



South Carolina
Department of Labor, Licensing and Regulation



Real Estate Commission

110 Centerview Drive
Post Office Box 11847
Columbia, SC 29211-1847
Phone: (803) 896-4400
FAX: (803) 896-4427

Henry D. McMaster
Governor

Emily H. Farr
Director

June 12, 2025

No Builder's Agent Exemption in South Carolina

The Real Estate Commission has been made aware of some confusion about the use of real estate licensees in South Carolina that work directly for a builder of new real estate (a.k.a. "Builder's Agents"). Builder's Agents are typically located within new housing developments to sell new real estate and/or contract buyers of land with a home that will be built on the land (normally prior to closing on the land and home). North Carolina and Georgia have exemptions built into their laws that allows a Builder's Agent to operate on a Builder's behalf to sell real property being built by the Builder (or that has been built) without having to be licensed as a real estate licensee and/or without having to comply with certain real estate agency laws.¹ Unlike North Carolina and Georgia, however, South Carolina law has no provisions built into its statutes to exempt Builder's Agents from having to be real estate licensees or from having to comply with all of the normal rules and requirements regarding agency. As a result, someone operating as a Builder's Agent in South Carolina must still comply with all South Carolina real estate laws, including, but not limited to:

- 1) being a real estate licensee (S.C. Code §40-57-20);
- 2) providing the Disclosure of Brokerage Relationships form approved by the Commission to the Builder upon first substantive contact for each property to be sold (S.C. Code §40-57-370);
- 3) entering into a written Agency Listing Agreement, as appropriate, for each property to be sold (S.C. Code §40-57-350);
- 4) providing the Disclosure of Brokerage Relationships form approved by the Commission to potential buyers upon first substantive contact (S.C. Code §40-57-370); and
- 5) respecting any Agency relationship that may exist between potential buyers and a Buyer's Agent (S.C. Code §40-57-350).

¹ The North Carolina statute that allows for a Builder's Agent to sell real property without complying with all of the same statutes required of other real estate licensees is NC ST §93A-2(c)(1). Similarly, the Georgia statute that allows for a Builder's Agent to sell real property without complying with all of the same statutes required of other real estate licensees is Ga. Code §43-40-29(a)(1) and (b).

Example questions that can be asked to help determine if someone is represented by a Buyer's Agent are contained in Appendix A to this document.

Represented Buyer or Potential Buyer

For example, a Builder's Agent encountering a buyer or potential buyer (hereinafter, "buyer") represented by a Buyer's Agent may not show a home for sale to the buyer without their Buyer's Agent present. A Builder's Agent may host an open house at a model home, but must ensure they continue to comply with all the laws regarding Agency. Remaining respectful of and in compliance with the law surrounding agency is a requirement of S.C. Code §40-57-710(A)(24).

Similarly, when working with a buyer that is represented by a Buyer's Agent, a Builder's Agent needs to ensure they are communicating with the buyer through their Buyer's Agent. Cutting the Buyer's Agent out of communications related to negotiations, details of the purchase of the land and home, and inspections (including the final walk through and punch list inspections), is a violation of the agency relationship and can cause harm to the buyer due to the buyer not having their best interests fully represented. This requirement to communicate with the buyer through their Buyer's Agent exists even after a contract to purchase is signed and continues through to the closing.

Finally, Builder's Agents need to consider the contracts they ask buyers to sign with a strong emphasis on ensuring the contracts do not violate Agency protections or mislead the buyer. This is because unclear contract structures and commission language may unintentionally interfere with agency duties or confuse the buyer about who represents whom in the transaction. For example:

- 1) Builder-imposed commission terms or related restrictions that condition commission payment to a Buyer's Agent on builder pre-approval, specified percentages, or internal registration systems may conflict with the already signed Buyer's Agency agreement.
- 2) Contractual language that restricts rebates, gifts, or commission credits from the Buyer's Agent to the Buyer, if misapplied, could inhibit lawful and transparent compensation arrangements that are permitted when properly disclosed.
- 3) Ambiguity relating to the performance of advisory tasks versus clerical tasks. See S.C. Code §40-57-350(K). If a Builder's Agent advises, negotiates, or suggest terms to the buyer without clearly deferring to the Buyer's Agent and including them in the communication, then the Builder's Agent risks creating an implied agency relationship and/or violating the Buyer Agent's exclusive representation agreement.

Unrepresented Buyer or Potential Buyer

Should a Builder's Agent encounter a buyer that does not appear to be represented by a Buyer's Agent, then the Builder's Agent still needs to ensure they provide the Disclosure of Brokerage Relationships form approved by the Commission to the buyer upon first substantive contact. First substantive contact for a Builder's Agent can include, but is not limited to, items such as: 1) discussions about types of homes other than the model home that may be available for sale within the neighborhood; 2) showing homes other than the model home (which can be considered an open house) to the potential buyer; 3) discussing or showing specific plots of land upon which a home

could be built; 4) prices for homes that can be built other than the model home; and/or 5) upgrades that can be made to homes built in the neighborhood.

Additionally, if the Builder's Agent will engage in a client relationship with the buyer, then the Builder's Agent would need to enter into a proper agency agreement with the buyer as required by S.C. Code §40-57-135(I). Further, that proper agency agreement must explicitly disclose the Builder's Agent's role as a designated dual agent under S.C. Code §40-57-350(J)(7).

Alternatively, a Builder's Agent could engage in transactional brokerage only for the transaction. See S.C. Code §40-57-350(L).

Disclaimer: This reminder is not intended as legal advice. LLR is providing this reminder to make licensees aware of differences between what is allowed in South Carolina vs. other states. Licensees are strongly urged to review the entire Real Estate Practice Act and associated regulations to ensure compliance with all laws and regulations.

Appendix A

Ways to Determine if Someone is Represented by a Buyer's Agent

Reminder: Builder's Agents encountering potential purchasers who wish to do more than tour the model home and have general discussions about the possible homes available on the Builder's property must ensure they:

- 1) Provide the Disclosure of Brokerage Relationships form approved by the Commission to the potential buyer upon first substantive contact; and
- 2) Are not violating a Buyer's Agency agreement that may already exist between the potential buyer and a real estate licensee.

A Builder's Agent (or any Agent for that matter) can attempt to determine if a potential buyer is already represented by a real estate licensee through the following questions:

1. Asking the potential purchasers directly if they are represented by a brokerage may not lead to an accurate answer and, as a result, is less helpful in making a meaningful inquiry into whether someone is already represented by a brokerage. Further, asking only this question is unlikely to be found to be a sufficient inquiry into whether someone is already represented by a brokerage.
2. Ask the potential buyer directly if they are represented by a real estate agent. For the reasons discussed in item 7, below, asking this question first may not be the best approach.
3. Ask the potential buyer if they have signed any paperwork with any real estate agent. For the reasons discussed in item 7, below, asking this question near the beginning may not be the best approach.
4. Ask what types of homes or neighborhoods the potential purchaser is interested in;
5. If they name a particular neighborhood or very specific homes (vs. characteristics of homes), ask if they have seen any homes in that neighborhood yet;
 - Depending on the response, follow up with additional questions. For example, if the potential purchaser states they saw a home during an open house, a follow up may not be as necessary as the potential purchaser who says they have seen 3-4 homes in that neighborhood, which makes it more likely they have an Agency Agreement with a brokerage.
6. If the answer to "have they seen any homes in that neighborhood yet" indicates that they may have an Agency Agreement with someone, you can ask who showed them those homes. If they give one name as the person that showed the homes, that is a strong indicator that the potential purchaser has an Agency Agreement with that brokerage. If several names are disclosed, it is more likely that the potential purchasers do not have an Agency Agreement, but follow up questions will still be needed to determine if an agency relationship exists.
7. Any indications that the potential purchasers have an Agency Agreement means you should advise your potential purchasers that you need to contact the brokerage you suspect they may have an Agency Agreement with, and ask whether or not the potential purchasers have an Agency Agreement with the brokerage firm.