preparation of placing a property on the market

for sale, a number of structural, functional, and aesthetic improvements are put in place by the owner, as resources allow, so as to ensure that the property has a minimum of flaws or complicating factors that might delay sales. A home's marketability, and ultimately its value (sold price), is predicated by a properly maintained structure and its surrounding grounds, along with compliance regarding applicable rules and regulations.)

(12) Less pressing matters are better addressed via information outreach and incentive-based compliance.

(Sometimes the scope or nature of the problem simply does not necessitate or allow for the imposition of an aggressive universal compliance mandate. In such instances, a combination of tools and tactics can and should be employed to achieve the desired end-state.

Information outreach is perhaps the most important single factor in obtaining widespread compliance on a voluntary basis. It has been shown time and again that most folks will voluntarily comply with a requested course of action, once the reasoning has been articulated and understood by the target audience. Along with information as to the issue, it is important to include concrete action steps that individuals can follow to achieve compliance. For individuals who face economic hardships in relation to compliance, a set or series of offsets should be made available, such as low cost or no cost materials, technical and/or labor assistance, and so forth. To bring along those few stragglers who need that little nudge to initiate action, a number of time-sensitive incentives can be offered and publicized. If they choose to act in a timely fashion they can take advantage of "x", "y", and/or "z" before they sunset [more carrot, less stick]. On the regulatory front, government can aid in the change-out by establishing a series of ordinances designed to induce compliance over time; such as requiring all new construction be compliant with the needed design upgrade, disallowing the sale, resale, or installation of non-compliant devices, and establishing a pool of resources for an incentive program. This approach mirrors the "cleaner fleet" analogy in the automobile industry, wherein older model cars were not required to retrofit emissions control devices, but new cars were required to meet the revised standard. As the fleet changed out over time, emissions reductions were realized.)

Point-of-sale retrofit requirements are poor performers, overly burdensome, inconsistent, and worst of all inefficient. Governmental mandates should be reserved for those rare instances when forced intervention is clearly required, and then only after presenting a well-justified and compelling need, proposing the best feasible solution to correct the problem, then imposing the requirement uniformly, and punishing bad actors consistently. Anything less does a disservice to the issue/problem, the governing body that is to provide stewardship, and the individual who is to be informed and protected from harm.

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