

The Residential Property Disclosure Act: A Guide for Home Buyers & Sellers

Introduction

The Residential Property Disclosure Act (“the Disclosure Act”) [Tennessee Code Annotated 62-5-201 and following] requires most Sellers of residential real estate to complete a specified Residential Property Condition Disclosure Form (“the Disclosure Form”) and to give it to the Buyers.

This Guide is intended to inform Home Buyers and Sellers of their rights and obligations under the Disclosure Act, and to assist Sellers in completing the Disclosure Form. The relevant sections of the Disclosure Act and of the Disclosure Form are noted in brackets following the discussion of those sections.

This Guide is also intended to explain the connection between the Disclosure Form and a Home Inspection, the Inspection Contingency in contracts, and an FHA Appraisal.

Exemptions & Waivers

In certain limited circumstances Sellers are exempt from having to complete the Disclosure Form, and Buyers in any residential real estate transaction may agree to waive their right to receive the Disclosure Form from the Sellers. In the absence of an exemption or a waiver (both of which are discussed in more detail at the end of this Guide), Sellers of residential real estate are required to comply with the Disclosure Act, the main points of which are discussed in this Guide.

Transactions to which the Disclosure Act Applies

The Disclosure Act applies to sales of residential real property of one to four dwelling units; it applies to leases only if the lease is part of a “Lease-Option to Purchase Agreement”. [T.C.A. 66-5-201]

When to Disclose

The Sellers must give the Buyers the specified Disclosure Form before the contract becomes fully binding, in order to give the Buyers the opportunity to amend or withdraw their offer after reviewing the Disclosure Form. [T.C.A 66-5-203(a)] The most practical way to comply with this requirement is for the Sellers to respond to an offer from the Buyers with a counter-offer that is contingent on the Buyers first signing the Disclosure Form.

This Guide is a general explanation of the Residential Property Disclosure Act, and is not legal advice about any specific real estate transaction. If you encounter any issues that require legal advice, please consult with an attorney. The views and opinions expressed in this Guide are those solely of Charles E. Reed, Attorney at Law. Real Estate Agents who distribute this Guide do so as a courtesy only, in an effort to help Sellers and Buyers understand their respective rights and obligations under the Residential Property Disclosure Act, and by doing so do not express any opinion as to the accuracy of this Guide. For questions or comments email: Charles@TitleXpress.com.

Organization of the Disclosure Form

Introduction

The Introduction to the Disclosure Form is intended to inform the Buyers that:

- ➔ The representations in the Disclosure Form are those of the Sellers only, and not of any Real Estate Agent involved in the transaction [See also T.C.A 66-5-202(1)]
- ➔ **The Disclosure Form is not a warranty by the Sellers, and is not a substitute for any warranties or home inspections that the Buyers may wish to obtain.** [See also T.C.A 66-5-201]
- ➔ **The Sellers are not required to repair any item listed on the Disclosure Form, or on any home inspection report, unless they have agreed to do so in the contract.**

[The Certification Section, discussed below, also includes notices regarding home inspections and repairs.]

Main Section

The main section of the Disclosure Form consists of questions that the Sellers are required to answer, divided into the following sub-sections:

Instructions to Seller & Basic Information about the Property

The property address, the age of the home, whether the Sellers occupy the home, and whether the home is a site-built home or a nonsite-built home. [These terms are not defined in the Disclosure Act, but a “nonsite-built home” presumably is a manufactured home, a modular home, or a mobile home].

Section A

Whether any of the listed amenities (such as oven, microwave, & trash compactor) are included with the sale of the home; the specific type of utilities and other services to the home (such as water supply and waste disposal); and whether any of the items listed in Section A of the Disclosure Form are not in working condition.

Section B

Whether there are any defects in or malfunctions of the listed structural and mechanical components of the home (such as the floors, the foundation, the plumbing, or the electrical system).

Section C

Whether any of the listed conditions or circumstances affect the home (such as environmental hazards, encroachments, flood or drainage problems, or remodeling work done without permits and/or without complying with building codes).

Certification Section

This section of the Disclosure Form certifies that the Sellers’ responses are true and correct to the best of their knowledge as of the date it was signed.

This section also confirms that the Buyers understand that **the Disclosure Form is not a substitute for a home inspection** and that they have the responsibility to follow up on any obvious "material" defects, and that they have received a copy of the Disclosure Form.

In addition, **this section informs the parties that they may wish to have a home inspection, and to negotiate contract terms for the repair of any defects noted in the home inspection or in the Disclosure Form.**

[See also T.C.A 66-5-202(1)]

[The Introduction, discussed above, also includes notices regarding home inspections and repairs.]

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Standards Applied to Sellers

In answering the questions of the Disclosure Form, the Sellers are required to comply with the following standards:

- ➔ The Sellers must answer the questions in good faith [T.C.A 66-5-201], to the best of their knowledge as of the date they completed the Disclosure Form [Disclosure Form: Certification Section], and they must reasonably believe that the information is accurate. [T.C.A 66-5-204(a)(1)]
- ➔ The Sellers must answer the questions based on all of the information that they actually have, but **they are not required to have a home inspection or any other independent investigation in order to complete the Disclosure Form.** [T.C.A. 66-5-202(1)]
- ➔ If the Sellers' information on any question on the Disclosure Form is imprecise or inexact, they should write "approximate" or "estimated" next to their response to that question. [T.C.A 66-5-205; Disclosure Form: Instructions to the Seller]
- ➔ If the Sellers do not have any information about a question, they should indicate "unknown"; in contrast, the Sellers should never indicate "yes" or "no" unless they actually have information that reasonably confirms that the requested condition or circumstance exists or does not exist, as the case may be. [See T.C.A 66-5-205]
- ➔ The Sellers must disclose all "material" defects in the home. [T.C.A 66-5-202(1)] "Material" is not defined in the Disclosure Act, but it probably includes any fact or condition that might affect the Buyers' decision to purchase the home.

Sellers are not required to disclose...

The Sellers are not required to disclose to the Buyers whether any occupant of the home was HIV-positive, or had any other disease not likely to be transmitted by occupying a home, or whether the home had ever been the site of a homicide, suicide, or felony, or of any act that didn't have an effect on the condition of the property. [T.C.A. 66-5-207]

Substituting Reports

The Disclosure Act allows the Sellers to give the Buyers a report prepared by a Home Inspector, Termite Inspector, Engineer, Surveyor, Geologist or public agency in lieu of responding to any question on the Disclosure Form that is addressed by the report. [T.C.A 66-5-204(b) & (c)] If a report is used in lieu of responding to a question, the report should be attached to the Disclosure Form and referenced by adding something like "see attached report by ____" next to the question.

Home Inspection
Reports

A Home Inspection Report is the only report that the Sellers are likely to find useful in this regard; termite problems are not addressed by the Disclosure Form (the Sellers are only asked whether they have a termite contract), and so would be handled separately according to the terms of the contract; and reports by the other listed professionals would not be needed unless the home has some rather serious issues that need to be addressed.

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Details of the Disclosure Act & Disclosure Form

Follow-Up Disclosures

"Material" Changes

If there is a "material" change to any of the conditions or circumstances of the home after the Sellers complete the Disclosure Form, the Sellers are required to inform the Buyers of the change no later than at the Closing. [T.C.A 66-5-205; Disclosure Form: Certification Section] However, the Sellers should inform the Buyers of any "material" change as soon as possible, so any related issues can be worked out prior to the Closing.

No "Material" Changes

If there have not been any "material" changes to any of the conditions or circumstances of the home by the time of the Closing, the Sellers are required to confirm this fact to the Buyers at the closing, either by completing the Final Property Disclosure at the end of the Disclosure Form, or by a separate form to the same effect. [T.C.A 66-5-205]

Exemptions

In certain limited circumstances Sellers are exempt from having to complete the Disclosure Form. [T.C.A 66-5-209] The exemptions most likely to be encountered by Buyers and Sellers are the following:

Common Exemptions

- ➔ The purchase of a home directly from a lender who has foreclosed on that property (referred to as "REO" or "Real Estate Owned" property) [T.C.A 66-5-209(2)]
- ➔ Sales or transfers between co-owners of a home. [T.C.A 66-5-209(4)]
- ➔ The purchase of new construction, provided the Buyers receive a written Builder's Warranty [T.C.A 66-5-209(9)]
- ➔ The sale of a home at a public auction. [T.C.A 66-5-209(10)]
- ➔ The sale of a home in which the Sellers have not lived at any time within the three (3) years prior to the Closing. [T.C.A 66-5-209(11)]

Other Exemptions

The other exemptions are in the context of legal proceedings of some sort, such as transfers in connection with administering a deceased person's estate, or in connection with a bankruptcy.

Waivers of Right to Receive Disclosure

The Buyers may agree to waive their right to receive a Disclosure Form from the Sellers by signing a specified Property Disclaimer Statement, confirming that they are buying the property "as is" with all defects which may exist, except as otherwise provided in the contract, and that the Sellers are not making any representations or warranties as to the condition of the home. [66-5-202(2)] However, the Property Disclaimer Statement raises multiple legal issues, and should only be used if both the Buyers and the Sellers have received legal advice regarding its use in a specific transaction.

Penalties for Non-Compliance

The penalties to Sellers for failing to comply with the Disclosure Act range from termination of the purchase contract, to liability for actual damages, to punitive damages, depending on the circumstances. [T.C.A. 66-5-203(b) & 66-5-208(a) & (b)]

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The Disclosure Form & Home Inspections

As noted in the **highlighted sections** in the above discussion, the Disclosure Form emphasizes that it should not be used by the Buyers as a substitute for a Home Inspection and that although the Sellers' disclosures are not required to be based on a Home Inspection, the Sellers can give the Buyers a Home Inspection in lieu of completing the relevant sections of the Disclosure Form.

Home Inspections & Contract Contingencies

What is a Home Inspection?	A Home Inspection is an examination and evaluation of a home's physical structures (such as the roof, walls, ceilings, floors, and foundation) and mechanical systems (such as the heating, cooling, plumbing and electrical systems) by a professional Home Inspector. The Home Inspector presents the results of the Home Inspection in a Home Inspection Report, which describes the current condition and the estimated remaining life of the home's structures and systems and lists the items that the Home Inspector recommends to repair or replace.
Inspection Contingencies & the Home Inspection	Buyers usually get a Home Inspection in connection with the "Inspection Contingency" clause in the contract, which allows the Buyers to cancel the contract within a specified amount of time after the contract is signed if they cannot reach an agreement with the Sellers concerning the repair or replacement of items listed in the Buyers' Home Inspection Report.
Maximum dollar amount for repairs	The maximum amount that the Sellers will pay for repairs or replacements should be specified in the contract, but the details of completing repairs to everyone's satisfaction can still result in protracted negotiations.
Benefits of a Seller's Home Inspection	By getting their own Home Inspection before putting their home on the market, the Sellers can avoid being surprised by the Buyers' list of items to be repaired or replaced. This should also enable the parties to reach an agreement as part of the contract negotiations on how repairs will be handled, with the price of the home adjusted accordingly. And even if the Buyers get their own Home Inspection, the parties should be able to get a more complete picture of the condition of the home by comparing both Home Inspection Reports.

Home Inspections & FHA Appraisals

Home Inspections are strongly recommended by the U.S. Department of Housing and Urban Development (HUD) for FHA loans, but they are not required by law or by any mortgage lender.

FHA lenders will require any problems noted in the FHA Appraisal to be repaired as a condition of funding the loan; but even though FHA Appraisals address a few of the same issues addressed by a Home Inspection, the purpose of an FHA Appraisal is to determine whether the home is worth what the Buyer has agreed to pay for it, and not to evaluate the condition of the home.

Likewise, a Home Inspection Report does not express an opinion of the value of the home, but it should help the Buyers decide if the home is the right investment for them.

Tennessee does not have any licensing requirements for Home Inspectors (although some Home Inspectors might separately be licensed as contractors, engineers, or architects), so references can be important.

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Confirmation of the Parties:

Property Address

Street Address

City State ZIP Code County

Sellers

I/we am/are the Seller(s) of the above property, and have received a copy of this Guide to the Residential Property Disclosure Act, and have been advised to carefully read it prior to completing the Disclosure Form, and understand that I/we will need to contact an attorney if I/we need specific legal advice relating to the Disclosure Law.

Sellers:

Dated: _____

Dated: _____

Buyers

I/we am/are the Buyer(s) of the above property, and have received a copy of this Guide to the Residential Property Disclosure Act, and have been advised to carefully read it prior to reviewing the Sellers' Disclosure Form, and understand that I/we will need to contact an attorney if I/we need specific legal advice relating to the Disclosure Law.

Buyers:

Dated: _____

Dated: _____

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