

Q&A on Changes to Residential Property Disclosure Statement
By Will Martin, NCAR General Counsel
December 2011

QUESTION #1: Is it true that the Residential Property Disclosure Statement is being changed?

ANSWER: Yes. As a result of recently-enacted legislation, the NC Real Estate Commission has added several questions to the Residential Property Disclosure Statement pertaining to any owners' association regulating a property being offered for sale. The new Disclosure Statement will become effective January 1, 2012 and will be known as the "Residential Property and Owners' Association Disclosure Statement." A copy of the new Disclosure Statement can be obtained on the Real Estate Commission's web site at: <http://www.ncrec.gov/forms/rec422.pdf>

QUESTION #2: What are the changes to the Statement?

ANSWER: Question #21 on the new Disclosure Statement replaces question #19 on the existing Disclosure Statement. Questions 22 through 25 on the new Disclosure Statement are new. Although not identical, they are very similar to questions 1 through 4 of the standard Owners' Association Disclosure and Addendum (form 2A12-T).

QUESTION #3: Should sellers begin providing the new Disclosure Statement right away?

ANSWER: Although you may begin having sellers complete the new Disclosure Statement, you should continue providing the existing Disclosure Statement to prospective buyers through the end of this year. Any buyer who makes an offer on a property *on or after* January 1st should receive the new Disclosure Statement prior to making the offer. If they don't, they will have the right to terminate any resulting contract for three days following the effective date of the contract or three days from receipt of the new Disclosure Statement, whichever occurs first.

QUESTION #4: If a buyer looks at a house at the end of December, receives a copy of the current Disclosure Statement at that time and then makes an offer on the house on or after January 1st, would the buyer have a 3-day termination right?

ANSWER: Unless the buyer received the new Disclosure Statement prior to making the offer, the answer would likely be "yes" since the buyer would not have received a copy of the Disclosure Statement in effect at the time of the buyer's offer. However, assuming that the offer is made using the standard Offer to Purchase and Contract, the buyer's right to terminate for any reason or no reason during the Due Diligence Period would permit the buyer to terminate anyway.

QUESTION #5: Suppose a buyer makes an offer on a property on January 2, 2012 and that the second check box in paragraph 5(d) of the Offer to Purchase and Contract has been checked since the buyer hasn't received the new Disclosure Statement. May the seller change paragraph 5(d) to indicate that the buyer has received the Disclosure Statement, date and initial the change, sign the offer and then deliver it as modified along with a copy of the new Disclosure Statement to the buyer?

ANSWER: That would not be an appropriate way for the seller to handle the situation. Paragraph 5(d) in the Offer to Purchase and Contract is a representation by the buyer whether the buyer has or has not received the Disclosure Statement prior to making the offer. The seller can't change the historical fact

that the buyer did not receive the Disclosure Statement prior to making the offer. Assuming the offer is otherwise acceptable, the seller should simply sign and date the offer and communicate acceptance to the buyer or buyer's representative. This would create a binding contract, subject to the buyer's 3-day right to terminate as a result of the fact that he or she hadn't received the Disclosure Statement by the time the offer was made. The seller's modification of the offer raises a question about whether a contract has been formed, as the modification arguably constitutes a rejection and counteroffer.

QUESTION #6: Will the owners of listings that are in place prior to January 1st be required to complete and provide the new Disclosure Statement if they've already completed the existing Disclosure Statement?

ANSWER: If the owner's property is subject to regulation by an owners' association, the answer to the question is "yes." On the other hand, if an owner's property is *not* subject to regulation by an owners' association, there is a good argument that the owner would not be required to provide the new Disclosure Statement because the new questions, which all pertain to owners' association regulation, would be irrelevant to the owner's property. The Real Estate Commission's legal staff has indicated informally that an agent representing a seller of property that is not regulated by an owners' association will not be disciplined simply for failing to have the owner complete a new Disclosure Statement to replace an existing Disclosure Statement already completed by the seller. Having said the foregoing, the most prudent course of action would be to have the owners of existing listings complete the new Disclosure Statement and begin providing it to buyers on and after January 1st. This would close the door on any possible argument that the seller was not in compliance with the law by not providing the Disclosure Statement in effect at the time of the buyer's offer.

QUESTION #7: Suppose the seller's property is under contract as of the end of the year but doesn't close until just after the first of next year. Must the seller still provide the buyer the new Disclosure Statement?

ANSWER: The answer to this question is not entirely clear. As noted in question #6 above, giving a buyer a copy of the new Disclosure Statement when the buyer has already received the existing Disclosure Statement should preclude any argument that the seller hadn't given the buyer the correct Disclosure Statement. However, giving a buyer who is already under contract a copy of the new Disclosure Statement could give the buyer an argument that the buyer has a new 3-day right of termination following receipt of the new Disclosure Statement. Although this may not be a very strong argument, to avoid the argument being raised at all the most prudent course of action would be to *not* give the buyer the new Disclosure Statement in this situation.

However, remember that in any situation where the owner discovers a material inaccuracy in the existing Disclosure Statement or it is rendered inaccurate in a material way by the occurrence of some event or circumstance (whether the property is under contract already or not), the Disclosure Act requires the owner to promptly correct the inaccuracy by delivering a corrected Disclosure Statement to the buyer. If that happens on or after January 1st, the new Disclosure Statement should be completed and provided to correct the inaccuracy.

QUESTION #8: Since as indicated in question #2 above, the questions on the new Disclosure Statement are very similar to the questions on the Owners' Association Disclosure and Addendum form, will the seller still have to complete the Addendum and attach it to the Offer to Purchase and Contract after the beginning of the year?

ANSWER: Not if the parties are using form 2-T. References to the Owners' Association Disclosure and Addendum form will be eliminated from form 2-T effective January 1st.

However, since the new Disclosure Statement does not address the seller providing documents pertaining to any owners' association, new wording is being added in paragraph 7(e) of form 2-T that will authorize and direct the provision of certain items to the buyer by the association or its representative (for example, a management company), much like paragraph 6 in the Owners' Association Disclosure and Addendum form.

Also, although contact information for any owners' association(s) regulating the property is addressed in the new Disclosure Statement (see question 22), in cases where the seller elects not to make any representations about any such owners' association(s) (see question 21), it is believed that the seller should be required to at least provide contact information to facilitate a buyer's ability to obtain information about any owners' association(s). Consequently, paragraph 7(e) of form 2-T will also contain blanks for owner association contact information.

QUESTION #9: Will the Owners' Association Disclosure and Addendum form still be available for use with the Offer to Purchase and Contract—Vacant Lot/Land (form 12-T) and Offer to Purchase and Contract—New Construction (form 800-T)?

ANSWER: Yes. Since neither transfers of unimproved real estate nor transfers involving the first sale of a dwelling never inhabited are subject to the Residential Property Disclosure Act, the Addendum will be kept for use in situations where offers are made using forms 12-T or 800-T if the property is subject to regulation by an owners' association(s). Additionally, the name of the Addendum itself will be changed to make it clear to users that it should only be used in connection with the transfer of property that is exempt from the Residential Property Disclosure Act. The new name of the Addendum will be "Owners' Association Disclosure and Addendum For Properties Exempt from Residential Property Disclosure Statement."

QUESTION #10: Where can a copy of the new Disclosure Statement be obtained?

ANSWER: As indicated in question #1 above, it's available now on the Real Estate Commission's web site. It's also available in the forms library on NCAR's web site at www.ncrealtors.org. The existing version of the Disclosure Statement is also being retained in the NCAR forms library through the end of the year. The new Disclosure Statement has also been provided to NCAR's approved forms software vendors for inclusion in their forms software programs.