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Redefining Residential Real Estate Disclosure: Why Energy Consumption Should be Disclosed Prior to the Sale of Residential Real Property

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I. INTRODUCTION

"Since a home is often the largest purchase consumers make and [a home is] a major use of energy, why shouldn't a shopper have access to the . . . information" regarding a home's energy consumption?[1] It seems like a simple question, but lawmakers have yet to require the disclosure of energy consumption prior to the sale of residential real property in most states and jurisdictions.

Energy consumption disclosure should be required under statutory law or common law for numerous reasons. As Sections II.A and II.B describe, energy consumption is analogous to other material defects that require disclosure and should, therefore, be disclosed to the buyer prior to the sale of residential real property. Because energy consumption materially affects the value of the property, it is difficult to be observed by a potential buyer, and nondisclosure of such may induce a buyer to act, its disclosure should be compelled prior to the sale of residential real property. Section II.C then explains why sellers must disclose material defects to potential buyers and how this logic is similar to why energy consumption data should also be disclosed. Section III delves into other reasons energy consumption should require disclosure. These seemingly policy reasons include energy consumption's effects on the environment and on one's finances. Section IV then details states and jurisdictions that have enacted, proposed, and/or rejected bills or programs calling for energy consumption disclosure prior to the sale of residential real property. These examples illustrate what has, and has not, been successful as advocates attempt to require energy consumption disclosure in hopes of reducing energy waste and energy costs.

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[1] Editorial, *Efficiency Begins at Home*, BOSTON GLOBE, Jan. 9, 2008, at A14.

II. How is Energy Consumption Similar to Other Material Defects that Require Disclosure in the Sale of Residential Real Property?

The definition of a material defect and the factors which determine whether an alleged defect is material must be reviewed to explain that energy consumption is indeed a material defect requiring disclosure. Also, it is important to identify structural and non-structural problems that have been determined to be material defects to illustrate how energy consumption is analogous to these. Finally, the reasoning behind why such factors constitute material defects will be discussed, showing that the reasons for requiring energy consumption disclosure mirror those arguments.

A. What is a Material Defect?

In the sale of residential real property, many characteristics of the land and/or home must be disclosed to the potential buyer; these are commonly known as material defects.[2] Material defects are "problem[s] with a residential real property or any portion of it that would have a significant adverse impact on the value of the property . . . ."[3] While states vary as to what they require to be disclosed, most states follow a general principle of what constitutes a material defect, including whether the factor "materially affects the value of the property,"[4] whether the factor would be difficult to observe by a potential prudent buyer,[5] and whether nondisclosure of the factor induced the buyer to act.[6] In employing these general rules towards qualification of a matter as a material defect, one can see how energy consumption constitutes a material defect and should also be disclosed.

(i) Materially Affects the Value of the Property

Among the factors courts use in determining what should be considered a material defect, the most important is whether the proposed defect "materially affects the value of the property."[7] This phrase can be interpreted in different ways among courts, but it generally means that any factor which will alter the price of the property for the buyer must be disclosed.[8]

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[2] 68 Pa. Cons. Stat. Ann. § 7102 (2009). Note that Pennsylvania's statutes regarding residential real property will be used as a guide throughout this Comment because they are similar to those of most states.

[3] *Id.*

[4] *See, e.g.*, Shapiro v. Sutherland, 76 Cal. Rptr. 2d 101, 107 (Cal. Ct. App. 1998). *See also* Reed v. King, 193 Cal. Rptr. 130, 131-32 (Cal. Ct. App. 1983); Johnson v. Davis, 480 So.2d 625, 628-29 (Fla. 1985); Stambovsky v. Ackley, 572 N.Y.S.2d 672, 676 (N.Y. App. Div. 1991).

[5] Nesbitt v. Frederick, 941 So.2d 950, 956 (Ala. 2006). *See also Shapiro*, 76 Cal. Rptr. 2d at 107; *Reed*, 193 Cal. Rptr. at 133; *Johnson*, 480 So.2d at 628-29; *Stambovsky*, 572 N.Y.S.2d at 676; Paul A. Locke & Patricia I. Elliott, *Caveat Broker: What Can Real Estate Licensees Do About Their Potentially Expanding Liability for Failure to Disclose Radon Risks in Home Purchase and Sale Transaction?*, 25 Colum. J. Envtl. L. 71, 81 (2000); Kate McQueen, *Promoting Energy Efficiency through Building Codes*, 12 NaturalRes. & Env't. 122, 125 (1997); Mina S. Park, *Predecessor Landowner Liability: Disclosing Latent Defects*, 13 UCLA J. Envtl. L. & Pol'y 299, 321 (1994); *Kansas Governor Signs Bill to Promote Energy Efficiency in New Buildings*, States News Service, Apr. 10, 2007, *available at* http://apps1.eere.energy.gov/states/news_detail.cfm/news_id=10715 [hereinafter *Energy Efficiency*].

[6] *Johnson*, 480 So.2d. at 627. *See also* Jeffrey D. Masters & John R. Musitano, Jr., *Managing Liability Risks in Green Construction*, Los Angeles Lawyer, Dec. 2007, at 17, 18, *available at* http://www.lacba.org/Files/LAL/Vol30No9/2437.pdf.

[7] *Shapiro*, 76 Cal. Rptr. 2d at 107; *See also Reed*, 193 Cal. Rptr. at 131-32; *Johnson*, 480 So.2d at 628-29; *Stambovsky*, 572 N.Y.S.2d at 676.

[8] *Shapiro*, 76 Cal. Rptr. 2d at 107. *See also Reed*, 193 Cal. Rptr. at 131-32; *Johnson*, 480 So.2d at 628-29; *Stambovsky*, 572 N.Y.S.2d at 676.

One way courts decide if the factor does materially affect the property's value is to look for "a significant and measurable effect on [the] market value" of the property.[9] Utilizing this rule, California courts look at "the gravity of the harm inflicted by nondisclosure," to determine whether there is some sort of a measurable effect on the value of the property.[10] For example, one can clearly surmise that there is a depreciation of value of a house with a structural problem.[11] In addition, courts have also found that nonstructural factors, such as a house being subject to loud noises by neighbors, can also have a considerable and calculable effect on the value of the property.[12] Similar to these examples, energy consumption has both "a significant and measurable effect on [the] market value"[13] of residential real property. Energy consumption is significant because energy costs are the most expensive of any utility costs associated with residential real property.[14] Further, the decline in value is also measurable with mathematical figures that plainly illustrate the increased recurring costs of inefficient energy consumption in homes when compared to homes with lower energy consumption.[15]

In all determinations of whether a factor materially affects the property's value, courts employ an objective test,[16] relying on the facts of each particular case.[17] In using an objective test, courts do not look at the subjective value of the property or the potential defect to each specific buyer.[18] To the contrary, courts see if a reasonable person, or a reasonable buyer, would find that the factor materially altered the property's value.[19] In doing so, courts need not analyze the subjective opinions of that particular buyer concerning the specific alleged defect at the exact time of the purchase, and can avoid incidents where litigants later attempt to rescind a residential property contract by claiming that a defect was significant to them.[20] Using this objective test, energy consumption disclosure should be a material defect because it is considered to be important to reasonable buyers with its implications of high costs to the buyer in order to heat, cool, light, and maintain a property.[21]

As previously mentioned, courts deciding whether a factor materially alters the property's value do so on a case-by-case basis, relying on the case's facts.[22] This fact-intensive analysis takes all of the details of that particular case into consideration before deciding if the defect affected the

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[9] *Shapiro*, 76 Cal. Rptr. 2d at 107 (citing *Reed*, 193 Cal. Rptr. at 131-32).
[10] *Reed*, 193 Cal. Rptr. at 132.
[11] *Id.* at 131-32. *See also Shapiro*, 76 Cal. Rptr. 2d at 107.
[12] *Shapiro*, 76 Cal. Rptr. 2d at 107 (finding that the house was subject to extremely "noisy neighbors" and such was a material defect).
[13] *Id.* (citing *Reed*, 193 Cal. Rptr. at 131-32).
[14] *See* John C. Dernbach, *The Business of Climate Change: Challenges and Opportunities for Multinational Business Enterprises: Overcoming the Behavioral Impetus for Greater U.S. Energy Consumption*, 20 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 15, 23 (2007).
[15] *Id.* at 35.
[16] Ronald Benton Brown & Joseph M. Grohman, *Property Law: 1998 Survey of Florida Law*, 23 NOVA L. REV. 229, 317 (1998). *See also* Florrie Young Roberts, *Disclosure Duties in Real Estate Sales and Attempts to Reallocate the Risk*, 34 CONN. L. REV. 1, 10 (2001).
[17] *See Shapiro*, 76 Cal. Rptr. 2d at 107. *See also Reed*, 193 Cal. Rptr. at 132.
[18] Brown & Grohman, *supra* note 16, at 317; Roberts, *supra* note 16, at 10.
[19] Brown & Grohman, *supra* note 16, at 317; Roberts, *supra* note 16, at 10.
[20] *See* Brown & Grohman, *supra* note 16, at 317; Roberts, *supra* note 16, at 10.
[21] *See* Dernbach, *supra* note 14, at 35; McQueen, *supra* note 5, at 125.
[22] *Shapiro*, 76 Cal. Rptr. 2d at 107. *See also Reed*, 193 Cal. Rptr. at 132.

property's value and forces judges to not follow a *per se* rule for certain factors.[23] Following this test, energy consumption should be disclosed if the facts of the case collectively show a material effect on the property's value.

(ii) Difficult to be Observed by the Buyer

Another factor courts use in deciding if an alleged problem is a material defect involves whether a buyer would have difficulty observing the alleged defect in an inspection of the home.[24] Courts have historically determined that problems which a reasonable buyer would not prudently observe in a walk-through of the house are to be considered material defects and require disclosure.[25] Frequently, buyers do not have the "expertise" to know exactly what to look for or what to ask during an inspection in order to uncover all potential material defects.[26] While some structural defects, such as a leaky roof,[27] may be easily observed, other factors, such as the presence of radon in the home[28] or a particular history concerning the house which makes it undesirable, are not easily seen.[29]

Likewise, energy consumption cannot be readily observed in residential real property.[30] While some energy consumption "labeling requirements" exist for certain home appliances that a buyer could observe, these are not sufficient for a buyer to be aware of the overall energy costs of the property.[31] Because energy consumption is not easily observed by a prudent buyer, it too should be considered a material defect requiring disclosure.[32]

(iii) Nondisclosure Induces the Buyer to Act

One last factor courts utilize when determining if an issue is a material defect is deciding whether nondisclosure of that factor induces a buyer to act.[33] Courts find that those factors not revealed to the buyer which influence the buyer's decision to purchase the property require disclosure.[34] Usually, these cases involve the nondisclosure of a defect that affects the property's value and, therefore, the buyer would be more or less likely to go through with the purchase in using a simple cost analysis.[35] Under this rule, energy consumption should be disclosed because it is a

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[23] *Shapiro*, 76 Cal. Rptr. 2d at 107; 193 Cal. Rptr. at 132.
[24] *Nesbitt*, 941 So.2d at 956. *See also Shapiro*, 76 Cal. Rptr. 2d at 107; *Reed*, 193 Cal. Rptr. at 133; *Johnson*, 480 So.2d at 628-29; *Stambovsky*, 572 N.Y.S.2d at 676; Locke & Elliott, *supra* note 5, at 81; McQueen, *supra* note 5, at 125; Park, *supra* note 5, at 321; *Energy Efficiency*, *supra* note 5.
[25] *See Nesbit*, 941 So.2d at 956; *Shapiro*, 76 Cal. Rptr. 2d at 107; *Reed*, 193 Cal. Rptr. at 133; *Johnson,* 480 So.2d at 628-29; *Stambovsky*, 572 N.Y.S.2d at 676; Locke & Elliot, *supra* note 5, at 81; McQueen, *supra* note 5, at 125; Park, *supra* note 5, at 321.
[26] *See* Brown & Grohman, *supra* note 16, at 315; McQueen, *supra* note 5, at 124.
[27] *Johnson*, 480 So.2d at 628-29.
[28] Locke & Elliott, *supra* note 5, at 81.
[29] *Reed*, 193 Cal. Rptr. at 133 (explaining that the defect of a murder previously taking place in the home would not be observed by buyers); *Stambovsky*, 572 N.Y.S.2d at 676 (determining that the notion of a property being known as haunted by the community would not be easily detected by potential buyers).
[30] *See* Dernbach, *supra* note 14, at 35; McQueen, *supra* note 5, at 124.
[31] Dernbach, *supra* note 14, at 35.
[32] *Id.*
[33] *Johnson*, 480 So.2d at 627; Masters & Musitano, *supra* note 6, at 18.
[34] *Johnson*, 480 So.2d at 627; Masters & Musitano, *supra* note 6, at 18.
[35] *Johnson,* 480 So.2d at 627; Masters & Musitano*, supra* note 6, at 18.

factor that, if not disclosed by the seller, affects a buyer's decision as it affects the property's value.[36]

B. What Factors Constitute Material Defects and How is Energy Consumption Similar to Those?

Over time, with consistent disclosure issues arising over certain factors, states have created disclosure forms to be completed prior to the sale of residential real property.[37] However, some states or jurisdictions refer also to common law traditions of precedents in deciding whether a factor must be disclosed.[38] The discussion below outlines some of these factors, which according to either statutory law or common law, are considered material defects requiring disclosure and explains how energy consumption is comparable.

(i) Structural or Physical Defects

In the sale of residential real property, several structural or physical defects require disclosure for obvious reasons related to their implications of affecting the property's value.[39] For example, the quintessential property law case of *Johnson v. Davis* found that a leaking roof is one such material defect.[40] Other problems affecting a home's foundation were found to require disclosure in both Alabama[41] and Tennessee courts.[42] The reasoning behind finding these factors and others to be material defects will be discussed in-depth later in this paper, but it mainly rests on the idea that such issues greatly affect the property's value.[43]

Nevertheless, there are other physical factors that require disclosure that may come as a surprise and that show a shocking resemblance to issues arising from failure to disclose energy consumption. Courts have found that the following physical factors require disclosure: water supply system leaks,[44] heating system defaults,[45] and poorly functioning furnace and air-conditioning units.[46] Each of these established material defects, judges determined, affect both the property's market value and the environment, thus requiring them to be disclosed.[47] Similarly, energy consumption exceedingly affects the home's value both in the present and in the future with energy costs that will most likely steadily increase.[48] Because energy consumption both affects the value of the property and the environment, it too should be disclosed.

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[36] *See* Dernbach, *supra* note 14, at 35.
[37] Alex M. Johnson, Jr., *An Economic Analysis of the Duty to Disclose Information: Lessons Learned from the Caveat Emptor*, 45 SAN DIEGO L. REV. 79, 113 (2008). To date, thirty-four states maintain statutes requiring disclosure of certain factors. *Id.* For an example of a template that many states use for their disclosure forms, consult 68 PA. CONST. STAT. § 7403 (2008) (repealing 68 P.S. § 1025 in 2000, *available at* http://faculty.law.pitt.edu/fox/ltf/ltf02/PAdiscl.htm, (which offers an even more specific disclosure form)).
[38] *See* Johnson, *supra* note 37, at 113; Locke & Elliott, *supra note* 5, at 73.
[39] *Nesbitt*, 941 So.2d at 955; *Johnson*, 480 So.2d at 629; Pitz v. Woodruff, No. M2003-01849-COA-R3Cv, 2004 Tenn. App. LEXIS 851, at *24 (Tenn. Ct. App. Dec. 17, 2004); Johnson, *supra* note 37, at 109-10.
[40] *Johnson*, 480 So.2d at 629. For a more complete list of structural factors which constitute material defects, consult 68 PA. CONS. STAT. § 7403 (2008).
[41] *Nesbitt*, 941 So.2d at 955.
[42] *Pitz*, 2004 Tenn. App. LEXIS 851, at *24.
[43] *See Nesbitt*, 941 So.2d at 955; *Johnson*, 480 So.2d at 629; *Pitz*, 2004 Tenn. App. LEXIS 851, at *24.
[44] *In re* Sprague v. Sprague, 205 B.R. 851, 859-60 (Bankr. N.D. Ohio 1997).
[45] Smoot v. Hyde, 855 S.W.2d 399, 400 (Mo. Ct. App. 1993).
[46] *Pitz*, 2004 Tenn. App. LEXIS 851, at *24.
[47] *Smoot*, 855 S.W.2d at 400; *In re Sprague*, 205 B.R. at 859-60; *Pitz*, 2004 Tenn. App. LEXIS 851, at *24.
[48] *See* Dernbach, *supra* note 14, at 35.

(ii) Non-structural Defects

While understanding the physical conditions which constitute material defects is important, it is also significant to analyze non-structural issues which courts find to be material defects to see how energy consumption constitutes a material defect. Courts have found that nonphysical defects are consistently discovered in homes with the advent of technology and, regardless of their character, compel disclosure.[49] With improved inspections using this technology, buyers can be made aware of defects which are not normally seen or understood by a prudent buyer but are equally important in making the decision to buy residential real property.[50] Embracing this technology to protect buyers, courts choose not to look at the "character" of the defect, whether it is physical or nonphysical, and instead analyze the facts of the case to objectively see if the problem represents a material defect.[51]

Examples of these nonstructural material defects include the presence of radon,[52] environmental contamination,[53] and asbestos,[54] each found by courts to be material defects once technology advanced enough to detect these in homes. Years ago these factors would never have been detected and, therefore, could not have been found as requiring disclosure prior to the sale of residential real property.[55] However, modern technology allows buyers to uncover such material defects with information which influences their purchase decision.[56] Also, it is important to note that not all states and jurisdictions statutorily require disclosure of these material defects; many times these are disclosed routinely under common law or even simply under realtor practice.[57] Aside from their obvious impacts on public health, the presence of radon, environmental contamination, and asbestos have been found to affect a property's value and, consequently, are considered material defects.[58]

Similarly, energy consumption can now be readily inspected with technological improvements and has been found to affect a property's value, making it analogous to these nonphysical material defects that require disclosure.[59] Such inspections can be done by performing energy efficiency tests on the various appliances throughout the home prior to the sale of residential real property.[60] As will be thoroughly discussed later, energy consumption also does affect a property's value, largely impacting one's present utility costs and the future resale price of the

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[49] Johnson, *supra* note 37, at 109.
[50] *Id. See generally Nesbitt*, 941 So.2d at 956; *Shapiro*, 76 Cal. Rptr. 2d at 107; *Reed*, 193 Cal. Rptr. at 133; *Johnson*, 480 So.2d at 628-29; *Stambovsky*, 572 N.Y.S.2d at 676; Locke & Elliott, *supra* note 5, at 81; McQueen, *supra* note 5, at 125; Park, *supra* note 5, at 321; *Energy Efficiency*, *supra* note 5.
[51] *Reed*, 193 Cal. Rptr. at 133. *See Shapiro*, 76 Cal. Rptr. 2d at 104; *In re Sprague*, 205 B.R. at 855; *Stambovsky*, 572 N.Y.S.2d at 676; Johnson, *supra* note 37, at 109; Locke & Elliott, *supra* note 5, at 81; Roberts, *supra* note 16, at 9.
[52] Johnson, *supra* note 37, at 109; Locke & Elliott, *supra* note 5, at 73.
[53] Johnson, *supra* note 37, at 109.
[54] *Id.*
[55] *See id.*; *See also* Locke & Elliott, *supra* note 5, at 85, 89.
[56] Johnson, *supra* note 37, at 109; Locke & Elliott, *supra* note 5, at 73.
[57] Johnson, *supra* note 37, at 109; Locke & Elliott, *supra* note 5, at 73.
[58] Johnson, *supra* note 37, at 109; Locke & Elliott, *supra* note 5, at 73.
[59] *See* Dernbach, *supra* note 14, at 35.
[60] *See* McQueen, *supra* note 5, at 125.

property.[61] Thus, energy consumption, too, should require disclosure.

Along the same line of reasoning of considering the presence of radon, environmental contamination, and asbestos as material defects, courts have determined that other nonphysical problems materially affect a property's value and, accordingly, compel disclosure.[62] Again, these courts did not judge the character of the alleged defect, only its implications on the property, to find it to be a subjective defect requiring disclosure.[63] In another well-known property case, a New York court decided that the history of a house being haunted did constitute a material defect because of its impact on the property's value.[64] Likewise, a California court ruled that a seller must disclose to potential buyers that a murder took place in a home due to its implications of decreasing the property's value.[65] Other such nonphysical material defects include loud noise from neighbors[66] or a strong, pungent odor throughout the house.[67] The operable rule to all of these nonstructural material defects is their obvious effect on the property's value,[68] bearing a strong similitude to the notion of why energy consumption disclosure should be required. Despite its nonphysical nature and nontraditional characterization as a material defect, energy consumption should compel disclosure because of its impact on a property's value.

(iii) A Factor Found not to be a Material Defect

When a court rules that a factor does not require disclosure, it tends to rely on an external factor to which the property's area is prone and of which a reasonable buyer should be aware.[69] For example, in Florida, a state that is extremely prone to floods due to its geographical location and strong storms and hurricanes that devastate the area, courts do not necessarily treat flooding of a property as a material defect that requires disclosure.[70] For this reason, a Florida court did not find that a seller should have advised the buyer of the property's susceptibility to flooding because the buyer could have, and most likely should have, been aware of this fact already.[71] Contrarily, it is important to realize that energy consumption is not similar to this finding and should, thus, require disclosure, because it cannot be reasonably assumed that a reasonable buyer could know which areas of the country, or even of a state, would be prone to higher energy consumption.[72]

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[61] *See infra* Part III.B; Dernbach, *supra* note 14, at 35; John C. Dernbach, *Achieving Early and Substantial Greenhouse Gas Reductions Under a Post-Kyoto Agreement*, 20 GEO. INT'L ENVTL. REV. 573, 590 (2008); CITY OF PORTLAND OFFICE OF SUSTAINABLE DEV., THE HIGH PERFORMANCE GREEN BUILDING POLICY (Dec. 4, 2008), available at http://www.portlandonline.com/bps/index.cfm?c=45879&a=220879; Senator Hillary Clinton, Clinton's November 19, 2007, Speech on Economic Challenges (Nov. 19, 2007), available at http://www.cnn.com/2007/POLITICS/12/21/clinton.trans.economy/.

[62] *See Shapiro*, 76 Cal. Rptr. 2d at 104.

[63] *Reed*, 193 Cal. Rptr. at 133. *See generally Shapiro*, 76 Cal. Rptr. 2d at 104; *In re Sprague*, 205 B.R. at 855; *Stambovsky*, 572 N.Y.S.2d at 676; Johnson, *supra* note 37, at 109; Locke & Elliott, *supra* note 5, at 81; Roberts, *supra* note 16, at 9.

[64] *Stambovsky*, 572 N.Y.S.2d at 676.

[65] *Reed*, 193 Cal. Rptr. at 133.

[66] *Shapiro*, 76 Cal. Rptr. 2d at 104.

[67] *In re Sprague*, 205 B.R. at 855.

[68] *Reed*, 193 Cal. Rptr. at 133. *See Shapiro*, 76 Cal. Rptr. 2d at 107; *In re Sprague*, 205 B.R. at 855; *Stambovsky*, 572 N.Y.S.2d at 676; Johnson, *supra* note 37, at 109; Locke & Elliott, *supra* note 5, at 81; Roberts, *supra* note 16, at 10.

[69] *See* Nelson v. Wiggs, 699 So. 2d 258, 261 (Fla. Dist. Ct. App. 1997); Brown & Grohman, *supra* note 16, at 315.

[70] *Nelson*, 699 So. 2d at 261; Brown & Grohman, *supra* note 16, at 315.

[71] *Nelson*, 699 So. 2d at 261; Brown & Grohman, *supra* note 16, at 315.

[72] *See* Dernbach, *supra* note 14, at 35.

C. Why Must Sellers Disclose Material Defects and How is this Reasoning Similar to that of Why Energy Consumption Should be Disclosed?

Besides their implications on the property's value, courts and legislatures utilize other reasons to determine that material defects require disclosure. First, one must realize that the age-old doctrine of caveat emptor[73] is continuously being chipped away, allowing for more material defects to be disclosed.[74] Second, modern trends of fair dealing do not coincide with the nondisclosure of factors affecting a property's value.[75] Finally, buyers consistently rely on the seller's disclosures in their purchasing decisions and later elect to not conduct further inspection into potential problems, which is also contrary to fair dealing principles.[76]

(i) Decline in the Doctrine of Caveat Emptor

Early in the history of property law, caveat emptor became a fundamental and significant doctrine.[77] It warned buyers to "beware" as they were assumed to be at fault if problems later arose when they did not first observe such defects or about which they did not question the seller.[78] Over time, as properties and homes became more complicated and sophisticated, courts became less apt to apply the caveat emptor doctrine because buyers could not be expected to understand what problems may be present, to inspect all areas of the property, and to question sellers about such alleged technical problems.[79] Along similar reasoning, courts should not require buyers to reasonably understand the energy consumption of a property prior to purchase under caveat emptor. It should not be considered a factor of which buyers bear the responsibility of failing to become aware and, consequently, should compel disclosure.

(ii) Fair Dealing

In accordance with the decline of caveat emptor application, courts also adhere to stricter policies in enforcing "fair dealings" in the sale of residential real property.[80] In doing so, courts tend to apply the seller's duty to disclose "liberally . . . so that a buyer will be fully informed on matters affecting the value of the property," thus reiterating fair dealing among the parties.[81]

Fair dealing requires the buyer and the seller to be on comparable footing when negotiating and completing the sale of residential real property.[82] Such equality does not exist when the seller

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[73] Johnson, *supra* note 37, at 181 n.9. "[C]aveat emptor, or 'let the buyer beware,' means that in the absence of fraud, misrepresentation, or active concealment, the seller is under no duty to disclose any defects . . . to the putative buyer, and the buyer has a duty to discover such defects upon a reasonable examination of the property." *Id.*; *see* Alex M. Johnson, Jr., Understanding Modern Real Estate Transactions § 2.06(A) (2d ed. 2007).
[74] *Reed*, 193 Cal. Rptr. at 132; Johnson, *supra* note 37, at 97-98.
[75] *Shapiro*, 76 Cal. Rptr. 2d at 108; *Johnson*, 480 So.2d at 628; Johnson, *supra* note 37, at 88-91, 109; Roberts, *supra* note 16, at 7.
[76] *Johnson*, 480 So.2d at 627; Johnson, *supra* note 37, at 106; Masters & Musitano, *supra* note 6, at 18.
[77] *Reed*, 193 Cal. Rptr. at 132; Johnson, *supra* note 37, at 97-98.
[78] *Reed*, 193 Cal. Rptr. at 132; Johnson, *supra* note 37, at 97-98.
[79] *See* Johnson, *supra* note 37, at 97-98.
[80] *See, e.g.*, *Shapiro*, 76 Cal. Rptr. 2d at 108; *Johnson*, 480 So.2d at 628; Johnson, *supra* note 37, at 88-91, 109; Roberts, *supra* note 16, at 7.
[81] Alexander v. McKnight, 9 Cal. Rptr. 2d 453, 455 (Cal. Ct. App. 1992).
[82] *See* Johnson, *supra* note 37, at 109.

does not disclose necessary factors which may constitute material defects.[83] Assuming that the seller has the best and most comprehensive information regarding the property (having owned, and possibly lived on, the property for some time), fair dealing would require a great amount of disclosure by the seller.[84] This may include disclosing problems which are not listed on a state's required disclosure form or which are not compelled under common law.[85] No inspection into the most meticulous or technological of matters would reveal what a seller most likely observed while owning the property.[86]

Following the policy of fair dealing, sellers should be obligated to disclose energy consumption to potential buyers. Without such a requirement, the buyers and the seller are not on equal grounds because the seller retains valuable information concerning the property about which the buyer is not aware and, therefore, with which the buyer cannot adequately utilize in deciding whether to purchase the property.

(iii) Reliance on Seller's Disclosures and Nondisclosures

As discussed above, courts, when deciding if a factor constitutes a material defect, commonly look at whether nondisclosure of a certain factor induced a buyer to purchase the property.[87] Along with this, and with the policy of fair dealing, courts also take note of whether nondisclosure (or the extent of the actual disclosure) of a certain factor led the buyer to not make further inquiry into such an alleged problem.[88] For instance, if a seller briefly mentions a leaky roof, but dismisses it as not a frequent or significant problem, a buyer is not apt to ask additional questions about the potential roof problem because the seller, who knows the property best, does not consider it an issue.[89] Such partial disclosure, or total nondisclosure if the seller did not mention the problem at all, leads the buyer to make vital decisions of whether or not to seek additional inspections of the problem.[90] Courts find this significant in determining if a factor is a material defect because, in adherence to fair dealing, a seller should disclose all he or she knows about a potential defect to allow the buyer to prudently discover as much information as possible about the property. Accordingly, energy consumption should be disclosed prior to the sale of residential real property because nondisclosure, or only partial disclosure, of such could cause a buyer to not question or inspect a property's energy efficiency. This could lead to a flawed decision to purchase by the buyer and, thus, disclosure should be obligatory.

III. Besides its Similarities to Other Material Defects, Why Else Should Energy Consumption be Disclosed to Buyers?

Along with the distinct similarities energy consumption disclosure bears to other established material defects, it is also significant to note other reasons why such disclosure should be required. For example, energy consumption critically affects the environment, which is of even greater

[83] *Id.*
[84] *Id.* at 88-91.
[85] *Id.*
[86] *Id.* at 110.
[87] *See Johnson*, 480 So.2d at 627; Masters & Musitano, *supra* note 6, at 18.
[88] *See* Johnson, *supra* note 37, at 106; *Johnson*, 480 So.2d at 627; Masters & Musitano, *supra* note 6, at 18.
[89] *See* Johnson, *supra* note 37, at 106; *Johnson*, 480 So.2d at 627; Masters & Musitano, *supra* note 6, at 18.
[90] *See* Johnson, *supra* note 37, at 106; *Johnson*, 480 So.2d at 627; Masters & Musitano, *supra* note 6, at 18.

concern as environmental awareness grows every day.[91] The owner's financial situation is also immensely affected by energy consumption because this energy consumption usually constitutes a household's largest utility cost and can, therefore, sometimes leave a property owner unable to afford the property due to energy costs.[92] For these two reasons, concerning its effects on both the environment and one's finances, many buyers already find energy consumption to be extremely important and, consequently, request that it be disclosed.[93]

A. Environmental Concerns

Increasingly, environmental concerns creep up in all facets of society, especially those related to energy consumption. It may be difficult to understand how energy consumption directly affects the environment so this article will attempt a short summary to explain this process. Air pollution intensifies when one's energy consumption increases, such as with heating and cooling losses from poor insulation in a home, and later leads to health problems for humans when they are inhaled.[94] Increased energy consumption is also linked to escalating greenhouse gases in the atmosphere, which cause detrimental climate changes that consistently deplete the environment.[95] With climate and environmental concerns of rising societal interest in recent years, it is no wonder that scientists are looking to reduce energy consumption to later minimize the implications of energy consumption on the environment.

It is necessary to understand the sheer magnitude of energy consumption in the United States that later affects the environment. Quite significantly, the United States maintains the highest per capita energy consumption of any other nation,[96] and much of this energy consumption is caused by energy use in one's house.[97] Along with this, it is important to note that the per capita energy consumption in the United States has increased over the past few years.[98] The increase can be attributed to many factors, one being that the size of a new home in the United States has almost doubled in the last thirty years, thus greatly increasing per capita energy consumption in homes in order to heat, light, and maintain ones of this size.[99] Because the United States consumes a significant amount of energy, researchers have now resorted to seeking options that will reduce

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[91] *See* Dernbach, *supra* note 14, at 17, 23. *See also* Dernbach, *supra* note 61, at 583, 589; Michael P. Vandenbergh & Anne C. Steinemann, *The Carbon-Neutral Individual*, 82 N.Y.U. L. REV. 1673, 1703-04 (2007); *Efficiency Begins at Home*, *supra* note 1,

[92] Dernbach, *supra* note 14, at 35. *See also* Dernbach, *supra* note 61, at 590; SUSTAINABLE DEV, *supra* note 61; Clinton, *supra* note 61.

[93] *See* Dernbach, *supra* note 14, at 35. *See also* Masters & Musitano, *supra* note 6, at 18; *Efficiency Begins at Home*, *supra* note 1,

[94] McQueen, *supra* note 5, at 123.

[95] Dernbach, *supra* note 61, at 574, 583, 589; McQueen, *supra* note 5, at 123. The energy consumption of humans is blamed for increases in greenhouse gases and humans produce the bulk of their energy waste on their properties. Dernbach, *supra* note 61, at 583, 569.

[96] Dernbach, *supra* note 14, at 17. The energy consumption per capita of the United States is actually more than double that in Western Europe and more than tenfold of that in China. *Id.*

[97] Dernbach, *supra* note 61, at 589. One-third of the energy consumption of the United States is related to household usage. *Id.*

[98] *Id.*

[99] Dernbach, *supra* note 14, at 23. "The average size of new homes has increased from 1,500 to 2,300 square feet in the past [thirty] years." *Id.*

energy consumption in order to decrease the impact of the energy consumption of the United States on the worldwide environment.[100]

Recently, scientists and advocates have urged the reduction of energy consumption in the United States by attempting to make environmental concerns a priority in American society and encouraging people to acknowledge and reduce their energy consumption.[101] It is assumed that once an individual is aware of his or her immense energy consumption and its adverse effects on the environment, he or she will then seek to reduce this energy consumption.[102]

Because there have been positive effects when Americans realize the amount of energy they consume, researchers and scholars continue to push for policies and regulations which support energy conservation.[103] One such policy would require energy consumption disclosure at the time of sale of residential real property.[104] Forcing sellers to become aware of the energy consumption of their property, and how that energy consumption may affect a buyer's purchase decision, has already encouraged some sellers to install energy efficient improvements and may cause many other sellers to install similar improvements.[105] These improvements may include replacing old refrigerators, heaters, and air conditioners with more energy-efficient appliances, or better insulating a house to reduce the loss of heating or air conditioning.[106] These changes would decrease future energy consumption in the home, which would lead to less environmental depletion.

B. Financial Impacts of High Energy Consumption Costs

While environmental concerns are certainly a well-known topic in American society, individuals also have a critical interest in their own financial situations. As thoroughly discussed above, energy consumption does materially alter a property's value, making it similar to a material defect that compels disclosure.[107] Moreover, energy consumption also greatly affects both the utility costs associated with the residential real property and the resale value of the property.[108] Thus, it is clear that a property's energy consumption has a significant financial impact.

First, recall that energy bills normally create the most financial burden to owners in the form of utility costs.[109] This is significant in the advent of a financial market that is leaving many homeowners barely able to afford their monthly mortgage payments.[110] More specifically, the foreclosure market of properties has grown exponentially over the last few years as homebuyers are unable to afford the mortgages that they previously signed.[111] Due to the fact that energy consumption presently serves as a surmounting cost to homeowners, sellers should be required to disclose energy consumption prior to the sale of residential real property in order to prevent

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[100] Dernbach, *supra* note 61, at 587; *see also* Dylan Rivera, *Portland slows down on green*, THE OREGONIAN, Dec. 27, 2007, at D01.
[101] *See* Dernbach, *supra* note 61, at 587, 589.
[102] *Id.* at 589; Dernbach, *supra* note 14, at 29.
[103] Dernbach *supra* note 14, at 29; Dernbach *supra* note 61, at 589; *see e.g., Efficiency Begins at Home*, *supra* note 1,
[104] *See* Dernbach, *supra* note 14, at 35.
[105] *Id.*; *Efficiency Begins at Home*, *supra* note 1,
[106] *See* Dernbach, *supra* note 14, at 35.
[107] *See id.* at 23.
[108] *Id.* at 23, 35.
[109] *Id.* at 23.
[110] *Id.*; Clinton, *supra* note 61.
[111] Clinton, *supra* note 61.

homeowners from incorrectly assuming that they will be able to afford the incidental costs associated with the property and later not being able to afford the mortgage.[112]

Second, energy consumption also influences the possible resale price of residential real property in the future, and therefore, has another direct financial impact.[113] As energy consumption and its effects on both the environment and the financial sector rise in societal importance, buyers will become less likely to purchase a house with poor energy efficiency.[114] It is important to remember that only ten or fifteen years ago, such environmental and financial concerns were not discussed frequently.[115] However, presently, these are familiar and recognized issues across the nation and will most likely continue to grow in importance.[116] Accordingly, requiring the disclosure of energy consumption will preclude homeowners from encountering severely decreased resale property values by keeping said properties attractive to buyers with decent energy efficiency.[117]

An analogous argument to the financial implications of increased energy consumption costs for residential real property can be seen in the costs associated with owning a motorized vehicle.[118] Over time, both buyers and sellers of motor vehicles realized the economic benefits of energy-conscious vehicles with reduced gasoline costs when vehicles required less gas and a better resale value of these vehicles when they became in-demand.[119] Similarly, reduced energy consumption in residential real property leads to less energy costs and a better resale value of the property.

C. Energy Consumption's Overall Importance to Buyers

Because of these direct impacts energy consumption has on both the environment and on one's finances, homebuyers commonly consider energy consumption to be a vital factor in deciding to purchase property.[120] Writers go so far as to describe energy consumption as a "material fact[] securing [one's] assent to the purchase contract."[121] This trend of viewing energy consumption as an integral aspect in the decision to purchase property began some time ago and continues today.[122] More than ten years ago, the National Association of Homebuilders discovered that "home buyer focus groups . . . considered energy efficiency important," and this consensus continues to be valid with the advent of even more environmental and financial concerns.[123] Energy consumption disclosure should be appropriately required because buyers find it instrumental in their decision to purchase property.

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[112] *Id.*; *see* Dernbach, *supra* note 14, at 35. *See generally* Meg Power, *The Burden of FY 2008 Residential Energy Bills on Low-Income Consumers*, ECONOMIC OPPORTUNITY STUDIES, Mar. 20, 2008, *available at* http://www.opportunitystudies.org/repository/File/energy_affordability/Forecast_Burdens_08.pdf.
[113] Dernbach, *supra* note 14, at 35.
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *See* Dernbach, *supra* note 14, at 24-27.
[119] *Id.*
[120] *See id.*; Masters & Musitano, *supra* note 6, at 18; McQueen, *supra* note 5, at 124; *Efficiency Begins at Home*, *supra* note 1,
[121] Masters & Musitano, *supra* note 6, at 18.
[122] Dernbach, *supra* note 14, at 35; McQueen, *supra* note 5, at 124.
[123] McQueen, *supra* note 5, at 124.

IV. WHAT STATES OR JURISDICTIONS HAVE PROPOSED OR ENACTED LEGISLATION REQUIRING ENERGY CONSUMPTION DISCLOSURE FOR THE SALE OF RESIDENTIAL REAL PROPERTY AND WHY?

As an initial response to homebuyers' desires to be provided with energy consumption data, several states began implementing home energy rating systems in the 1990s.[124] These "voluntary programs for builders, homeowners, and home buyers . . . provide[] public information about the efficiency and estimated utility costs of the home."[125] The rating is based on "local energy/utility costs, inspecting and determining the type and insulating values or efficiency of all components and equipment to be installed in the home, and . . . a . . . test . . . to determine air leakage."[126] After taking all of these factors into account, the computed rating can be compared to "the reference home" to see how energy-efficient the home indeed is, rather than leaving it up to speculation.[127] Seeking to fulfill the expectations of homebuyers looking to know and understand the property's energy consumption prior to their purchase, these home energy ratings became quite popular, despite never being mandated by law.[128]

Other than this non-binding program, some states, cities, and counties began implementing legislation compelling disclosure of energy consumption prior to the sale of residential real property. Each jurisdiction varies in its requirements under these regulations, but they all aim to reduce energy consumption and its adverse effects.

A. States and Jurisdictions Requiring Energy Consumption Disclosure

Thus far, a few states and jurisdictions have implemented mandated energy consumption disclosure in the sale of residential real property.[129] However, it is important to note that there is not only one method for implementing such legislation and that it can be done to cater to those advocating for the energy consumption disclosure requirement and to those opposing it.

Montgomery County, Maryland. Montgomery County, Maryland has been at the forefront of creating energy-conscious policies and regulations over the years.[130] In its most recent legislation concerning energy efficiency, the county requires the seller of residential real property to supply the buyer with "copies of the electric, gas, and . . . home heating oil bills or costs and usage history for the . . . home for the immediate prior [twelve] months."[131] In addition to this simple requirement of energy consumption disclosure, the act also strongly encourages sellers to perform a home energy audit of the property prior to the sale.[132] The audit provides for "any test or diagnostic

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[124] *Id.* at 125. Referring to the idea that a home's energy consumption is not normally readily observed by buyers, the author notes that "[a]lthough [these] programs may differ from state to state, . . . the basic objective is the same–to make visible what is usually invisible in a home." *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] McQueen, *supra* note 5, at 125.

[129] *See* NEV. REV. STAT. ANN. § 113.115(1)-(2) (LexisNexis 2008); Ann E. Marimow, *Montgomery Aims to Make Green Homes Mandatory*, WASH. POST, Apr. 23, 2008, at A01.

[130] *See, e.g.*, Marimow, *supra* note 129. With its recent piece of legislation, the county seeks "to reduce energy consumption [fifteen] to [thirty] percent." *Id.*

[131] MONTGOMERY CO. CODE ch. 40 § 13(b)(2) (Md. 2008). The act further provides for situations where, if the seller has not owned and/or occupied the property for the last twelve months, he or she may supply the buyer with the utility bills for the time he or she was indeed on the property. *Id.*

[132] *See id.* § 13(B)(b)(1).

measurement which the Department [of Environmental Protection] finds necessary to ensure that a home's energy efficiency is accurately measured."[133] This information is then passed on to the potential buyer prior to the sale of the property to ensure he or she is made aware of the energy consumption implications of the property.[134]

By passing such legislation, Montgomery County seeks "to protect the public health and welfare by . . . mitigat[ing] the energy and environmental impacts" a home has on "its surrounding[s]" both locally and nationally.[135] This reasoning is important because it shows the direct influence energy consumption disclosure can have on the population by reducing environmental concerns of those living there and by improving their health.[136] While not many statistics are available as of yet as to how well these new laws have worked, the county believes it will be a success because of Montgomery County's overall desire to be more environmentally friendly and energy-conscious.[137]

Nevada. Nevada's newly passed legislation requiring energy consumption disclosure will take effect in 2011.[138] Interestingly, this enactment includes several specific factors which must be evaluated for the energy consumption disclosure besides the approximate energy costs.[139] Particularly, the state will require "an evaluation . . . of any electrical, heating, cooling, plumbing, and sewer systems" of the home to be included in the disclosure form to show how well such appliances are working.[140] It also provides that disclosure is compelled for any "condition of any other aspects of the property . . . [that] indicate whether or not each of those systems and other aspects of the property has a defect," an all-encompassing provision that requires disclosure of any other factor which may lead to increased energy consumption.[141]

The purposes of Nevada's statute echo those reasons highlighted throughout this piece as to how energy consumption constitutes a material defect and other policy reasons as to why the state seeks to require energy consumption disclosure.[142] For example, the statute reinforces the idea that any factor which may affect the value of property must be disclosed, expressly those related to energy consumption.[143] Additionally, Nevada's rationale for this enactment mirrors another line of reasoning behind requiring the disclosure of energy consumption when it looks to "improv[e] energy conservation and energy efficiency in residential property" in hopes to ease environmental concerns of high energy consumption.[144]

Kansas. In the days immediately preceding Earth Day in 2007, and in hopes of conserving both environmental and financial resources, Kansas ratified its legislation requiring energy

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133 *See id.* § 13(a)(2)(1).
134 *See id.* § 13(B)(b).
135 MONTGOMERY CO. CODE § 8-47 (Md. 2008).
136 *Id.*
137 *See* Marimow, *supra* note 130.
138 NEV. REV. STAT. ANN. § 113.115(1)-(2) (LexisNexis 2008).
139 *See id.* § 113.120(1).
140 *Id.*
141 *Id.*
142 *Id.*; *see also Shapiro*, 76 Cal. Rptr. 2d at 107; *Reed*, 193 Cal. Rptr. at 131-32; *Johnson*, 480 So.2d at 628-29; *Stambovsky*, 572 N.Y.S.2d at 676.
143 NEV. REV. STAT. ANN. § 113.120(1) (LexisNexis 2008).
144 *See id.* § 701.250.

consumption disclosure at any time during the sale of residential real property.[145] One defining characteristic of the Kansas legislation, however, is that the act is designed to be extremely buyer-friendly, leaving little for the buyer to worry about and placing the blame on sellers for issues which may arise that affect energy consumption costs.[146] This includes easily read forms and understandable testing standards that buyers are more apt to comprehend and utilize in their purchase decision.[147] In so structuring its statute, Kansas hopes to reduce energy waste and conserve financial resources by aiding buyers in making a thorough decision as to whether or not to purchase residential real property.[148]

B. States and Jurisdictions Proposing to Require Energy Consumption Disclosure

In addition to states and jurisdictions that have already required energy consumption disclosure, several others have proposed similar bills and initiatives in hopes of reaching the same energy consumption reduction rates and environmental goals.[149]

Portland, Oregon. Similar to the regulation implemented in Montgomery County, Maryland, the City Council of Portland, Oregon recently proposed a policy to promote energy consumption disclosure in its own city by requiring such in the sale of residential real property.[150] The city hopes that its recommended policy will benefit Portland both environmentally and financially by making residential real properties more energy-efficient by requiring such disclosure.[151] First, this policy seeks this requirement to attain more "sustainable development" throughout the city in reducing pollution and greenhouse gases by making the population more aware of its energy consumption.[152] Second, the policy aims to financially help Portland in two important ways.[153] Primarily, it looks to create better purchasing conditions with a fully-informed buyer that will, in the future, alleviate possible heightened energy costs or dispel low resale prices of the property.[154] Next, it also hopes to establish a better financial atmosphere in Portland by allowing the inhabitants to save money on energy costs once they are made aware of, and consequently reduce, their energy consumption.[155] This money can then be "available for local economic growth" of the city.[156]

Vermont. Vermont's recently proposed bill would require sellers to provide buyers with the "annual energy consumption at the property for the preceding five years."[157] If the seller would not present the buyer with such information, the buyer could rescind the contract for the sale of residential real property.[158] This is indeed a long period of time for which the seller must produce energy consumption data, especially considering that most states and jurisdictions compel the

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145 Kan. H.B. 2036 (2007) (amending KAN.STAT.ANN. § 66-1228); *Energy Efficiency*, *supra* note 5.
146 Kan. H.B. 2036 (2007) (amending KAN.STAT.ANN. § 66-1228); *Energy Efficiency*, *supra* note 5.
147 Kan. H.B. 2036 (2007) (amending KAN.STAT.ANN. § 66-1228); *Energy Efficiency*, *supra* note 5.
148 *Energy Efficiency*, *supra* note 5.
149 S.P. 841, 123rd Leg., 1st Spec. Sess. (Me. 2008) (seeking to enact ME. REV. STAT. ANN. tit. 30 § 4224 (2)-(3)); H.R. 234 (Vt. 2007) (seeking to amend VT. STAT. ANN. tit. 32, § 9606(c) (2009)); Rivera, *supra* note 100 at D01.
150 Rivera, *supra* note 100.
151 *Id.*; SUSTAINABLE DEV., *supra* note 61.
152 Rivera, *supra* note 100; SUSTAINABLE DEV., *supra* note 61.
153 *Id.*
154 *See* discussion *supra* Part III.B.
155 SUSTAINABLE DEV., *supra* note 61.
156 *Id.*
157 Vt. H.R. 234 (seeking to amend tit. 32, § 9606(c)).
158 *Id.*

disclosure of only about a year's worth of data.[159] However, keep in mind that this bill has not yet been passed and frequently a requirement such as this will be debated and negotiated at length to possibly reach a lower requirement in remaining amenable to both those in support of and in opposition to mandating energy consumption disclosure.[160]

Under Vermont's proposed Act, sellers would have one alternative to providing buyers with such lengthy data concerning energy consumption.[161] A seller could conduct "a home energy rating performed within the two years immediately" prior to the date of the sale of the property to produce information regarding the home's energy consumption which could then be given to the potential buyer.[162] There is chance that offering these two different avenues for compelled energy consumption disclosure may lead to a quicker and easier agreement within Vermont's legislature to pass this bill.

Maine. The newly proposed bill in Maine, seeking required energy consumption disclosure, does so in a different manner. As with other bills and enactments, it aims to increase residential energy conservation for both environmental and financial reasons.[163] However, it demands that sellers give buyers a certificate demonstrating that the property complies with energy codes which were enacted to promote energy efficiency.[164] This bill varies from other legislation that would normally oblige the seller to give the buyer specific energy consumption data and costs relevant to the property.[165] Nevertheless, the purpose of Maine's proposed Act remains the same -- looking to afford the buyer with concrete energy consumption information for later positive impacts in both the environmental and financial sectors.

C. Why States May, After Consideration, Choose to not Require Energy Consumption Disclosure

The Massachusetts legislature proposed The Green Communities Act of 2007 to promote energy conservation throughout the state.[166] It sought to require energy consumption disclosure prior to the sale of residential real property for many of the same reasons that other states and jurisdictions enacted similar bills, such as for environmental and financial concerns.[167] However, despite a positive feedback from constituents, the final version of The Green Communities Act of 2007 passed by the Massachusetts legislature did not include energy consumption disclosure requirements.[168]

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159 *See* MONTGOMERY CO. CODE ch. 40 § 1(b)(2) (Md. 2008).
160 *See generally Efficiency Begins at Home*, *supra* note 1 (explaining that the two sides, those in support of and in opposition to requiring energy consumption disclosure, must agree on many terms before a bill can be passed compelling such action).
161 Vt. H.R. 234 (seeking to amend tit. 32, § 9606(c)). The "home energy audit" must be conducted by a state-approved organization and offers information on the property's energy consumption and waste. *Id.*
162 *Id.*
163 Me. S.P. 841 (seeking to enact tit. 30, § 4224(2)-(3)).
164 *Id.*
165 *See* MONTGOMERY CO. CODE ch. 40 § 1(b)(2) (Md. 2008); Vt. H.R. 234 (seeking to amend tit. 32, § 9606(c)).
166 The Green Communities Act of 2007, H.B. 3965 (Mass. 2007); *Efficiency Begins at Home*, *supra* note 1.
167 The Green Communities Act of 2007, H.B. 3965 (Mass. 2007); *Efficiency Begins at Home*, *supra* note 1. The Act specifically listed environmental goals it hoped to reach, such as "reduc[ing] greenhouse gas emissions by 20 per cent [sic] from the 1990 levels by the year 2020 and developing a plan to reduce energy consumption in the Commonwealth by 10 per cent [sic] by 2017." The Green Communities Act of 2007, H.B. 3965 (Mass. 2007).
168 *Id.*; *Efficiency Begins at Home*, *supra* note 1.

The revision came as a surprise because advocates thought they would attain their energy conservation goals with the Act by addressing the problem at its main source, residential energy consumption, by compelling energy consumption disclosure.[169] Unfortunately, the voices of the advocates were overshadowed by those of realtor associations who remained adamantly against the requirement of energy consumption disclosure.[170] Realtors expressed strong distaste for the proposed legislation, fearing sellers will not want to pay for the added cost of an inspection of energy consumption in addition to the other incidental costs associated with selling residential real property.[171] In the present housing and financial markets, as difficult as the ones the United States is currently facing, realtor associations worried that sellers would not put their properties on the market if they were burdened with increased costs.[172]

While this modification to the bill regrettably occurred in Massachusetts, thus not compelling energy consumption disclosure, it is important for other states and jurisdictions hoping to enact comparable legislation to understand why exactly the effort was not successful here. Realtor associations expressly took issue with the idea of sellers paying for an energy consumption inspection of the property.[173] To remedy the point of contention, a state proposing energy consumption disclosure requirements could author its bill to appear like that of Montgomery County, Maryland or of Vermont to require that simple copies of energy utility bills be provided to the potential buyer.[174] Accordingly, sellers would not confront another cost for a thorough energy consumption inspection during the process of selling their property and would only need to request such information from their energy utility company.[175]

V. CONCLUSION

Whether under local, state or common law, energy consumption disclosure should be mandatory in the sale of residential real property. Like other material defects, energy consumption materially affects the value of a property and is difficult to be observed by even the most prudent of buyers. Also, with its striking similarities to material defects already designated by courts and legislators as necessitating disclosure, energy consumption disclosure should also be compelled.

In addition to its similarities to problems previously designated as material defects, energy consumption disclosure should also be required according to existing legal and societal policies. The aged doctrine of caveat emptor has declined, allowing for more mandated disclosures by sellers prior to the sale of residential real property. Recent trends show that courts are leaning towards policies of fair dealing among buyers and sellers and that judges prefer not to see issues go undisclosed by sellers that may potentially harm buyers in the future. Besides these factors which promote designating energy consumption as a material defect requiring disclosure, energy consumption disclosure should also be compelled because it is understood to be important to buyers in recent years as environmental and financial issues are two of a buyer's primary concerns.

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169 *Efficiency Begins at Home*, *supra* note 1.
170 *Id.*
171 *Id.*
172 *Id.*
173 *Id.*
174 MONTGOMERY CO. CODE ch. 40 § 1(b)(2) (Md. 2008); Vt. H.R. 234 (seeking to amend tit. 32, § 9606(c)).
175 *Id.*

After demonstrating that energy consumption should require disclosure due to its similarities to material defects, along with other policy reasons for obligating disclosure, it is necessary to understand how some states and jurisdictions have proposed, and in some cases enacted, legislation compelling energy consumption disclosure. For instance, some force sellers to provide potential buyers with data regarding the property's energy consumption for the past few months or years.[176] Other legislatures designed acts which require energy efficiency inspections that sellers must perform and then turn over to potential buyers prior to the sale of residential real property.[177] In some areas of the country, it has become routine practice for realtors to ask sellers to provide buyers with energy consumption data.[178] No matter how energy consumption disclosure becomes required, through legislation, common law, or realty practice, it will surely benefit residential real property owners, both buyers and sellers, over time.

[176] *See, e.g.*, MONTGOMERY CO. CODE ch. 40 § 1(b)(2) (Md. 2008)
[177] *See, e.g.,* Me. S.P. 841 (seeking to enact tit. 30, § 4224(2)-(3)).
[178] *See, e.g.*, http://www.realtor.org/diversified_re_firms/20080401_nar_doe_partnership.