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Senate Bill 73: Real Estate Disclosure Reports
Senate Committee on Housing, Commerce and Trade
Testimony of Senator Joan Ballweg
June 15, 2021

Good morning, members of the committee. Thank you for hearing this important piece of legislation.

Real Estate Condition Reports are an essential part of a real estate transaction to ensure fairness between the buyer and seller as well as transparency about the property being exchanged. This bill makes several technical changes to the Real Estate Condition Report to provide additional clarity on how these reports should be filled out.

The first change is to correct an issue in statute regarding the ability of a buyer to receive their earnest money after they exercise their right to rescind their offer. Under Wis. State § 709.05, a buyer automatically gets their earnest money back if they rescind their offer as long as certain conditions are met. Yet, under Wis. Stat. § 709.02(1), a buyer can also rescind their offer under certain conditions, but they do not have the right to automatically receive their money back. This bill will rectify the inconsistency between these two statutory sections by clarifying that the buyer will receive their earnest money if they have the right to rescind their offer.

The second change addresses the practice of some sellers to take shortcuts by putting an "X" through a report or striking lines through "N/A" responses, instead of answering each question. This can create uncertainty between a buyer and a seller, so the bill specifies that a report is considered complete only if all specific questions are answered.

Third, the bill provides clarity that a seller only has to disclose private right-of-ways. This is necessary since it is unclear if a seller must disclose a public right-of-way, even though the question is only intended to address private rights-of-ways.

Lastly, the bill adds a disclosure for the purposes of the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA) to determine if the seller is a foreign person for tax purposes. Under this federal law, if someone buys real estate in the United States from a foreign seller, they are required to withhold 15 percent of the gains realized on the sale for taxes. If the seller is a foreign person, but the buyer did not withhold this amount, then the buyer can be held liable by the IRS for this tax. Section 4 of this legislation adds a question to help comply with FIRPTA by asking if the seller is a foreign person, as defined under FIRPTA.

These technical changes and clarifications will help provide additional direction to sellers filling out their Real Estate Condition Reports and additional transparency in real estate transactions.

Thank you for your time. I am happy to answer any questions you may have.



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Chairman Jagler and Senate Housing, Commerce and Trade Committee Members,

Thank you for holding a Public Hearing on SB 73 related to real estate disclosure reports.

This bill was drafted in consultation with the Wisconsin Realtors Association and makes necessary modifications to the real estate disclosure reports. These changes will provide clarity to both buyers and sellers and ensure more transparency throughout the process.

I am honored to have worked with Senator Ballweg on this legislation.

SB 73 addresses four main updates to the Real Estate Disclosure Reports (Wis. Stat. Ch. 709):

1. **Issue 1:** State statutes are inconsistent as related to the return of earnest money to the buyer in cases where the buyer has the right to rescind the offer. This issue is remedied and the statutes are made consistent in Section 1 of the bill.
2. **Issue 2:** Currently, when completing the condition report some sellers simply “X” out the entire report section. This is problematic as it does not answer the questions posed to the seller and does not provide the buyer with complete information. The bill clarifies in section 2 that a seller must complete all the fields in the condition report otherwise the report will be considered incomplete.
3. **Issue 3:** Currently sellers are confused about whether or not they have to disclose public rights-of-way on the disclosure report. Sections 3 and 6 clarify that the question applies only to private rights-of-way.
4. **Issue 4:** Federal law imposes a withholding tax on foreign sellers when they sell real property under the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA). People buying U.S. real estate from foreign sellers are required to withhold 15% of the amount realized to ensure IRS taxation of the gains realized on the sale. The buyer is the responsible party and may be held liable for the tax if the buyer fails to withhold the proper amount if the seller is a “foreign person” as defined in FIRPTA. The bill adds a question to the condition report that a seller must disclose if they are a “foreign person” for purposes of federal taxation. This is an important designation for federal tax purposes.

Thank you for your time and I am available to answer any questions you may have.



To: Senate Committee on Housing, Commerce and Trade
From: Cori Lamont, Senior Director of Legal and Public Affairs
Date: June 15, 2021
RE: SB 73/AB 65 – Real Estate Disclosure Report (Wis. Stat. Ch. 709)

Two sessions ago, the legislature passed 2017 Wisconsin Act 338, which in part provided a more user-friendly report for a seller to complete when selling residential or vacant land. Since the implementation on July 1, 2018 of the revised Real Estate Condition Report and Vacant Land Disclosure Report reports, the WRA has discovered the need to correct one statutory inconsistency, clarify a practice issue, address one minor technical modification to a question for clarification, and to add a new disclosure.

1. Inconsistency in the statute

Two different sections of Wisconsin Statute Chapter 709 provide a buyer a two-business day right to rescind the offer or option in writing but provide inconsistent results as to the return of the buyer's earnest money when the buyer exercises those rights.

For instance, Wis. Stat. § 709.05 permits a buyer to automatically get their earnest money back if the buyer exercises their rescission rights when a) the buyer receives a report after the submission of an offer or option if a defect as defined in the report is disclosed, b) the buyer receives an incomplete report or inaccurate assertion that an item is not applicable, or c) the buyer receives an amended report disclosing a defect that was not previously disclosed.

Interestingly, Wis. Stat. § 709.02(1) also affords the buyer a two-business day right to rescind in writing if the buyer does not receive the report within 10 days after acceptance of the offer or option but does not provide the buyer the right to automatically receive the earnest money back after exercising these rights.

As a result, the two sections of the statute are inconsistent creating confusion for the parties.

SB 73 amends Wis. Stat. § 709.02(1) to authorize the buyer to receive their earnest money back if the buyer has the right to rescind the offer, creating consistency between Wis. Stat. § 709.05 and Wis. Stat. § 709.02(1).

2. Clarify practice issue

Some sellers provide an "X" through the entire report or strike a line through all "N/A" responses, rather than answering the specific questions. This practice creates ambiguity as to whether the seller has provided the buyer a completed report.

SB 73 clarifies if the seller provides a report with strikethroughs or unanswered questions that the form is incomplete, the buyer then has certain statutory direction in Wis. Stat. § 709.05(1) as to their rescission rights.

3. Technical modification

When sellers are completing the current report, sellers are unsure as to whether they are required to disclose public rights-of-ways. However, the question was intended to ask the seller about private rights-of-ways impacting the land.

SB 73 modifies the items in the land use disclosure to the reports to specify the disclosure applies to private, not public rights-of-ways.

4. New disclosure

Federal law imposes a withholding tax on foreign sellers when they sell real property, and requires buyers involved in such transactions to potentially be responsible for the tax.

The sale of a United States real property interest by a foreign seller is subject to income tax withholding under the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA). FIRPTA authorized the United States to tax "foreign people" selling United States real property interests. A "foreign person" is defined in FIRPTA as a nonresident alien individual, foreign corporation, foreign partnership, foreign trust, or foreign estate. It does not include a resident alien individual. U.S. green card holders, U.S. citizens and non-citizens who fulfill the requirement of the substantial presence test are not subject to FIRPTA.

People buying United States real estate interests from foreign sellers, certain purchasers' agents, and settlement officers are required to withhold 15 percent of the amount realized to ensure Internal Revenue Service (IRS) taxation of the gains realized on the sale. Under FIRPTA, the buyer is the withholding agent. The buyer must find out if the seller is a foreign person. If the seller is a foreign person and the buyer fails to withhold, the buyer may be held liable for the tax.

Although at this time, these transactions are infrequent due to the significant consequences for buyers failing to comply with FIRPTA, the state approved offers to purchase, including the WB-11 Residential Offer to Purchase required for use by Wisconsin real estate licensees includes a FIRPTA provision on lines 513-542.

SB 73 adds FIRPTA as a disclosure to the reports to help in determining if the seller is a foreign person for tax purposes.

The WRA respectfully requests your support for SB 73.