



**House
Legislative
Analysis
Section**

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HOME SELLER DISCLOSURES

House Bill 4375 (Substitute H-2)
First Analysis (3-25-93)

Sponsor: Rep. Floyd Clack
Committee: Consumers

THE APPARENT PROBLEM:

Over the past few years, a number of states have enacted laws requiring sellers of residential real property to disclose information about the property to prospective buyers. As of September 1992, seven states (Alaska, California, Kentucky, Maine, New Hampshire, Virginia, and Wisconsin) had enacted such legislation. The laws vary: Virginia, for example, requires all home sellers to provide either a disclaimer or a property disclosure statement; California, on the other hand, requires home sellers to provide a statutorily-prescribed property disclosure statement. Disclosures can operate for the benefit of both seller and buyer by providing reassurances about a home and by eliminating unpleasant surprises that can arise after a buyer moves in. Because of the benefits that seller disclosures can provide, especially for inexperienced buyers, it has been proposed that Michigan, too, enact a mandatory seller disclosure law.

THE CONTENT OF THE BILL:

The bill would create the Seller Disclosure Act, to require the sellers of residential property to make certain written disclosures about the property to prospective buyers.

Scope. The bill would apply to transfers of residential property of between one and four dwelling units; it would not apply to court-ordered transfers, divorce or separation settlements, or any of the following transfers of residential property: to foreclosure sales or to lenders following mortgage defaults; by inheritance; from one co-tenant to another; to a spouse or close relative; to or from any governmental entity; or a builder's transfer of a newly constructed house.

Timing of disclosures; grace period. In the case of a sale, the property seller would have to provide the prospective buyer with the required written statement before the purchase agreement was signed. For land contracts, leases with options to

purchase, or ground leases with improvements, the statement would have to be provided before the contract was signed. Whether a sale or other arrangement, the transferor would have to indicate compliance with the bill on the purchase agreement, the land contract, the lease, on any addendum to them, or on a separate document. For any required disclosures made after a purchase offer was signed, the buyer would have 72 or 120 hours, depending on circumstances, to terminate the offer. A buyer's right to terminate would expire upon transfer of the property by deed or land contract.

Liability. A seller's agent would not be liable for a seller's violation unless any agent [sic] knowingly acted in concert with a seller to violate the bill. The disclosure form prescribed by the bill would contain a statement that in no event could the parties hold the broker liable for any representations not directly made by the broker or the broker's agent. Neither the seller nor his or her agent would be liable for any error in information delivered under the bill if he or she had no personal knowledge of the error, or if the error was based entirely on information provided by a public agency, a surveyor, an exterminator, or other expert. If a public agency or expert provided information directly to the prospective purchaser, the seller would be relieved of responsibility with regard to the disclosure of that item of information, unless the seller had knowledge of contradictory information.

Errors, etc. It would not be a violation of the act if information disclosed under the act was subsequently rendered inaccurate. If information needed for a required disclosure was unknown or unavailable to the seller, and the seller had made a reasonable effort to ascertain it, he or she could satisfy the bill's requirements by so notifying the purchaser. It would not be a violation to fail to disclose information that could be obtained only by inspecting inaccessible parts of the property or

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discovered only by someone with science or trade expertise beyond the knowledge of the seller.

Disclosures. The bill would prescribe a disclosure form that would contain a disclaimer on the disclosures constituting a warranty, and would require disclosures on items included in the property and their condition, structural defects in the property, hazardous materials on the property, structures shared with other property owners, easements, and other matters, including whether there were any area environmental concerns such as proximity to a landfill or an airport. The disclosure form would include places for the seller to indicate the home's most recent state equalized valuation and how long the seller had owned the property. The form would state that the seller would immediately disclose any changes in the property's structural/mechanical/appliance systems to the buyer. The disclosure statement would warn the reader that professional inspections may be desirable, and that the information provided was not intended to be a part of any contract between buyer and seller.

Local options. A city, township, or county could require additional disclosures, and could require disclosures on a form different from the bill's.

Amendments. Required disclosures could be amended in writing, but any amendment would have to meet the bill's deadlines for providing disclosures, and would be subject to the grace period.

Delivery of disclosures. A disclosure would have to be provided to the buyer in person, by fax, or by registered mail.

Validity of sale. A property transfer would not be invalidated solely because of a person's failure to comply with the bill.

FISCAL IMPLICATIONS:

The Department of Commerce says the bill would not affect state or local budget expenditures. (3-23-93)

ARGUMENTS:

For:

The bill would mandate that residential property sellers make certain minimum disclosures to prospective buyers. Proponents point out a number

of advantages: by ensuring that a minimum amount of information is provided on the home, the laws make for better-informed buyers, which in turn means fewer disappointed buyers and therefore fewer lawsuits and disrupted sales. The scenario is one in which everyone benefits, particularly the first-time buyer, who may otherwise be unaware of the sorts of questions to ask or the kinds of things to look for.

Against:

Many are skeptical of the benefits claimed for the bill. The bill is in many ways vague about what is to be disclosed (as in requiring "area environmental concerns" to be described), and it allows the seller to fill out the form by marking "unknown" next to each item. The question arises whether buyers are in fact getting useful information about the house; rather than minimize lawsuits, the document could generate them by giving false security to buyers who are later disappointed. Both sellers and buyers are likely to attempt to use the document in court. If the bill's benefits to sellers and buyers are questionable, the question arises whether the bill operates to minimize liability for one group to the detriment of another. The disclosure document is something that is to be between the seller and buyer; it tends to remove the agent from the picture, while placing additional responsibilities on the seller, and, perhaps, eliminating causes of action for the buyer. The bill further contains several provisions explicitly protecting agents from liability. And, as noted in a realtor newsletter, mandatory property condition disclosures and disclosures of agency relationships "are designed to reduce realtor liability."

Response:

The bill would not alter the liabilities that exist under case law. A real estate agent is and would continue to be liable for any misrepresentations that he or she made, unless he or she had been misinformed by the seller. The bill might reduce the frequency with which real estate agents are named in lawsuits, but that would not necessarily be a bad thing, as agents frequently are wrongly named as defendants in cases where the dispute is really with the seller.

Against:

The bill purports to require that certain disclosures be made, but it carries no penalties for violations. If the bill is to have force, it should impose some sort of penalty for failure to comply.

Against:

It is unclear whether the bill adequately addresses various situations. For example, the disclosure form does not require a seller to note how long, or even whether, he or she has resided in the home; there is a presumption that the seller would be familiar with the property, when in fact that may not be the case. Exemptions may be overbroad: for example, in exempting transfers between certain family members, the bill assumes that one family member would not overlook or misrepresent aspects of a home when selling it to another family member. Sales following foreclosures also apparently would be exempted, but in sales where the foreclosing bank is selling the property, it may make sense to require that a home inspection be conducted so that a prospective buyer may be adequately informed.

Against:

The bill is written in complex and confusing language. Rather than make it easy for sellers (and buyers) to understand what the disclosure statement means, and what the law demands of sellers, the bill could discourage homeowners from attempting to sell their homes themselves, opting instead to sell through a real estate agent.

POSITIONS:

The Michigan Association of Realtors supports the bill. (3-23-93)

The Michigan Bankers Association does not oppose the bill at this time. (3-23-93)

The Mortgage Bankers Association does not have a position on the bill. (3-24-93)

The Department of Commerce has not yet taken a position on the bill. (3-23-93)