DISCLOSURE REQUIREMENTS AND HOME INSPECTION

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DISCLOSURE REQUIREMENTS AND HOME INSPECTION

I. DISCLOSURE

A. Historical Requirements for Disclosure by Sellers

1. Traditionally, the doctrine of *Caveat Emptor* applied. There was not statutory or common law requirement that sellers make any disclosure, other than as noted below. *See Midland Nat'l Bank of Minneapolis v. Perranoski*, 299 N.W.2d 404 (Minn. 1980).

2. If a seller made a disclosure, it needed to be complete. *See Klein v. First Edina Nat'l Bank*, 293 Minn. 418, 196 N.AW.2d 619 (1972).
3. Special knowledge may create a duty. *See Sit v. T&M Properties*, 408 N.W.2d 182 (Minn. Ct. App. 1987).

B. Statutory Disclosure Requirements

1. **Lead Paint.** (42 U.S.C. 4852d). For all residential dwellings built prior to 1978, the seller must disclose whether the seller has any knowledge of lead based paint and/or lead based paint hazards in the housing unit and whether or not the seller has any reports or records relating to lead based paint or lead based paint hazards in the housing unit.

2. **Water Wells.** (Minn. Stat. § 103I.235, *et seq.*). Before signing a Purchase Agreement, the seller must disclose whether there are any wells on the property and, if so, whether they are in use, not in use, or sealed. A well is "sealed" only if sealed in accordance with regulations.

3. **Individual Sewage Treatment Systems.** (Minn. Stat. § 115.55, *et seq.*). Sellers must disclose how sewage generated at the property is managed. Specifically, they must disclose whether sewage goes to a permitted facility (sanitary sewer) or does not go to a private facility (private system).

4. **Underground Storage Tanks.** There are numerous federal and state laws, regulations and rules governing underground and above ground storage tanks. If such a tank exists on a property, it should always be disclosed.

5. **Methamphetamine Production.** (Minn. Stat. § 152.0275). The seller must disclose if the seller is aware of the manufacture of methamphetamine having occurred on the property. If so, the seller must disclose whether any orders have been issue relative to the remediation and whether the property has been remediated.

6. **Radon.** (Minn. Stat. § 144.496). Effective January 1, 2014, the residential seller must disclose what the seller knows about radon levels, whether radon tests have been performed, the results of those tests and whether a mitigation system is in place. The seller must provide the buyer with the Minnesota Department of Health's publication entitled "Radon in Real Estate Transactions" (see Exhibit 9).

7. **Common Interest Community Resale Transaction.** (Minn. Stat. § 515B.4-107). Whenever a property subject to the Minnesota Common Interest Community Act is resold (i.e., sold by a party other than the original Declarant), the buyer must be provided with a Resale Disclosure Certificate. Although most Associations will use their own form, or that of their management company, the Bar Association has promulgated a form which can be provided to the Association in order for it to make the requisite disclosures.

8. **Contract for Deed Sales**. (Minn. Stat. §§ 559.201-202). Multiple Contract for Deed sellers must provide residential buyers with a disclosure of the potential risks. A multiple seller is one who has sold four or more properties by Contract for Deed within the prior twelve months.

C. Minn. Stat. § 513.52, et seq.

1. Disclosure Statute

a. Residential Property: The new statute applies to any parcel of real property occupied or intended to be occupied as a single family residence, including units in a common interest community.

b. Transactions: The statutes apply to virtually every type of transfer, including sale, exchange, deed, contract for deed, lease with option to purchase and other option agreements.

c. Benefitted Party: Any prospective purchaser of residential real property.

2. Excluded Transactions. (§ 513.34)

a. Non-residential real property.

b. Gifts.

c. Transfers pursuant to Court Order.

d. Transfers to the Government.

e. Foreclosures and Deeds in lieu of foreclosure.

f. Transfers to heirs and devisees.

g. Transfers between Cotenants.

h. Transfers among members of immediate families.

i. Transfers between Divorced Spouses.

j. New Construction.

k. Transfers to Tenants in Possession.

l. Certain CIC Transactions.

3. Timing. (§ 513.55)

a. The seller must make the disclosure prior to signing the agreement to convey.

4. To whom do you Disclose? (§ 513.55)

a. The Disclosure must be delivered to the buyer or the licensee “representing or assisting” the prospective buyer.

5. Contents of Disclosure. (§ 513.55)

a. The seller must disclose, in good faith and to the best of the seller's knowledge, "all material facts of which the seller is aware" that could adversely and significantly affect:

(1) An ordinary buyer's use and enjoyment of the property; or

(2) Any intended use of the property of which the seller is aware.

b. The disclosure must be accurate to the date of the disclosure.

c. If the seller subsequently learns of any inaccuracies, the seller must notify the buyer, in writing, as soon as possible.

6. Exceptions. (§ 513.55)

a. Minn. Stat. § 513.55 does not create a duty to disclose that the property:

(1) Is or was occupied with someone infected with HIV or diagnosed with AIDS.

(2) Was the site of a suicide, accidental death, natural death or perceived paranormal activity.

(3) Is located in a neighborhood containing any adult family home, community based residential facility or nursing home.

(4) Information regarding sex offenders, provided that the seller has provided the buyer with notice that such information can be obtained from a local law enforcement agency or the Department of Corrections.

b. The seller need not furnish the written disclosure if:

(1) The buyer has received a written report from a professional inspector. However, the seller must disclose any facts known to the seller which contradict the information in the written report or was not covered in the report of which he was aware; or

(2) If the buyer waives the statutory requirements, by a writing signed by both the buyer and seller.

7. Effect on Common Law (§ 513.56, subd. 4).

a. The disclosure limitation in § 513.56, subd. 1 and 2 “modifies” the common law duties of disclosure.

8. Seller Alternatives. The written disclosure required by Minn. Stat. § 513.55 may be waived if the seller and the prospective buyer agree in writing. Minn. Stat. § 513.60.

a. However, even where a waiver exists, if the seller chooses to make certain disclosures, the seller’s disclosure must be complete. Minnesota courts long ago recognized that even if one has no duty to disclose a particular fact, if one chooses to speak he must say enough to prevent the words from misleading the other party. *M.H. v. Caritas Family Services*, 488 n.W.2d 282, 288 (Minn. 1992); *see, e.g., Safeco Ins. Co. of Am. V. Dain Bosworth, Inc.*, 531 N.W.2d 867, 871 (Minn. Ct. App. 1995) (stating that party who chooses to speak must speak truthfully, even in absence of duty to speak); *Klein v. First Edina Nat’l Bank*, 293 Minn. 418, 421, 196 N.W.2d 619, 622 (1972) (stating that, when party speaks, party must disclose sufficient information to avoid misleading another); *Hoyt Properties, Inc. v. Prod. Res. Group, L.L.C.,* 716 N.W.2d 366, 373 (Minn. Ct. App. 2006) *aff’d*, 736 N.W.2d 313 (Minn. 2007) (Stating that “[t]he attorney, indeed, had no duty to concede that his client’s adversaries had a winning claim; but once he chose to respond to Steve Hoyt, he had a duty to be truthful.”) *Swedeen v. Swedeen*, 270 Minn. 491, 500, 134 N.W.2d 871, 877-78 (1965) (finding that “’[a] duty to speak may arise from partial disclosure; the speaker being under the duty of saying nothing, or to tell the whole truth. A statement literally true is actionable, if made to create an impression substantially false.’”).

b. Additionally, Minnesota courts have also held that a duty to disclose facts may exist “’when disclosure would be necessary to clarify information already disclosed, which would otherwise be misleading’. . . .” *M.H.* 488 N.W.2d at 288 (quoting *L H Airco., Inc. v. Rapistan Corp.*, 446 N.W.2d

372, 380 (Minn. 1989)); *Swedeen*, 270 Minn. at 500, 134 N.W.2d at 877 (1965) (stating it is settled law that a statement which is true but that the maker knows or believes to be misleading because of his failure to state qualifying information is a fraudulent misrepresentation; similarly a half-truth that contains only those matters which are favorable and omits all reference to those which are unfavorable is as much a false representation as if all the facts stated were untrue).

D. Liability for Non-Disclosure.

1. Failure to Comply with Chapter 513 (§ 513.57).

a. The sale is not invalidated. However, the buyer may subsequently seek rescission.

b. Seller is liable for the buyer's damages and the buyer is entitled to equitable relief.

c. An action to recover under these statutes must be commenced within two years after closing.

d. The remedies provided by these statutes are non-exclusive. All other remedies remain available.

2. Other Causes of Action and Remedies.

a. Negligent Misrepresentation. (Failure to exercise reasonable care in obtaining or communicating information.) See *Bonhiver v. Graff,* 311 Minn. 111, 248 N.W.2d 291 (1976). The opposing party has no duty to communicate information so rarely is the claim successful against the opposing party (buyer/seller) or their real estate agent.

b. Fraudulent Misrepresentation. (Traditional fraud factors are applicable.) See *Davis v. Re-Trac Manufacturing Corp*, 276 Minn. 116, 149 N.W.2d 37 (1967)

c. Consumer Fraud Act. (Minn. Stat. § 325F.68) See *Ly v. Nystrom*, 615 N.W.2d 302 (Minn. 2002) and its progeny. It must be shown that the cause of action has a benefit to the public. “One on One” real estate transactions rarely meet this standard.

E. Disclosure Obligations of Agents and Brokers

1. **Statutory Disclosure Requirements.** Minn. Stat. § 82.68, subd. 3(a) states: “A licensee shall disclose to a prospective purchaser all material facts of which the licensee is aware, which could adversely and significantly affect an ordinary purchaser’s use or enjoyment of the property of which the licensee is aware.” A real estate agent’s duty to disclose material facts is an independent obligation a part from a seller’s duty to disclose material facts.

   a. A private right of action against a real estate agent for failure to comply with Minn. Stat. § 82.68, subd. 3(a) does not exist under Minn. Stat. Ch. 82. *See* Minn. Stat. Ch. 82. Minn. Stat. Ch. 82 grants enforcement powers to the commissioner of commerce. *Semrad v. Edina Realty, Inc.*, 493 N.W.2d 528, 532 (Minn. 1992). Minnesota courts have noted that, while the legislature was aware of the method by which it could create a private right of action under Minn. Stat. Ch. 82, it did not do so. *Semrad*, 470 N.W.2d at 532. Moreover, the penalty provision of the statute makes violation a gross misdemeanor but makes no reference to civil liability. Minn. Stat. § 82.83; *Semrad*, 493 N.W.2d at 532.

2. **Common Law.** Brokers have been found to have liability under theories of both intentional and negligent misrepresentation (depending on what side of the transaction they are on). *See Davis v. Re-Trac Manufacturing Corp*., 276 Minn. 116, 149 N.W.2d 37 (1967); *Sawyer v. Tildahl*, 275 Minn. 457, 148 N.W.2d 131 (1967).

II. INSPECTIONS

A. Mandatory

1. **Code compliance inspections.** Many municipalities (i.e., Bloomington and St. Louis Park) require a code compliance inspection at the time of sale. These ordinances require that various components of homes must be brought up to code at the time of sale.

2. **Truth-in-Housing Inspections.** Other communities, such as Minneapolis, simply require that an inspection be conducted by an authorized inspector to determine the general condition of the home.

Although these ordinances typically do not require that any repairs be made, the inspection must be conducted and a copy of the report filed with the City.

3. **Individual sewage treatment systems.** State law does not require that all private sewer systems be inspected. However, the state law allows local units of government the opportunity to impose such requirements. Thus, there will be significant differences from county to county and in some instances, from municipality to municipality in the same county.

B. Optional

Regardless of whether a required inspection has taken place, private home inspections are available. There are any number of vendors who are trained to perform such inspections. In some instances, a seller will have an inspection conducted in order to determine the actual condition of the property and proactively make any repairs. More typically, buyers will arrange for their own inspection. In those instances, the Purchase Agreement will contain an Inspection Contingency Addendum (MSBA or MAR form) or other language making the purchase contingent upon a satisfactory inspection.

C. Advisability of inspections

1. Protection of Buyers.

Obviously, a private inspection is helpful to the potential buyer, as it will point out many problems with the property which an ordinary buyer might not notice. With the average home price in the Metropolitan Area being almost $200,000.00, such inspections are cheap “insurance”. Private inspections are always a good idea; even better in situations involving AS-IS sales or sellers who refuse to make disclosures.

a. There are different types of inspections (i.e. intrusive, visual, mold, air quality, etc.)

2. Protection of Sellers.

Such inspections can actually protect sellers from future claims by the buyers. It is more difficult for a buyer to prevail in a post-closing claim (litigation or arbitration) if the buyer has had a thorough inspection. Further, there is an unreported case in Minnesota in which the Court of Appeals held that a buyer who has had such an inspection conducted is deemed to have relied upon the results of that inspection, not on any representations by the seller. *Zehrer v. Helland*, No. C2-98-214,1998.

QUESTIONS?