

ACT 161

S.B. NO. 3266

A Bill for an Act Relating to Real Property.

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

SECTION 1. Section 508D-1, Hawaii Revised Statutes, is amended to read as follows:

“[[§508D-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 purports to fully and accurately [discloses] disclose all material facts relating to the residential real property being offered for sale that:

- (1) Are within the knowledge or control of the seller;
- (2) Are disclosed by documents recorded in the bureau of conveyances; or
- (3) Can be observed from visible, accessible areas.

“Material fact” means any [material] fact, defect, or condition, past or present, [relating to] which materially affects the value of 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 disclosure 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] as it may be amended, by which a seller agrees to sell and a buyer agrees to buy residential real property which shall include 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].

"Residential real property" means fee simple or leasehold real property on which currently is situated:

- (1) From one to four dwelling units; or
- (2) A residential condominium or cooperative apartment, the primary use of which is occupancy as a residence.

["Transfer or disposition] "Sale of residential real property" [includes a sale, exchange,] means the transfer or disposition of residential real property for consideration including, without limitation, a sale by exchange (provided that the transferor to an exchange accommodator but not the exchange accommodator who has acquired the residential real property for tax purposes prior to transfer to the buyer is deemed to be the seller for purposes of this chapter), auction, [long-term lease without option to buy,] or lease with option to buy."

SECTION 2. Section 508D-2, Hawaii Revised Statutes, is amended to read as follows:

"[**§508D-2**] **Applicability.** Except as otherwise provided for in this chapter, this chapter applies to any [transfer or disposition] sale 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]. The failure of the seller or the seller's agent to comply with this chapter shall not affect the validity of title to any residential real property sold."

SECTION 3. Section 508D-3, Hawaii Revised Statutes, is amended to read as follows:

"**§508D-3 Exemptions.** [The provisions of this] This chapter shall not apply to the [transfer or disposition] following sales of residential real property:

- (1) [To] Sale to a co-owner;
- (2) [To] Sale to a spouse, parent, or child of the seller;
- (3) [To any transfer by] Sale by devise, descent, or court order;
- (4) [By] Sale by operation of law, including, but not limited, to¹ any transfer by foreclosure, bankruptcy, or partition [sales;], or any transfer

- to a seller's creditor incident to a deed (or assignment) in lieu of foreclosure, workout, or the settlement or partial settlement of any preexisting obligation of a seller owed a creditor and any later sale of residential real property by such creditor;
- (5) [Resulting] Sale by a lessor to a lessee resulting from conversion of [lease] leased land to fee simple;
 - (6) [To initial sales of new single family dwelling units under a current public offering statement;] Initial sale of new residential real property pursuant to chapter 484 under a current public offering statement or chapter 484 exemption;
 - (7) Sale where the seller is an absentee owner who has complied with the requirements of section 508D-10;
 - [(7) Made pursuant to chapter 521;
 - (8) When the seller and buyer agree in writing that the transfer will not be covered under this chapter as outlined in section 508D-10;
 - (9) Regarding the initial sales] (8) Sales of condominium apartments [under] accompanied by delivery of an unexpired public report; or
 - [(10) Regarding the sale] (9) Sale of time share interests [duly registered under a current effective disclosure statement pursuant to] as defined under chapter 514E.”

SECTION 4. Section 508D-4, Hawaii Revised Statutes, is amended to read as follows:

“**[[]§508D-4[)] Prohibitions on [transfers or disposition] sales of residential real property.** Except as provided in section 508D-3, no seller may [transfer or dispose of any interest in] sell residential real property [subject to the disclosure requirements of this chapter] unless:

- (1) Prior to the [transfer or disposition] sale of such residential real property, a disclosure [of real property condition] statement is:
 - (A) Signed and dated by the seller [and dated] within six months [of] before or ten calendar days after the acceptance of [an offer to purchase;] a real estate purchase contract by the buyer; and
 - (B) Delivered to the buyer as provided in section 508D-5;
- [(2) The buyer is afforded a reasonable opportunity to examine the statement as provided in section 508D-5; and
- (3)] (2) The buyer acknowledges receipt of the disclosure statement on the real estate purchase contract or in any addendum attached to the contract, or in a separate document[, and indicates in writing any rescission of the offer.]; and
- (3) The buyer is afforded the opportunity to examine the disclosure statement as provided in section 508D-5.”

SECTION 5. Section 508D-5, Hawaii Revised Statutes, is amended to read as follows:

“**[[]§508D-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 real estate purchase contract, the seller, either directly or through the seller's agent, shall provide the disclosure statement to the buyer.

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

- (1) Examine the disclosure statement; [or] and

- (2) [Rescind] Decide whether to rescind the [offer to purchase real property;] real estate purchase contract.

[subject to this chapter. The] If the buyer decides to rescind the real estate purchase contract, the buyer shall [indicate in writing] deliver to the seller directly or through the seller's agent [any rescission of the offer.] within the fifteen-day period written notification of the buyer's decision to rescind the real estate purchase contract. Failure to deliver the written notification to the seller within the fifteen-day period shall be deemed an acceptance of the disclosure statement. Any rescission [of the offer] made pursuant to this subsection shall be without loss of deposits to the buyer[. Furthermore, all] which deposits shall be immediately returned to the buyer.

(c) The seller and buyer[, in writing,] may agree in writing 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] form of the receipt for the disclosure statement[.] required by section 508D-4(2) shall provide that the buyer shall have the right to examine the disclosure statement and to rescind the real estate purchase contract in accordance with this section."

SECTION 6. Section 508D-6, Hawaii Revised Statutes, is amended to read as follows:

"[§508D-6]] Later discovered inaccurate information. [Within the time period as provided in section 508D-17,] Prior to closing the real estate purchase contract, a buyer who receives a disclosure statement that fails to disclose a material [facts] fact or [defects, or] contains an inaccurate assertion [that an item is not applicable,] which materially affects the value of the residential real property, and who was not aware of the foregoing [failures] failure or [inaccuracies, shall indicate] inaccuracy, may elect in writing [an election] to rescind the real estate purchase contract within fifteen calendar days of the earlier to occur of (1) the discovery thereof, or (2) the receipt of an amended [corrected] disclosure statement[,] correcting the foregoing failure or inaccuracy, in the manner provided by [subsections] section 508D-5(b) or (c). The buyer's right to rescind the real estate purchase contract under this section shall not apply if the sale of the residential real property has been recorded; provided that the buyer may pursue all additional remedies provided by law."

SECTION 7. Section 508D-7, Hawaii Revised Statutes, is amended to read as follows:

"[§508D-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] sale of residential 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[.] for such purpose.

(b) When a seller's agent cannot obtain the disclosure statement and does not have written assurances from the buyer that the disclosure statement was received, the seller's agent shall [provide a written notice to the buyer of the] notify the buyer in writing of the buyer's rights to the disclosure statement and rights of rescission provided by this chapter. However, the seller's agent shall not be required to prepare the disclosure statement. The seller's agent responsible for delivering the disclosure statement, or the aforesaid written notification of the buyer's rights if applicable, shall maintain a record of the action taken by that agent to effect compliance.

(c) If the seller's [agent's inspection of the residential real property reveals] agent is or becomes aware of any 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. Nothing in this chapter precludes all other obligations of the seller's or the buyer's agent under Hawaii law."

SECTION 8. Section 508D-8, Hawaii Revised Statutes, is amended to read as follows:

“[[§508D-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] fact that:

- (1) An occupant of the [subject] residential real property was afflicted with acquired immune deficiency syndrome (AIDS) or AIDS related complex [(ARC)], or had been tested for human immunodeficiency virus [(HIV)]; or
- (2) The residential real property was the site of an act or occurrence that had no effect on the physical structure or the physical environment of the residential real property, or the improvements located on the residential 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.]

may be excluded from the disclosure statement. This information shall not be deemed a material fact for purposes of the disclosure statement.”

SECTION 9. Section 508D-9, Hawaii Revised Statutes, is amended to read as follows:

“[[§508D-9]] Good faith and due care 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[.] and with due care. 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 disclosure statement when the disclosure statement is prepared in good faith and with due care [and in good faith]. For purposes of this section, [“good faith”] “in good faith and with due care” includes honesty in fact in the investigation, research, and preparation of the disclosure statement and [includes] may include information on the following:

- (1) Facts based on only the seller's personal knowledge;
- (2) Facts provided to the seller by governmental agencies and departments;
- (3) [Reports] Existing reports prepared for the seller by [a:] third-party consultants, including without limitation 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] sufficient information [required to be disclosed] regarding material facts is [unknown or] not available to the seller, and the seller or seller's agent [make]

makes 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[.]; and
- (5) Facts provided to the seller by a managing agent of a homeowner's association, including without limitation, a condominium, cooperative, or community association.

Notwithstanding this subsection, a seller or seller's agent shall be under no obligation to engage the services of any person in the investigation, research, or preparation of the disclosure statement. The failure to engage the services of any such person for this purpose shall not be deemed an absence of good faith or due care by the seller or the seller's agent in the investigation, research, or preparation of the disclosure statement.

(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] and for the benefit of, the 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.] and shall be deemed accurate only as to the time when made, except as otherwise provided in section 508D-13."

SECTION 10. Section 508D-10, Hawaii Revised Statutes, is amended to read as follows:

"[§508D-10] Absentee owners and disclosure. A seller who has not lived in the residential real property for at least one_ hundred_ eighty days prior to the date of receiving [an offer] a real estate purchase contract may [issue a disclaimer] notify the buyer in writing that the seller does not have the requisite personal knowledge to make accurate disclosures about the residential real property, or provide a statement subject to section 508D-9(a)(4). [The seller and] Thereafter the buyer may [agree] elect 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 disclosure statement[;] at the buyer's expense; or
- (2) [Waive] Provide the seller written notification that the buyer waives the applicability of [section 508D-4 in writing.] this chapter."

SECTION 11. Section 508D-11, Hawaii Revised Statutes, is amended to read as follows:

"[§508D-11] Disclosure [forms.] form. [The] In addition to the other information required by this chapter, the form for the disclosure statement shall include [at least] the following:

- (1) A notice to the buyer [and seller] that the [parties] buyer may wish to obtain professional advice and inspections of the residential real property;
- (2) A notice to the buyer that the information contained in the disclosure statement is the representation of the seller and not the representation of the seller's agent[;] (except as to those representations, if any, being made by the seller's agent); and
- (3) A notice of the buyer's rescission rights pursuant to this chapter."

SECTION 12. Section 508D-12, Hawaii Revised Statutes, is amended to read as follows:

“[[§508D-12[]] Indication of receipt of [condition] disclosure 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, or 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[, or seller’s agent[, or escrow company,] for a period of three years from the date the receipt was taken.”

SECTION 13. Section 508D-13, Hawaii Revised Statutes, is amended to read as follows:

“§508D-13 [Subsequent] Later material facts. Information in a disclosure statement that has not been disclosed or becomes inaccurate regarding a material fact as a result of an act [or], agreement, or occurrence (or otherwise becomes known to seller) after the statement is provided to the buyer does not violate this chapter. However, if such information materially affects the value of the residential real property, the seller [is required to] shall provide an amended disclosure statement to the buyer within ten calendar days after the seller’s discovery of [the inaccuracy] such information if the seller discovers [the inaccuracy] such information prior to the recorded sale of the residential real property[.], and in any event, no later than twelve noon of the last business day prior to the recorded sale of the real property. The buyer shall have fifteen calendar days to examine the amended disclosure statement and, if the buyer was not already aware of such information, may rescind real estate purchase contract in accordance with section 508D-5.”

SECTION 14. Section 508D-14, Hawaii Revised Statutes, is amended to read as follows:

“[[§508D-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] sale of residential real property.”

SECTION 15. Section 508D-15, Hawaii Revised Statutes, is amended to read as follows:

“[[§508D-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 disclosure statement provided to [buyers] the buyer 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 residential 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 that 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.]”

SECTION 16. Section 508D-16, Hawaii Revised Statutes, is amended as follows:

“**[[§508D-16]] Remedies; voidable contracts.** (a) A buyer may elect to complete the purchase of residential real property even if the seller fails to comply with the requirements of this chapter. After recordation of the sale of residential real property, a buyer shall have no right under this chapter to rescind the real estate purchase contract despite the seller's failure to comply with the requirements of this chapter.

(b) When the buyer is provided a [timely good faith] disclosure [of real property condition] statement prepared and delivered in accordance with this chapter and the buyer decides to rescind the real estate purchase contract, the buyer [is limited in] shall not be entitled to any damages but shall be entitled to the immediate return of all deposits.

(c) [When] In addition to the rights of rescission granted to the buyer under this chapter, when the seller negligently fails to provide the [required] disclosure [of real property condition] statement [pursuant to] required by this chapter, the seller shall be liable to the buyer for the amount of the actual damages, if any, suffered as a result of the seller's negligence.

[(d) When the seller wilfully 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) [(d) In addition to the remedies allowed under [subsections] subsection (b)[,] or (c), [or (d),] a court may also award the [buyer attorney] prevailing party attorney's fees, court costs, and administrative fees.”

SECTION 17. Section 508D-17, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) Any action brought under this chapter shall commence within two years from the date the buyer received the disclosure statement; provided that if no disclosure 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.] of the residential real property.”

SECTION 18. Section 508D-18, Hawaii Revised Statutes, is amended to read as follows:

“[[§508D-18] Arbitration or mediation. Prior] Alternative dispute resolution. If the real estate purchase contract provides for alternative dispute resolution, then prior to filing an action in [a higher] any 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.] alternative dispute resolution as required in the real estate purchase contract.”

SECTION 19. Section 508D-20, Hawaii Revised Statutes, is repealed.

SECTION 20. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

SECTION 21. Statutory material to be repealed is bracketed.² New statutory material is underscored.

SECTION 22. This Act shall take effect upon its approval.

(Approved June 12, 1996.)

Notes

1. So in original.
2. Edited pursuant to HRS §23G-16.5.