

ACT 214

H.B. NO. 1317

A Bill for an Act Relating to Disclosures in Real Estate Transactions.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds that a home is the single largest investment most people make in a lifetime. Because of this, it is important that all relevant information regarding a home's condition be provided to buyers. Statistics show that approximately sixty-seven per cent of lawsuits involving real estate transactions are based on misrepresentations. The seller, who is frequently also the occupant, is better informed than the real estate agent to provide details relating to the condition of the property.

Hawaii has rejected the common law position of caveat emptor or "let the buyer beware," and has adopted a system of full disclosure. To retain their license, real estate licensees have a duty to not only be fair to all parties in real estate transactions, but also to ascertain and disclose material facts.

A real estate licensee is an agent for a principal. If the principal is the seller of real property, the seller gives the agent authority to make representations about the property. Absent supervening responsibilities imposed by the State, the agent can only work within the scope of authority given by the principal. Fiduciary duties of loyalty, fidelity, and obedience to legitimate instructions require the agent not to undermine the position of the seller by providing too much information.

The purpose of this Act is to establish mandatory seller disclosures of material facts in real estate transactions in the State.

SECTION 2. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

**“CHAPTER
MANDATORY SELLER DISCLOSURES
IN REAL ESTATE TRANSACTIONS**

§ -1 **Definitions.** As used in this chapter, unless the context requires otherwise:

“Disclosure of real property condition statement” or “statement” means a written statement prepared by the seller or at the seller’s direction, that fully and accurately discloses any material fact, defect, or condition, past or present, relating to the residential real property being offered for sale that may influence the decision of the buyer, based on the seller’s or the seller’s agent’s observation of:

- (1) Visible, accessible areas;
- (2) Related recorded and unrecorded documents;
- (3) Information available from governmental agencies; and
- (4) Information within the knowledge and control of the seller.

The statement shall not be construed as a warranty of any kind, or a substitute for any expert inspection, professional advice, or warranty that the buyer may wish to obtain.

“Material change” means any change which affects the information contained in a disclosure of real property condition statement in any one of the following ways:

- (1) Renders it misleading;
- (2) Substantially affects the rights or obligations of a buyer; or
- (3) May reasonably affect a buyer’s decision to buy, including changes in the use, size, value, restrictive covenants, and encumbrances.

“Real estate purchase contract” means a contract, including a deposit, receipt, offer, acceptance, or other similar agreement for the sale, exchange, long-term lease without option to buy, or lease with option to buy of real property, and any amendments to the contract.

“Transfer or disposition of residential real property” includes a sale, exchange, auction, long-term lease without option to buy, or lease with option to buy.

§ -2 **Applicability.** Except as otherwise provided for in this chapter, this chapter applies to any transfer or disposition of an improved or unimproved residential lot or residential real property consisting of one to four dwelling units, including:

- (1) A condominium apartment; and
- (2) A cooperative apartment.

§ -3 **Exemptions.** The provisions of this chapter shall not apply to the transfer or disposition of residential real property:

- (1) To a co-owner;
- (2) To a spouse, parent, or child of the seller;
- (3) To any transfer by devise, descent, or court order;
- (4) By operation of law, including but not limited to any transfer by foreclosure, bankruptcy, or partition sales;

- (5) Resulting from conversion of lease land to fee simple;
- (6) To initial sales of new single family dwelling units under a current public offering statement;
- (7) Made pursuant to chapter 521, the residential landlord-tenant code;
- (8) When the seller and buyer agree in writing that the transfer will not be covered under this chapter as outlined in section -10; or
- (9) Regarding the initial sales of condominium apartments under an unexpired public report.

§ **-4 Prohibitions on transfers or disposition of residential real property.** Except as provided in section -3, no seller may transfer or dispose of any interest in residential real property subject to the disclosure requirements of this chapter unless:

- (1) Prior to the transfer or disposition of residential real property, a disclosure of real property condition statement is:
 - (A) Signed by the seller and dated within six months of the acceptance of an offer to purchase; and
 - (B) Delivered to the buyer as provided in section -5;
- (2) The buyer is afforded a reasonable opportunity to examine the statement as provided in section -5; and
- (3) The buyer acknowledges receipt of the statement on the real estate purchase contract in any addendum attached to the contract, or in a separate document, and indicates in writing any rescission of the offer.

§ **-5 Delivery of disclosure of real property condition statement to buyer; procedures.** (a) No later than ten calendar days from acceptance of an offer to purchase real property subject to this chapter, a seller, either directly or through the seller's agent, shall provide the statement to the buyer.

(b) Upon receipt of the statement, the buyer shall have fifteen calendar days to:

- (1) Examine the statement; or
- (2) Rescind the offer to purchase real property;

subject to this chapter. The buyer shall indicate in writing to the seller or through the seller's agent any rescission of the offer. Any rescission of the offer made pursuant to this subsection shall be without loss of deposits to the buyer. Furthermore, all deposits shall be immediately returned to the buyer.

(c) The seller and buyer, in writing, may agree to reduce or extend the time period provided for the delivery or examination and rescission period. The language in this subsection shall be included in the receipt for the statement.

§ **-6 Later discovered inaccurate information.** Within the time period as provided in section -17, a buyer who receives a statement that fails to disclose material facts or defects, or contains an inaccurate assertion that an item is not applicable, and who was not aware of the foregoing failures or inaccuracies, shall indicate in writing an election to rescind the real estate purchase contract within fifteen calendar days of the discovery or receipt of an amended corrected statement, in the manner provided by subsections -5(b) or (c). The buyer may pursue all additional remedies provided by law.

§ **-7 Seller's agent's duties and responsibilities for disclosure.** (a) Any person or entity, other than a real estate licensee, acting in the capacity of an

escrow agent for the transfer or disposition of real property subject to this chapter, shall not be deemed the agent of the seller or buyer for purposes of the disclosure requirements of this chapter unless the seller or buyer and the escrow agent agree in writing to the establishment of the agency.

(b) When a seller's agent cannot obtain the statement and does not have written assurances from the buyer that the statement was received, the seller's agent shall provide a written notice to the buyer of the rights to the statement and rights of rescission provided by this chapter. The seller's agent responsible for delivering the statement shall maintain a record of the action taken to effect compliance.

(c) If the seller's agent's inspection of the residential real property reveals facts inconsistent with or contradictory to the disclosure of the real property condition statement or the inspection report of a third party, the seller's agent shall disclose these facts to the seller, the buyer, and their agents.

§ -8 Excluded facts from the disclosure of real property condition statement. Except as otherwise provided by law the following material facts may be excluded from the statement:

- (1) An occupant of the subject property was afflicted with acquired immune deficiency syndrome (AIDS) or AIDS related complex (ARC), or had been tested for human immunodeficiency virus (HIV);
- (2) The real property was the site of an act or occurrence that had no effect on the physical structure or the physical environment of the real property, or the improvements located on the real property; or
- (3) A homicide, felony, or suicide occurred on the real property more than three years before the date the seller signed the statement.

§ -9 Good faith in preparing the disclosure of real property condition statement. (a) A seller or the seller's agent shall prepare the disclosure of real property condition statement in good faith. A buyer shall have no cause of action against a seller or seller's agent for, arising out of, or relating to the providing of a statement when the statement is prepared with due care and in good faith. For purposes of this section, "good faith" includes honesty in fact in the investigation, research, and preparation of the statement and includes information on the following:

- (1) Facts based on only the seller's personal knowledge;
- (2) Facts provided by governmental agencies and departments;
- (3) Reports prepared for the seller by a:
 - (A) Licensed engineer;
 - (B) Land surveyor;
 - (C) Geologist;
 - (D) Wood-destroying insect control expert; or
 - (E) Contractor, or other home inspection expert;
 dealing with matters within the scope of the professional's license or expertise for the purpose of the disclosure of real property condition statement; and
- (4) An approximation of the information, when material information required to be disclosed is unknown or not available to the seller, and the seller or seller's agent make reasonable efforts to ascertain the information; provided the approximation is:
 - (A) Clearly identified as an approximation;
 - (B) Reasonable;

- (C) Based on the best information available to the seller or seller's agent; and
- (D) Not used for the purpose of circumventing or evading the requirements of this chapter.

(b) The representations contained in the disclosure of a real property condition statement shall be construed to be made only to, and to be used only by, a buyer whose identity has been made known to the seller, a lending institution, or an escrow company involved in processing a real estate purchase contract.

§ **-10 Absentee owners and disclosure.** A seller who has not lived in the property for at least one hundred eighty days prior to the date of receiving an offer may issue a disclaimer that the seller does not have the requisite personal knowledge to make accurate disclosures about the real property, or provide a statement subject to section -9(a)(4). The seller and the buyer may agree to:

- (1) Substitute an inspection report by a home inspector, licensed contractor, or licensed appraiser covering the same matters as would have been included in a statement; or
- (2) Waive the applicability of section -4 in writing.

§ **-11 Disclosure forms.** The form for the statement shall include at least the following:

- (1) A notice to buyer and seller that the parties may wish to obtain professional advice and inspections of the property;
- (2) A notice to the buyer that the information contained in the statement is the representation of the seller and not the representation of the seller's agent; and
- (3) A notice of the buyer's rescission rights pursuant to this chapter.

§ **-12 Indication of receipt of condition statement.** (a) The seller and buyer shall indicate receipt of the seller's disclosure of real property condition statement on the real estate purchase contract, in any addendum attached to the contract, or in a separate document.

(b) Receipts taken for the disclosure of real property condition statement shall be kept on file in possession of the seller, seller's agent, or escrow company, for a period of three years from the date the receipt was taken.

§ **-13 Subsequent material facts.** Information in a statement that becomes inaccurate as a result of an act or agreement after the statement is provided to the buyer does not violate this chapter. However, the seller is required to provide an amended statement to the buyer within ten calendar days after the discovery of the inaccuracy.

§ **-14 Additional disclosure requirements.** The requirements of this chapter are in addition to all other disclosure obligations required by law relating to the transfer or disposition of residential real property.

§ **-15 Notification required; ambiguity.** (a) When residential real property lies:

- (1) Within the boundaries of a special flood hazard area as officially designated on Flood Insurance Administration maps promulgated by the United States Department of Housing and Urban Development for the purposes of determining eligibility for emergency flood insurance programs;

- (2) Within the boundaries of the noise exposure area shown on maps prepared by the department of transportation in accordance with Federal Aviation Regulation Part 150-Airport Noise Compatibility Planning (14 Code of Federal Regulations Part 150) for any public airport;
- (3) Within the boundaries of the Air Installation Compatibility Use Zone of any Air Force, Army, Navy, or Marine Corps airport as officially designated by military authorities; or
- (4) Within the anticipated inundation areas designated on the department of defense's civil defense tsunami inundation maps;

subject to the availability of maps that designate the four areas by tax map key (zone, section, parcel), the seller shall include such material fact information in the statement provided to buyers subject to this chapter. Each county shall provide, where available, maps of its jurisdiction detailing the four designated areas specified in this subsection. The maps shall identify the properties situated within the four designated areas by tax map key number (zone, section, parcel) and shall be of a size sufficient to provide information necessary to serve the purposes of this section. Each county shall provide legible copies of the maps and may charge a reasonable copying fee.

(b) When it is questionable whether real property lies within any of the designated areas referred to in subsection (a) due to the inherent ambiguity of boundary lines drawn on maps of large scale, the ambiguity shall be construed in favor of the seller provided a good faith effort has been made to determine the applicability of subsection (a) to the subject real property.

(c) Nothing in this section shall affect the validity of title to real property transferred, based solely on the reason that any seller or seller's agent failed to conform to the provisions of this section.

§ **-16 Remedies; voidable contracts.** (a) A buyer may elect to complete the purchase of real property even if the seller fails to comply with the requirements of this chapter.

(b) When the buyer is provided a timely good faith disclosure of real property condition statement and the buyer decides to rescind the real estate purchase contract, the buyer is limited in damages to the return of all deposits.

(c) When the seller negligently fails to provide the required disclosure of real property condition statement pursuant to this chapter, the seller shall be liable to the buyer for the amount of the actual damages suffered as a result of the negligence.

(d) When the seller willfully violates this chapter, or fails to perform a duty required by this chapter, the seller is liable to the buyer for up to three times the actual damages suffered by the buyer as a result of the violation or failure.

(e) In addition to the remedies allowed under subsections (b), (c), or (d), a court may also award the buyer attorney fees, court costs, and administrative fees.

§ **-17 Limitation of actions.** (a) Any action brought under this chapter shall commence within two years from the date the buyer received the statement; provided that if no statement was delivered to the buyer, then the action shall commence within two years of the recorded sale or occupancy; except where the parties have agreed in writing that the disclosures required by this chapter shall be waived.

(b) This chapter supersedes all other laws relating to the time for commencement of actions for failure to make the disclosures required by this chapter.

§ **-18 Arbitration or mediation.** Prior to filing an action in a higher court to enforce the provisions of this chapter, a seller or buyer shall first submit the claim to arbitration pursuant to chapter 658 or mediation. However, it is not the intent of this section to limit the buyer's remedies pursuant to this chapter.

§ **-19 Severability.** If any provision of this chapter, or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application, and to this end the provision of this chapter are severable.

§ **-20 Penalty.** Any person who violates this chapter shall be liable for a civil penalty of \$1,000 to the buyer and actual damages of the buyer, if any, reasonable attorneys' fees, court costs, and administrative fees, in addition to any other remedies pursuant to this chapter and provided by law."

SECTION 3. Section 467-31, Hawaii Revised Statutes, is repealed.

SECTION 4. This Act shall not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

SECTION 5. Statutory material to be repealed is bracketed.¹

SECTION 6. This Act shall take effect on July 1, 1995.

(Approved June 22, 1994.)

Note

1. Edited pursuant to HRS §23G-16.5.