

When In Doubt, Disclose!

“Caveat Emptor”... Buyer Beware! Historically, laws relating to the parties in a business relationship were rooted in the belief that the buyers were expected to perform the necessary due diligence to protect their interests in the transaction, and had to deal with the consequences of not fully investigating all matters related to the respective transaction. Over the years, especially as it relates to real estate transactions, this burden has shifted to one of “disclosure”, with laws that promote consumer protection through honesty and good faith dealing by all parties involved. Every jurisdiction in the United States follows some form of “Seller’s Disclosure” with respect to real estate transactions. The Real Estate Commission is currently working on a “Seller’s Disclosure” law that ensures all parties to a real estate transaction on Guam are treated in a fair and honest manner.

First of all, what is a “Seller’s Disclosure”? It is a written statement that is prepared by the seller or at the seller’s direction, that fully and accurately discloses all past and present material facts related to a residential property being sold. A material fact is any fact, defect, or condition, past or present, which would be expected to measurably affect the value to a reasonable person of the residential real property being offered for sale. The information being disclosed should be 1) facts based on the personal/actual knowledge of the seller; 2) issues that can be observed from visible and accessible areas within the property; and 3) facts that are required by federal or state/territory law such as lead paint and asbestos disclosures. The premise behind having a “Seller’s Disclosure” law is that once the seller provides full and accurate information on any existing or previous problems with the home, land, or property, the buyer can decide for themselves whether or not those issues are something they can live with.

A “Seller’s Disclosure” should be prepared by the seller in good faith and with due care, which means that the seller should be honest and factual when making any disclosures. Sellers may draw upon information known to them personally, facts provided by governmental agencies/departments, reports provided by third parties (surveys, termite reports, engineers, contractors, etc.), and managers of homeowner associations if appropriate. Sellers however are not obligated to hire independent contractors or engage the services of third party professionals when preparing a “Seller’s Disclosure” report. A thorough “Seller’s Disclosure” report will include information and comments on any condition or factor that could affect the buyer’s decision to buy the property, the value of the property, or the use of the property. Information might include items affecting title to the property, problems or defects with the house operating systems (electrical, plumbing, sewer/septic, air-conditioning), fixtures and appliances, structural concerns, land issues (drainage, flooding, encroachments), zoning compliance, environmental regulations affecting the property, infestation, legal matters affecting the property (liens, law suits), stigmatized property concerns, or common area issues. An experienced seller’s agent will be able to assist the seller in preparing a disclosure report, but it is not the responsibility of the agent to provide information, answers, or comments

regarding any information concerning the property.

A “Seller’s Disclosure” report, however, should not be considered as a substitute for any inspection report, personal advice, or warranty provided by a third-party professional. An experienced buyer’s agent will ensure that the buyer personally inspects and examines any property they plan to purchase for apparent defects, as well as recommend a home inspection by a licensed home inspector prior to the purchase.

Win-Win-Win! Having a good “Seller Disclosure” law and related disclosure form is a benefit for the buyer, seller, and real estate professional.

The buyer benefits from obtaining and reviewing key information on the property they are considering for purchase. They are better able to make an informed decision and negotiate the best possible purchase price.

The seller benefits by enhancing the marketability of his or her property in several ways. First, he or she may find through the disclosure process that they can make necessary repairs or improvements to the property prior to marketing it, thereby helping to get a better price. Second, by having detailed information on the property, buyers feel more comfortable in making an offer, which can result in higher prices and faster closings. Sellers are also able to market the property “as is” since they have disclosed all material facts related to the property, thereby avoiding legal issues from buyers who have issues with the property after the purchase is completed.

Real estate professionals benefit by having more information available to them in marketing the property, as well as, minimizing personal risk associated with unhappy buyers who feel they were misled by incorrect or inaccurate information on the property.

We hope to get a “Seller’s Disclosure” law on the books soon. In the meantime, experienced real estate professionals can assist you in putting together a “Seller’s Disclosure” report when planning to sell your home. In the end, the more you disclose, the safer you are in this ever increasing “consumer protection” environment we all live in. If you have any concerns or comments about disclosure issues, please contact the real estate licensing division of the Department of Revenue and Taxation.