

Seller's Disclosure



by Cathy Crowe

SELLERS DISCLOSURE

Seller disclosures in Texas are governed by Texas Property Code Section § 5.00. That statute provides: “A seller of residential real property comprising not more than one dwelling unit located in this state shall give to the purchaser of the property a written notice” of material defects in the property. The statute asks sellers to use the disclosure form developed by the Texas Real Estate Commission (TREC), which is a state agency charged with generally overseeing the real estate market.

This form must be delivered to the buyer “on or before the effective date” of the property purchase contract. In other words, you cannot have the buyer sign the purchase contract and become bound by it, and then a week later, hand the buyer a disclosure form saying that the electricity in the house does not work. Obviously, this sort of material defect would have influenced the buyer’s decision about the transaction, or at least the price the buyer was willing to pay for the home.

If you fail to deliver the disclosure form pre-contract, the buyer may terminate the contract for any reason within seven days after receiving the notice from you. Given all the uncertainties and stresses involved in selling your home, you do not want to create this additional layer of uncertainty by allowing the buyer to escape the contract.

Both you and the buyer will sign the disclosure form, as proof that it has been given, dated and received. (Obviously, you should retain a copy for your records.)

What Defects Does the Texas Disclosure Statement Cover?

Before considering the specifics of what the Texas disclosure form covers, it is useful to remember what the form does *not* cover. Importantly, the form only needs to be “completed to the best of seller's belief and knowledge as of the date the notice is completed and signed...”

This means that you are not required to conduct any independent inspections of your property or hire an engineer or professional inspector to verify the condition of any aspect of your home. If the information required by the form is unknown to you, the statute simply directs you to indicate that fact on the form.

The statute also specifically excludes certain information from required disclosure: “A seller or seller’s agent shall have no duty to make a disclosure or release information related to whether a death by natural causes, suicide, or accident unrelated to the condition of the property occurred on the property or whether a previous occupant had, may this is to prevent buyers have had, has, or may have AIDS, HIV related illnesses, or HIV infection.” The purpose of from making decisions based upon irrelevant information about prior owners of the property.

Now let's turn to what *is* on the form. The Texas statute is very specific about the information that home sellers must disclose to prospective home buyers. TREC’s 4-page form is divided into several sections.

On the first page, you are asked to check whether your property has specific elements: for example, central air conditioning, a swimming pool, or a satellite dish. It then asks you to explain in detail whether you are aware of any “known defects” with the elements you have identified.

You are also asked to disclose whether you are aware of any prior problems or repairs to particular aspects of the property. Is there a history of termite infestations? Previous structural damage? Evidence of radon gas? These are the sorts of potential issues about which a buyer would want to know before signing a purchase contract.

Remember, though, that you need only disclose information that you personally know. Thus, if you have no reason to believe that the home contains asbestos, you have no obligation to hire an inspector to find out before submitting the form. (The buyer has every right to do this, however, but at his or her own expense.)

What is new Sept 2019

6. Are you (Seller) aware of any of the following conditions?* Write Yes (Y) if you are aware, write No (N) if you are not aware.

_____ Present flood insurance coverage

_____ Previous flooding due to a failure or breach of a reservoir or a controlled or emergency release of water from a reservoir

_____ Previous water penetration into a structure on the property due to a natural flood event

Write Yes (Y) if you are aware, and check wholly or partly as applicable, write No (N) if you are not aware.

_____ Located wholly partly in a 100-year floodplain (Special Flood Hazard Area-Zone A, V, A99, AE, AO, AH, VE, or AR)

_____ Located wholly partly in a 500-year floodplain (Moderate Flood Hazard Area-Zone X (shaded))

_____ Located wholly partly in a floodway

_____ Located wholly partly in a flood pool

_____ Located wholly partly in a reservoir

If the answer to any of the above is yes, explain (attach additional sheets if necessary): _____

*For purposes of this notice:

"100-year floodplain" means any area of land that:

(A) is identified on the flood insurance rate map as a special flood hazard area, which is designated as Zone A, V, A99, AE, AO, AH, VE, or AR on the map;

(B) has a one percent annual chance of flooding, which is considered to be a high risk of flooding; and

(C) may include a regulatory floodway, flood pool, or reservoir. "500-year floodplain" means any area of land that:

(A) is identified on the flood insurance rate map as a moderate flood hazard area, which is designated on the map as Zone X (shaded); and

(B) has a two-tenths of one percent annual chance of flooding, which is considered to be a moderate risk of flooding.

(C)

"Flood pool" means the area adjacent to a reservoir that lies above the normal maximum operating level of the reservoir and that is subject to controlled inundation under the management of the United States Army Corps of Engineers.

"Flood insurance rate map" means the most recent flood hazard map published by the Federal Emergency Management Agency under the National Flood Insurance Act of 1968 (42 U.S.C. Section 4001 et seq.).

"Floodway" means an area that is identified on the flood insurance rate map as a regulatory floodway, which includes the channel of a river or other watercourse and the adjacent land areas that must be reserved for the discharge of a base flood, also referred to as a 100-year flood, without cumulatively increasing the water surface elevation of more than a designated height.

"Reservoir" means a water impoundment project operated by the United States Army Corps of Engineers that is intended to retain water or delay the runoff of water in a designated surface area of land.

7. Have you (Seller) ever filed a claim for flood damage to the property with any insurance provider, including the National Flood Insurance Program (NFIP)?* Yes No. If yes, explain (attach additional sheets as necessary): _____

*Homes in high risk flood zones with mortgages from federally regulated or insured lenders are required to have flood insurance. Even when not required, the Federal Emergency Management Agency (FEMA) encourages homeowners in high risk, moderate risk, and low risk flood zones to purchase flood insurance that covers the structure(s) and the personal property within the structure(s).

8. Have you (Seller) ever received assistance from FEMA or the U.S. Small Business Administration (SBA) for flood damage to the property? Yes No. If yes, explain (attach additional sheets as necessary): _____
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Penalty

If the seller does not give the Seller's Disclosure as required, Property Code section 5.008(f) permits the buyer to "terminate the contract for any reason within seven days after receiving the notice." The statute does not address the legal consequences of the seller never giving the Seller's Disclosure at all. However, if the failure to give the notice is coupled with fraud or failure to disclose defects, then other laws and penalties may (and likely will) arise pursuant to the Deceptive Trade Practices Act and/or the Statutory Fraud Act

Investor sellers beware: if you fail to disclose a material item, a jury can find that your action was "unconscionable" (an open-ended term by any definition) and award treble damages, attorney's fees, and court costs against you.

Who has to disclose and who is exempt?

Section 5.008, Texas Property Code, provides as follows:

§ 5.008. SELLER'S DISCLOSURE OF PROPERTY CONDITION.

(a) A seller of residential real property comprising not more than one dwelling unit located in this state shall give to the purchaser of the property a written notice as prescribed by this section or a written notice substantially similar to the notice prescribed by this section which contains, at a minimum, all of the items in the notice prescribed by this section.

(b) The notice must be executed and must, at a minimum, read substantially similar to the following: [See TREC No. OP-H at <http://www.trec.state.tx.us/pdf/contracts/OP-H.pdf> for text of disclosure notice.]

(c) A seller or seller's agent shall have no duty to make a disclosure or release information related to whether a death by natural causes, suicide, or accident unrelated to the condition of the property occurred on the property or whether a previous occupant had, may have had, has, or may have AIDS, HIV related illnesses, or HIV infection.

(d) The notice shall be completed to the best of seller's belief and knowledge as of the date the notice is completed and signed by the seller. If the information required by the notice is unknown to the seller, the seller shall indicate that fact on the notice, and by that act is in compliance with this section.

(e) This section does not apply to a transfer:

- (1) pursuant to a court order or foreclosure sale;
- (2) by a trustee in bankruptcy;
- (3) to a mortgagee by a mortgagor or successor in interest, or to a beneficiary of a deed of trust by a trustor or successor in interest;
- (4) by a mortgagee or a beneficiary under a deed of trust who has acquired the real property at a sale conducted pursuant to a power of sale under a deed of trust or a sale pursuant to a court ordered foreclosure or has acquired the real property by a deed in lieu of foreclosure;

(5) by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust;

(6) from one co-owner to one or more other co-owners;

(7) made to a spouse or to a person or persons in the lineal line of consanguinity of one or more of the transferors;

(8) between spouses resulting from a decree of dissolution of marriage or a decree of legal separation or from a property settlement agreement incidental to such a decree;

(9) to or from any governmental entity;

(10) of a new residence of not more than one dwelling unit which has not previously been occupied for residential purposes; or

(11) of real property where the value of any dwelling does not exceed five percent of the value of the property.

(f) The notice shall be delivered by the seller to the purchaser on or before the effective date of an executory contract binding the purchaser to purchase the property. If a contract is entered without the seller providing the notice required by this section, the purchaser may terminate the contract for any reason within seven days after receiving the notice.

]—Added by Acts 1993, 73rd Leg., ch. 356, § 1, eff. Jan. 1, 1994. Amended by Acts 2005, 79th Leg., ch. 728, § 17.001, eff. Sept. 1, 2005.



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