



## Residential Sale Disclosure Requirements in Nebraska

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Nebraska has required that the seller of residential real property provide a written disclosure of the condition of the property since 1994. Neb. Rev. Stat. §76-2,120 contains the general requirements concerning the disclosure statement required of most sellers of residential real property in Nebraska. A disclosure statement is generally required for the sale of residential real property. Residential real property is defined as real property that is being used primarily for residential purposes on which are located one to four dwelling units. *Id.* at §76-2,120(1)(c). Certain transfers are exempt from the disclosure requirements, including foreclosure sales; sales under court orders; sales by bankruptcy trustees; sales under trust deeds; estate sales; sales from co-owners to other co-owners; sales from governmental agencies and sales of newly constructed property. *Id.* at §76-2,120(6).

The disclosure statement form is provided by the Nebraska Real Estate Commission. The current version of the disclosure statement is available at the Real Estate Commission's website: <http://www.nrec.state.ne.us/pdf/spcd.pdf>. The disclosure statement is not intended as a warranty; but the seller is required to disclose facts of which the seller has knowledge.

Most of the provisions of the disclosure statement are self-explanatory. However, there are some comments that a careful seller should consider when completing the disclosure statement. First, the seller needs to tell the truth. If the roof leaks, disclose it. If the roof leaked in the past, but has been repaired, disclose it. If your realtor, or other advisor, recommends against disclosing a defect, ignore them.

Second, if you do not know the answer to a question, check the "Do Not Know" box if that option is available. If a seller knowingly fails to disclose a known defect, the buyer can recover actual damages, including the buyer's attorney's fees. An attorney's fees award under the statute is mandatory and many times the attorney's fees associated with pursuing a complaint under the statute may exceed the actual damages incurred by the buyer. It is better to lose a sale than to take the risk that a known defect will cause damage to the buyer. An action under the statute must be filed within one year after the buyer takes possession of the property or when the deed to the property is delivered, whichever occurs first. After one year, the buyer still has the option of suing for fraud,

breach of contract or under other theories, but most of those theories do not include an award of attorney's fees, making them far less attractive than an action under the statute.

One of the troubling sections of the disclosure statement for sellers is Part II, Section B dealing with environmental conditions. Most sellers are not knowledgeable enough about environmental matters to make an accurate disclosure. Note that the form provides three boxes for each question—"Yes," "No," or "Do Not Know." The difficulty with the form has to do with the implication of checking each of the boxes. Clearly, if the seller is aware that the house has asbestos in it, the seller should check the "Yes" box. A simple solution. However, if the seller does not actually know whether the house has asbestos in it, should the seller check the "No" box—because the seller has no actual knowledge, or should the seller check the "Do Not Know" box?

My recommendation is that sellers should always check the "Do Not Know" box unless they have absolute knowledge that the home is free from the defect. For example, if the seller had the house tested for asbestos and the test came back negative, then the seller could check "No" indicate that the house was tested and provide a copy of the test results to the buyer. Unless the seller is absolutely sure that the house is asbestos free, then the seller should check the "Do Not Know" box. Why? The answer is based on the difference between telling a potential buyer that there is "No" asbestos, which is almost like a representation that there is no asbestos in the house, versus the "Do Not Know" option, which, if selected, leads the buyer to believe that the seller simply does not know whether asbestos is present in the home. The presence of the "Do Not Know" box on the form at all also could lead a buyer to assume that a seller who checks the "No" box, knows that there is no asbestos in the house. Otherwise, the seller would have checked the "Do Not Know" box.

The seller should be absolutely sure that the disclosures are accurate. While the disclosures are not warranties of the condition of the home, a buyer is entitled to rely on the disclosures. Particular care should be taken in those sections of the disclosure form that provide the "Do Not Know" option. If the seller does not know, check the "Do Not Know" box. If the buyer cares about asbestos, radon, mold, lead based paint, or ghosts, let the buyer ask for an independent inspection and let the buyer rely on the buyer's own inspection and not on the seller's disclosure.

What about updating the disclosure statement? If the seller discovers that the disclosure statement is not accurate, the seller should immediately correct the error on the disclosure statement and be certain that a buyer making an offer has the corrected disclosure statement. For example, if a buyer asks to have the home checked for asbestos and the inspection reveals asbestos, the seller should amend the disclosure statement to check the "Yes" box for the asbestos. To sell the home, the seller will have to either find a buyer willing to buy a house with asbestos in it; discount the price for the cost of removal of the asbestos or remove the asbestos. Most buyers who are concerned about asbestos, lead, mold or radon will not buy a house with any contamination. A seller who conceals a problem and sells a home to a buyer with these concerns will almost certainly get sued.

Another word to the wise, even if the seller could legally remove environmental contamination (such as asbestos) herself, it is better to have a professional remove the contamination and require a written report showing the removal of the contamination. The seller can then deliver both the report of contamination and the report showing the removal to a buyer. A buyer should have more confidence in a professional remediation of the contamination than an amateur job. Notwithstanding the advice of your realtor, it is better to lose a sale than to fund litigation defending an erroneous disclosure. Remember that your realtor will not recall telling you not to disclose the defect; and will not be the one sitting next to you at trial. However, your attorney will be sitting next to you at trial and litigation costs more than a lost sale or a discount on the sales price.

Sellers should use caution in the completion of the disclosure statement. Tell the truth and if you do not know, check the do not know box. If an answer needs to be explained to be correct, explain the answer, either in the space provided or by attaching an explanation on a separate sheet of paper. Full disclosure is the best defense against litigation over the disclosure statement.

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