

REO Properties and REO Sales



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To: Minnesota Association of REALTORS® Members

From: Donald D. Smith and Brad J. Boyd, Legal Counsel to the Minnesota Association of REALTORS®

Date: June 4, 2009

Subject: REO Sales

A chronic problem has developed over the last year with respect to the listing and sale of REO properties (those properties acquired by a lender through foreclosure and then put on the market for sale by that lender). Many of these lenders are refusing to comply with the Minnesota disclosure laws, as well as well disclosure, septic disclosure, lead-based paint disclosure, methamphetamine disclosure and predatory offender disclosure. **These lenders are not exempt from the seller disclosure statute found in MN Statute 513.52 to 513.60, or any other of the disclosure obligations listed above.**

The lenders are advising our members that they are exempt from the disclosure because federal law preempts state law on this issue and these lenders are therefore not required to make the disclosures under federal law. They have also stated the Fannie Mae charter prohibits the signing of any disclosure documents in compliance with state law. None of these statements are accurate. Lenders have no exemption from disclosure requirements under state law, there is no such prohibition in the Fannie Mae charter, and there is no federal law preemption on this issue. We have verified this through the National Association of REALTORS® and the Fannie Mae general counsel office as well as through our own research.

Therefore, brokers and agents must continue to advise those lenders with whom they have listing agreements of their obligation to comply with Minnesota laws. That does not mean they have to sign a standard MNAR Seller Property Disclosure Statement. There are two other options available under the statute including providing a "qualified third party inspection" or obtaining the buyer's agreement to waive the seller disclosure obligations. By law, if the lender or the listing broker/agent is aware of any problems not raised in the third party inspection, they must provide that information to the buyer or correct any misstatements. While the law is not crystal clear on this issue, it is our opinion that even with a waiver if lenders are aware of a problem, it would be prudent to disclose it. The waiver is a protection for sellers only and does not apply to the agent, who has an unwaivable responsibility of providing known information related to material facts even if

the buyer waived the obligation for seller to disclose under the seller disclosure statute.

Listing brokers and agents should push lenders to comply with Minnesota law and if necessary, can provide the attached memorandum to the lenders, setting forth the obligations of a seller under Minnesota law.

If the lender continues to persist in refusing to comply with Minnesota law, the listing broker/agent should strongly consider resigning the listing.

Another option for the brokerage in seeking compliance with the seller disclosure statute may be to assist the seller in obtaining a qualified third party inspection to provide to the buyer. This should be done with the written authorization of the lender because the brokerage is providing it on behalf of the lender. Such an option is not available with regard to the other disclosure obligations listed in this Memorandum. With respect to those disclosure obligations, lenders should either confirm in writing they have no knowledge of wells, septic, meth production etc. or the agent should conduct the requisite investigations to ascertain the existence of wells, septic systems, meth production, etc. so the seller can make the mandatory disclosures. The latter option would give rise to additional liability for agents if they provide inadequate or inaccurate information.

The predatory offender notice found in the MNAR Seller's Property Disclosure Statement and MNAR Standard Purchase Agreement allows lenders and other sellers to avoid specific disclosure on the issue, so long as they use MNAR forms containing that notice or provide a comparable notice. There is a similar notice related to airport zoning that is set forth in the MNAR Seller Property Disclosure Statement that serves a seller's interests.

To: Owner of REO Property in the State of Minnesota

From: Donald D. Smith and Brad J. Boyd, Legal Counsel to the Minnesota Association of REALTORS®

Date: June 4, 2009

Subject: Seller Disclosure Obligations Under Minnesota Law for REO Properties

A problem has arisen in Minnesota regarding lenders who have acquired property through foreclosure and then listed those properties for sale to Minnesota consumers. The problem is that lenders are refusing to comply with Minnesota disclosure laws. Those Minnesota disclosure laws include the obligation to provide to buyers either: (1) a written seller disclosure statement disclosing "all material facts of which the seller is aware that could adversely and significantly affect an ordinary buyer's use and enjoyment of the property or any intended use of the property of which the seller is aware;" (2) a "qualified third party" inspection; or (3) secure a written waiver from the buyer relative to the disclosure obligations set forth in the statute. See MN Statute 513.52 to 513.60. Additional disclosure obligations under Minnesota law include the following:

1. Disclosure of all wells and septic systems on the property. See MN Statute 103I.235 and MN Statute 115.55.

2. Disclosure whether the premises has been used for methamphetamine production. See MN Statute 152.0275.
3. Notices relative to predatory offender information. See MN Statute 243.166.
4. Valuation exclusion under MN Statute 273.11, Subd. 16.
5. Notice relative to information regarding airport zoning regulations. See MN Statute 82.22, Subd. 8(d).
6. Finally, under federal law the sellers of residential real estate are obligated to disclosure any known lead base paint hazards. See 42 U.S.C. 4852(d).

There is no exemption allowing lenders to avoid the disclosure obligations set forth in this Memorandum. We have conferred with the National Association of Realtors in-house staff and the general counsel for Fannie Mae and have confirmed our research that lenders do not have any federal statute that they can rely upon preempting the legal obligation to comply with the disclosure requirements set forth in this Memorandum. Furthermore, there is no provision in the Fannie Mae charter limiting lenders from complying with the disclosure obligations set forth herein in the sale of Minnesota residential real estate.

Therefore, lenders are obligated, like any other seller of residential real estate in Minnesota, to comply with the disclosure laws as outlined in this Memorandum. If a lender described in this Memorandum claims they are not obligated to make the disclosures outlined herein, those lenders must provide the legal support for that position to the listing agent, who has a separate legal obligation to disclose material facts.

Without such evidence, supported by accurate and substantiated legal authority, Realtors in the state of Minnesota are being encouraged to avoid unwarranted personal legal liability and risk to themselves and their brokerage, by resigning from any and all listings with sellers who refuse to comply with these legal obligations.