PROPERTY DISCLOSURE… A NEW ERA IN NORTH DAKOTA

"Disclosure"…. one of our guiding words in the real property profession…. will enter a new era on August 1, 2019. On that date, a new North Dakota law will require that a written property disclosure statement, identifying material defects, must be provided to the buyer, PRIOR TO SIGNING AN AGREEMENT, in those situations in which both (a) a real estate licensee is involved in the transaction, and (b) an owner is selling a owner-occupied primary residence.

Before anyone gets too concerned about the change, it is remembered, first, that most transactions involving a REALTOR® already include a property disclosure statement (thanks to forms provided by local boards) and, second, that the requirement of disclosure of material defects has been the law in North Dakota for over 30 years. The North Dakota Supreme Court set the standard for disclosure by the seller of real property in a court decision entitled Holcomb v. Zinke, 365 NW2d 507 (ND 1985). One of the primary issues in the Holcomb decision was a septic system which, if not pumped every couple weeks, would back up into the basement. Obviously, a buyer, inspecting the house prior to purchase, would have no idea about such an ongoing septic problem. In that case, the Court declared "a duty on the seller to disclose material facts which are known or should be known to the seller and which would not be discoverable by the buyer's exercise of ordinary care and diligence." That is an affirmative duty of disclosure upon the seller, i.e., a material defect, which would probably be undetected by a reasonable inspection, must be disclosed by the seller, even if the buyer doesn't ask about any hidden problems.

The law does change two important elements of property disclosure. Prior to the law's effective date, there was no timing component for property disclosure; now, the buyer must receive the written disclosure before the parties sign their agreement. In addition, nothing in the Holcomb court case mandated that the disclosure be made in writing. Now, where a licensee is involved and where a seller is selling an owner-occupied residence, written disclosure will be required. The law reads, in part, as follows:

> Before the parties sign an agreement for the sale, exchange, or purchase of real property, the seller shall make a written disclosure to the prospective buyer. The written disclosure must include all material facts of which the seller is aware could adversely and significantly affect an ordinary buyer's use and enjoyment of the property or any intended use of the property of which the seller is aware. The written disclosure must include latent defects, general condition, environmental issues, structural systems, and mechanical issues regarding the property. The seller shall make the written disclosure in good faith and based upon the best of the seller's knowledge at the time of the disclosure.

Because most owner-occupied residential real property transactions in North Dakota involve real estate licensees, it is fair to assume that most such transactions will be subject to the requirement of a written disclosure. A quick review of the impact of the new law will be helpful.

First, the law is clear that the buyer must receive the written property disclosure, “before the parties sign an agreement.”

Second, the law applies whenever a real estate licensee “represents or assists” a seller or buyer in a sale involving an owner-occupied principal residence. That means that the property disclosure rules are in place, whether you, as a REALTOR®, are working with a client or a customer. The law requires that the brokerage must retain a copy of the written disclosure statement, signed by the buyer, in the brokerage files.

Third, if a real estate licensee is working with a buyer client in a transaction with a FSBO seller, where the sale involves the seller’s principal residence, a written disclosure statement will be required. This situation could create one of the professional challenges for the future, if the FSBO seller is reluctant to prepare the written disclosure statement. It is recalled that a court case in South Dakota imposed liability upon a real estate licensee who failed to require the preparation of a written disclosure statement in a similar situation.

Fourth, the law only applies to an owner-occupied principal residence. Thus, it has no application to other residential property, commercial property, or agricultural property.

Fifth, the Real Estate Commission is required to prepare a model disclosure form. Although the law does not require the use of that particular form, the law states that the Commission’s form, once prepared, will satisfy the requirements of the law. As a result, it will be important for local REALTOR® boards to compare the local forms to the state form, if there is a desire to continue with a local form.

Finally, the law only requires disclosure to the “best of the seller’s knowledge at the time of disclosure”. This provision is consistent with the terms of most, if not all, existing disclosure statements, i.e., the seller should not be penalized for nondisclosure of a condition which was unknown to the seller.

No doubt, situations, which arise in the future, will require interpretation regarding application of the law. However, that reality should not distract from the benefits of the law. It has been suggested, quite accurately, that a good written disclosure actually protects both parties to the transaction, i.e., the seller who makes written disclosure lessens the risk of a lawsuit by the buyer, and the buyer who receives the written disclosure better understands the purchased property.