January 29, 2021

RE: *Testimony in Support of SB 2247 – Property Disclosure Requirements*

Chairman Burckhard and Members of the Senate Political Subdivision Committee, for the record, my name is Tricia Schlosser. I am an active member of the Government Affairs Committee for the North Dakota Association of Realtors. I am also the broker and owner of Century 21 Morrison Realty with offices in markets throughout the state, including Jamestown, Bismarck, Beulah, and Dickinson. I am here to testify in favor of Senate Bill 2247.

The current NDCC 47-10-02.1 was passed in 2019 with the belief that it would provide consumer protection for buyers and sellers of residential property in the state of North Dakota. It does provide protection for many consumers – but not all of them. The statute language is short-sighted in its scope, and it has created a loophole by some consumers and even by some real estate professionals. The current language has caused great confusion for brokers and agents in our industry and has even resulted in financial repercussions for some buyers because it appears to conflict with case law in the state of North Dakota.

In 1985, the North Dakota Supreme Court ruled in *Holcomb v. Zinke*, that *a seller of defective property has a duty to disclose material facts which are known by the seller or should be known to the seller and which would not be discoverable by the buyer's exercise of ordinary care and diligence.* NDCC 47-10-02.1 does not change the case law precedence and enforcement by the courts – it just

requires specific sellers to present written disclosure to potential buyer(s) on a specific timeline. As per case law, all other sellers of residential properties still need to disclose known defects – they are just not subject to a legislated timeline and can disclose these defects to a buyer verbally instead of in writing. Confusing? Exactly.

Too often in the last two years, consumers and licensed brokers and agents have misinterpreted Section 1 of NDCC 47-10-02.1 as, "If it is not an owner-occupied primary residence, and/or there is no licensed agent involved in the transaction, then the seller does not have to disclose known defects to a buyer." It has resulted in licensed agents and brokers to inadvertently and inaccurately advise their clients that a seller does not have to disclose in certain instances. This level of misinterpretation has had real and expensive consequences for buyers. In just one instance, in July 2020, a buyer client ended up paying over $11,700 for a new roof because the seller was instructed that he did not have to disclose any known defects on his single-family investment property, simply because he had not lived there. As a broker, I have also fielded over a dozen calls in the last two years from agents misinterpreting the seller's obligation of disclosure, simply because of the wording in this statute. It is alarming how much confusion this statute has unintendedly caused and SB 2247 needs to be passed in order to rectify the confusion and misinterpretations as soon as possible.

It is important to address the concerns some may have when eliminating the language in Section 1(a) of NDCC 47-10-02.1. The first concern is that, if there is no licensee involved, then consumers will not know that sellers have to disclose known property defects. As citizens, it is our responsibility to know the law of the land. Consumers, whether buying or selling real property on their own, will have to not only know about disclosure, but they will have to also understand the legalities of transferring clear and marketable title, the possibility of capital gains taxes, and many other issues. Since 1985, and I dare say before, most sellers have understood that they should disclose known defects about their property that may affect the buyer's intended use and enjoyment of it.

The second concern is regarding who will police the situation if a seller does not disclose known defects to potential buyers in writing. This answer has not changed since even prior to the landmark Holcomb v. Zinke case – the courts have historically handled and will always handle the disputes between buyers and sellers over damages resulting from nondisclosure of defects. Simply having a property disclosure statement filled out in a real estate licensee's records does not make a seller truthful when filling out the written disclosure. It does not happen often, but there are times a seller will advertently or inadvertently omit a material fact on the written disclosure and the buyer sues for damages. It is then up to the court to determine if the seller knew or should have known about the defect, if they actually disclosed it, and who has liability in each individual case.

The third concern is over who will collect the written property disclosure if a licensed agent is not doing so. The buyer and seller, regardless of a licensee's involvement in the transaction, have a responsibility to keep pertinent records regarding their sale or purchase. Again, just because a licensee has a copy of a written disclosure in a file, does not mean a seller is being truthful and does not guarantee a buyer quiet enjoyment of their new property.

SB 2247 also seeks to clarify that sellers must disclose defects to buyers of ALL residential properties, not just those that are an owner-occupied, primary residences. Opponents to this change would argue that sellers may not have full knowledge of all material defects in second homes, vacation homes, investment properties, and any other residential property they own. It is correct a seller may have limited knowledge of a property in which they do not reside. However, if the seller knows of a defect, they still need to disclose it, as it can still be enforced in the courts. If they do not have knowledge of a defect, then there is no way they can disclose it. Simply stated, sellers are bound to disclose only what they actually know. Amending this portion of 47-10-02.1 will eliminate confusion for licensees and make disclosure requirements clear for consumers.

Minnesota, Montana, and South Dakota have mandatory disclosure requirements for *all* sellers of residential properties, regardless if a real estate licensee is involved or not. These states also define

exceptions to the disclosure requirements. As you can see, the exceptions are written clearly in SB 2247. These reasonable exceptions involve statistically few transactions in the marketplace and allow for situations such as when one owner is conveying property to a fellow owner, or when a lender sells a foreclosed property and has no knowledge of property condition or defects.

The recommended change in Section 2 of NDCC 47-10-02.1 is that the written disclosure to the prospective buyer shall be made either before the parties enter into an agreement *or as otherwise determined by the Purchase Agreement*. This important addition to the statute allows for when real-life situations happen during the negotiation of a contract by a buyer and seller. This simple language gives buyers and sellers the ability to move forward to sign a contract even if the seller has not had time to fill out a written disclosure prior to the offer being negotiated. The buyer has the flexibility to make the purchase agreement contingent on the review and approval of the written disclosure within a contractually determined timeline rather than having to follow a one-size-fits all legislated timeline.

In summary, I strongly support consumer protection in the form of a written disclosure being mandatory for ALL sellers of ALL residential properties. And I support buyers and sellers having control over the timeline in which the written disclosure is made to the buyer. I respectfully ask that you vote **DO PASS ON SB 2247**. Thank you for your consideration. I am happy to answer any questions.