

# **Guidelines for the Preparation & Use of the Pennsylvania Association of Realtors<sup>®</sup> Seller's Property Disclosure Statement (Form SPD)**

## **Note to PAR Form Users**

As stated in the title, this document is only a *guideline* for the proper use of the PAR Seller's Property Disclosure Statement. The suggestions presented here should be used in conjunction with, and as a supplement to, your professional education; they are not meant as a substitute for proper professional education.

The sale of a home is complicated. No set of instructions, no matter how complete, could possibly cover all of the issues and nuances that appear in any individual transaction. Seek guidance from your Broker and/or your legal counsel if you have any questions about the progress of a transaction or about the proper use of this or any PAR Standard Form.

To make these Guidelines more useful there are numerous helpful "extras" added to the main text. Many of the "Note" or "Practice Tip" items you will see are based, in part, on the experiences of PAR members, staff and legal counsel, and are designed to point out some of the more practical items to consider when filling out the Agreement.

## **General Notes on Usage of PAR Standard Forms**

As stated in the title, these are only *guidelines* for the proper use of this form. The Guidelines presented here should be used in conjunction with, and as a supplement to, your professional education, and are in no way meant to substitute for proper professional education. Seek guidance from your Broker and/or your legal counsel if you have any questions about the proper use of this or any PAR form in a transaction.

To make these Guidelines more useful there may be helpful "extras" added to the main text. Many of the "NOTE" or "Practice Tip" items you will see are based, in part, on the experiences of PAR members and legal counsel, and are designed to point out some of the more practical items involved in filling out the form.

## **Format of Guidelines**

Unlike most other transactional forms, responsibility for filling out the Seller's Property Disclosure Statement rests with the seller of a property, not with the brokers or agents involved in the transaction. Rather than a detailed description of each subparagraph in the form as might be given in other Guidelines documents, these Guidelines are more general and provide basic information for brokers and agents to better understand certain provisions. It is hoped that this explanatory information will assist brokers and agents to provide guidance to sellers on how to properly fill out the form, as well as helping buyer agents improve buyers' understanding of the form.

## **Broker/Agent Responsibilities**

With responsibility for the completion of a Seller's Disclosure statement on the seller, rather than the seller's agent, many practitioners may believe that they have no responsibilities under the law. This is

incorrect. For example, the Real Estate Seller Disclosure Law (68 Pa. C.S. §§ 7301-7314) states that “an agent representing a seller must advise a seller of the seller’s responsibilities under this chapter in addition to providing seller with a copy of a disclosure form.”

More importantly, a licensee can be held liable for a seller’s non-disclosure or misrepresentation if the licensee had actual knowledge of a defect or of the misrepresentation. So while licensees aren’t required to perform an inspection of the property to see if the disclosure form is accurate, they may sometimes need to guide sellers to disclose conditions that the licensee is able to observe during their normal activities in the house. To take an extreme example, if the licensee sees a puddle of water in front of a crack in the basement wall but there is no water infiltration noted on the form, the licensee may later be held at least partially responsible for the misrepresentation.

## **Legal Requirements of Property Disclosure Form**

Unlike most PAR Standard Forms, a substantial amount of the content of Form SPD is mandated by state law. Specifically, the requirement that there be a disclosure form is set forth in the Real Estate Seller’s Property Disclosure Law. This law states that the State Real Estate Commission has the authority to create and update the basic required content of the disclosure form, but that sellers are permitted to exceed the basic requirements in the law by making disclosures beyond these basic legal requirements.

The most up-to-date “basic” disclosure form is available online from the web site of the State Real Estate Commission. PAR has elected to produce a form with disclosures beyond those required by law. The additions to the form made by PAR have been determined by the PAR Standard Forms Committee to be worthy of inclusion because of their positive impact in providing additional protections for sellers, buyers and (in some cases) licensees.

When presenting Form SPD to a seller, remember that the law does not require that this specific form be completed. The law only requires that the basic Real Estate Commission form be completed, but it permits sellers to use a form that exceeds the basic requirements. As with other forms utilized as part of a broker’s business, however, a broker may make an independent business decision that no seller clients will be accepted unless they agree to fill out a particular form (such as Form SPD) that contains disclosures beyond the minimum requirements of the law.

Keep in mind as well that while Form SPD exceeds the minimum requirements of the law, there may still be additional issues that the broker or seller feels necessary to add to the form. These may be local issues or just questions related to issues that the broker has found to be potentially problematic. **Sellers are required to disclose all “material defects” regarding the property, whether or not there is a specific question on the disclosure form.**

## **Structure of the Disclosure Form**

### **Question Types**

The parties should be aware that there are two basic types of questions asked in the form:

(1) “*Are you aware...?*” These questions are generally answered with a “Yes” or “No” by the seller. If the seller doesn’t have any knowledge of the matter, then the correct answer is “No.” This response

doesn't mean that there are no problems, just that the seller isn't aware of them. For example, if the seller hasn't resided in the property for some time, he may respond "No" to the question asking about past or present water leakage in the house or other structures. If there was a problem, but it was one that the seller was never informed of, then this is a correct answer. Buyers should be aware that "No" answers to these questions don't necessarily signal a lack of problems – they may just signal a lack of knowledge.

(2) *"Are there any...?" "How many...?" and "When was...?"* These questions have possible responses of "Yes," "No," "Unknown," or "Not Applicable." The "Unknown" (Unk) response has been included for scenarios in which the seller doesn't have enough information to respond with a "Yes" or "No" response. "Not Applicable" (N/A) is when the question doesn't even apply to the property at all. For example, if the question is about a fireplace and the property doesn't have one, "N/A" is the appropriate answer, not "Unknown." In many cases, the original question will apply, but the follow-up question(s) will not. In these questions a negative response may be more meaningful because a seller with a lack of knowledge on an issue would generally use the "Unknown" response option.

### **Time Limits**

For many questions there are no time limits put on the disclosure requirements of sellers. That is, if they are aware of a specific problem that occurred prior to their occupancy they might still need to disclose it. Sellers should read questions carefully to be sure they understand the full extent of this requirement.

### **Additional Explanation**

In most areas of the form sellers are asked a series of questions, but there is no space immediately available for any explanation of those responses. At the end of many paragraphs, however, there is a spot included for the seller to explain any responses that may indicate problems with the property. Note that these are not optional; if the seller discloses that a problem exists, they are obligated to provide at least a general description of the problem and, if it has been remedied, to explain the remedy. When determining how much of an explanation to provide, remember that these explanations will be used by buyers in determining what concerns they may want to investigate if they decide to get any property inspections.

### **Problems That Have Been Fixed**

Several sections specifically request information on remediation efforts that have been taken to fix certain issues. Other sections may not request that information, but still ask about "any" past problems, not current ones. Sellers should read each question carefully to see if it is asking for disclosure of any past problems or just current problems. As a general matter it will be safer for sellers to disclose a problem and note how it has been fixed instead of not reporting the past problem. This way, a buyer who may have concerns about a particular remedy will have the opportunity to look into the repair or remediation efforts as part of any inspections.

### **Introduction**

The introductory paragraphs (prior to Paragraph 1) help set the stage for sellers as they begin to fill out the form. Important points to explain include:

(1) Virtually all sellers are required to fill out a disclosure form. For information about exceptions, sellers can refer to the Notice page.

**Note:** The requirement to fill out a disclosure to present to the buyer is a requirement of the *seller*, not a requirement of the licensee. This means that there is no change to the requirement when a seller is not represented by a broker. Many FSBO sellers may mistakenly believe the requirement does not apply to them because they are not represented.

(2) The disclosure form is *not* a substitute for an inspection or inspections done by a buyer. If the buyer has any concerns or issues about the property, they shouldn't rely solely on the information in the form to satisfy those concerns.

(3) Many sellers fail to understand that there is a general requirement that *all* "material defects" about the property must be disclosed, whether they are specifically listed on the printed disclosure form or not. Any defect "that would have a significant adverse impact on the value of the property or that involves an unreasonable risk to people on the property" must be disclosed in some fashion; it is not a defense to say "there was no question on the form."

## **Paragraph 1: SELLER'S EXPERTISE**

Self-explanatory

## **Paragraph 2: OWNERSHIP/OCCUPANCY**

### **Subparagraph (A): Occupancy**

These questions are included to help establish the identity of the current occupants, if any. This knowledge can help buyers judge the likely accuracy of the information provided. If the property has been vacant for some time, or if it is occupied by tenants rather than by the seller, it may be helpful for buyers to remember that disclosures may be based on older information or on third-party information. For example, a statement by an absentee owner that there has been no water in the basement might really be interpreted as "no water in the basement that I'm aware of, but I haven't actually set foot in the property in the last five years." Similarly, sellers who have only owned the property for a short period of time might not know as much as those who have occupied the property for a longer time.

### **Subparagraph (B): Role of person completing this form**

This section makes clear the seller's capacity in the transaction. If the seller is the owner, it implies that the seller will likely have at least some knowledge of the property. If the seller is the executor or administrator, the seller may not be required to complete the form, but still may have knowledge of material defects.

### **Subparagraph (C): Property acquisition**

This question also helps the interested buyers understand the scope of the answers provided by the seller. A seller who has owned the property for 20 years can be expected to be far more knowledgeable about its condition than a seller who has owned it for 20 months.

### **Subparagraph (D): Animals**

Two issues are often raised when discussing pets and other animals. The first issue is any damage that may have been caused by animals living in the property. For example, stains to carpets or floors, pet odors, or damage to the yard may or may not be “material defects,” but knowledge of a past pet may cause buyers to look for specific types of damage in their inspections. Secondly, for some buyers there may be issues related to allergies. While the property may not have obvious odors or damage, certain buyers may be adversely affected by residue from those animals.

### **Paragraph 3: CONDOMINIUMS/PLANNED COMMUNITIES/OTHER HOMEOWNER ASSOCIATIONS**

Sellers in a condominium or homeowner association are responsible to fill out this disclosure form only to the extent that any of the items are related to the portion of the property that they own. Fees and their frequency of payment, as well as other financial obligations related to the association or community should be disclosed here. Other topics are covered in the set of documents about the condominium or homeowner association required to be provided to potential buyers by the seller. Buyers should be cautioned to review those additional documents before making any final decision on the purchase of a property.

### **Paragraph 4: ROOFS AND ATTIC**

The question regarding repair or replacement of the roof or roofs is intended to include replacement or repair to the “roofing material” (shingles, slate, etc.) as well as to the sheathing of the roof. Disclosure of any leaks can reasonably be interpreted to cover any of a variety of sources for the water. For example, water backing up under the roof from gutters blocked with ice or leaves would generally be considered a “leak” just as water from a hole in a roof.

**Practice Tip:** The most obvious purpose of this disclosure is to give buyers an idea about the physical condition of the roof. Beyond that, however, disclosure of a roof leak can be significant for many reasons. For example, certain types of leaks might be symptomatic of blocked gutters or poor circulation in the attic, which could point buyers to other issues worthy of investigation. Aside from these conditions, any water infiltration also increases the potential for other damage. If there has been a persistent leak for some time there may be water damage to attic flooring, ceiling or floor joists, or even water leakage into the living areas of the home. Further, any water infiltration increases the possibility of mold growth in areas where the water was present.

### **Paragraph 4: BASEMENTS AND CRAWL SPACES**

Water infiltration or dampness in the basement or crawl space may include flooding, sewage or water pipe leaks, water heater leaks, or just excessive humidity. Details about sump pits and pumps are disclosed here. While these disclosures are of value on their face – most buyers want to know if there is a likelihood of water coming into their basement – they may also point to other relevant issues that buyers may want to check out.

For example, water issues may also result in insurance claims, and numerous insurance claims may make it difficult to get an insurance policy on the property. Also, water infiltration and excessive

humidity can provide a good growing environment for mold. Knowledge of past issues may encourage potential buyers to have independent mold testing done if they are concerned about that possibility.

When disclosing repairs or remediation efforts, remember that this may include a wide variety of activities. Examples might include painting the walls with waterproofing paint, replacement of basement windows, installation of French drains, or even running a dehumidifier in the summer.

**Practice Tip:** This is one area in which sellers may attempt to minimize past occurrences and decide to not disclose “one-time” or “very minor” events. It is often a good practice to encourage sellers to be as thorough as possible in their disclosures, especially in this paragraph. While sellers may think disclosure of a minor issue might “scare off” a potential buyer, they often fail to consider that discovery of an undisclosed condition may result in a much more serious situation. Or to put it another way, while there are often claims about sellers trying to cover up through underdisclosure, a seller is very unlikely to ever be sued for *overdisclosure*. It may help to remind sellers that just about anything they know is also known by someone else. Buyers may react much less kindly when they receive information from insurance companies, home inspectors, or even neighbors when they believe the information should have been in the disclosure form.

## **Paragraph 6: TERMITES/WOOD-DESTROYING INSECTS, DRYROT, PESTS**

This paragraph is generally self-explanatory. Note that “treatments” are generally considered to be professional treatments, not the occasional placement of traps, bait or other efforts initiated by a homeowner. That having been said, if there have been substantial remediation efforts by the seller, they may be worthy of disclosure.

## **Paragraph 7: STRUCTURAL ITEMS**

### **Subparagraph (A): Walls/Foundation**

This question is targeted to issues relating to the integrity of the land and any impact on the home. This may include disclosures of routine cracks in basements or slabs caused by settling of the property, or it may include issues as extreme as earthquakes, sinkholes or subsidence due to subsurface mining activities.

### **Subparagraph (B): Driveways, etc.**

Sellers may not be responsible to disclose minor cracks or deterioration of these elements if they are easily visible, but as with other issues it may be better to err on the side of caution. Note that this asks about “past or present” problems. If there were issues with any of these elements in the past that have been fixed, the seller should disclose the past problems and note the repairs/remediation that took place.

### **Subparagraph (C): Water leakage**

There are other questions in the form for issues dealing with water leakage from the roof and basement. While this question is primarily aimed at disclosure of additional issues not covered in the other questions, it may be advisable to at least reference those other responses if there were leakage

or water infiltration issues noted. Sellers will want to consider any water leakage from broken pipes, broken or open windows, and all other sources in responding to this question.

### **Subparagraph (D): Stucco/EIFS**

In some areas of the state there have been issues with homes constructed with stucco or Exterior Insulating Finishing Systems (EIFS). EIFS go by various trade names and are sometimes referred to as “synthetic stucco.” Some properties with these systems have had water seep behind the exterior covering and become trapped, potentially causing substantial damage to the sheathing of the home. This question is designed to help buyers identify homes with these exterior systems so they can decide whether to conduct additional testing to determine if any damage has been done to the property.

### **Subparagraph (E): Fire/Storm/Water/Ice Damage**

Although some of these types of damage might be disclosed elsewhere, this question is included to be sure that past damage is disclosed, even if it has been fixed.

**Practice Tip:** This question may also work as a trigger for buyers concerned about conditions that may stem from this sort of damage. For example, water infiltration from a storm might also indicate a need for mold testing where water came in. Disclosed fire damage may cause the buyer to request a more in-depth structural inspection for the part of the home where the damage occurred.

**Practice Tip:** As a general matter, any damage or potential damage that may have been reported to the seller’s insurance company could negatively affect the insurability of the property, *even if no claim is ultimately filed*. A specific question regarding insurance claims is included later in the form, but it doesn’t cover inquiries where no claims are filed. Disclosure of these types of damages here can help the buyer decide whether to do further follow-up to assess the insurability of the property.

### **Subparagraph (F): Flooring**

There can be substantial issues related to flooring not readily observable to potential buyers. For example, carpet over hardwood floors may hide the fact that the floors are heavily damaged. In some instances carpet or other floor coverings may appear to be in good condition, but only because furnishings were placed over holes or stains that would not have been readily observed during a basic inspection.

## **Paragraph 8: ADDITIONS/ALTERATIONS**

This question can include things such as adding a deck or porch, tearing down or moving walls, finishing a basement, installing fences, and similar activities. Sellers may also wish to disclose other less substantial changes depending on the amount and type of work done. For example, taking down or replacing wallpaper probably wouldn’t need to be disclosed, but tearing out and replacing the drywall in a room probably would.

With the requirement that all municipalities subscribe to a statewide building code, permit requirements may have changed substantially in many municipalities. Where a municipality had

already enforced permit requirements, the importance of having obtained permits for past work is magnified, since the building code allows the municipality to enforce past permit requirements against current property owners. For example, where work was done that would have required a permit *at the time it was done*, a municipality may take actions ranging from requiring the owner to pay past fees and penalties to bringing the work up to the *current* codes levels (which may be significantly higher than the requirements at the time the work was done), all the way to forcing the current owner to remove the changes and make the property conform to its status before the unpermitted work was performed.

The grid included with this question is designed to allow sellers to provide permit-related information about these alterations and repairs as much as they are able. Date of work is asked so buyers can research past code requirements, if desired. Understanding that many sellers may not have records or accurate recall of past permits, if the sellers do not remember whether permits were pulled and/or final municipal inspections were performed, they can respond to those questions with a response of “unknown.” Remember that as with all other questions, sellers should be as forthcoming as possible.

**Practice Tip:** With the increased requirements for permits, and the attention being paid to this issue in some municipalities, it may become easier for prospective buyers to discover information about the history of a property. For example, a buyer may be able to find records of permits for work done on the property, or inspection reports indicating potential problems with certain projects. Sellers may want to keep this in mind when deciding how much to disclose in this area.

## Paragraph 9: WATER SUPPLY

This paragraph is primarily self-explanatory. The bypass valve in Subparagraph (C) refers to a mechanism that allows the source of water to be chosen for a given purpose. For example, the seller may have public water that is used for all household purposes but uses a well on the property to water the lawn. Note that Subparagraph (B)(1) asks only about “testing” and “results” but doesn’t ask the seller to specify what types of tests were run or to provide reports. When stating the results from testing, sellers may want to consider providing some explanatory information rather than simply describing results as “acceptable” or some other general term that doesn’t provide much guidance to buyers.

**Practice Tip:** As with many other areas in the disclosure form, sellers need to keep in mind that any problems they had with their water supply may well have been experienced by others living in the area. For example, poor municipal water service or well contamination will likely be discovered very easily by potential buyers in casual conversation with neighbors. Even if these types of events were well in the past, sellers generally should disclose them as the paragraph does not put any time limitations on disclosure.

## Paragraph 10: SEWAGE SYSTEM

The majority of this paragraph is directed at disclosures involving non-public sewage systems, but sellers should be aware that several questions still need to be answered even if the property is serviced by public sewer. For example, if a septic tank remains on the property even after connection



to a public sewer line, this would need to be disclosed in Subparagraph (D). Also, various types of sewage pumps may be used with a public sewer system hookup, just like a private system.

**Note:** Just like the Water Supply paragraph, the seller is asked to disclose *any* known “past or present” problems, with no time limitation. Even if a problem occurred some time ago and has been remedied, the seller should disclose the problem and how it was fixed.

## **Paragraph 11: PLUMBING SYSTEM**

Many sellers may not have any direct knowledge of the piping in the walls, but they can likely see at least some of the piping where it connects to various fixtures. This section is set up to allow sellers to check multiple items, so a seller with various types of plumbing could realistically check “copper,” “PVC,” and “unknown” all on the same form.

## **Paragraph 12: DOMESTIC WATER HEATING**

Select the type of water heating in the property. If there are multiple types, it will be helpful to explain why more than one is checked. For example, a row home property converted to two apartments may have the original gas water heater for one unit but a new electric water heater for the second.

**Note:** The Disclosure Law specifically states that the fact that a system is “at or beyond the end of the normal and useful life” is not necessarily a material defect. Water heaters have limited guarantees and limited life spans. It isn’t necessary for sellers to state the age of a water heater, but it is likely that a home inspector will note the age – especially if it is at or beyond the normal expected life of the item.

## **Paragraph 13: HEATING SYSTEM**

### **Subparagraph (A): Fuel Types**

Indicate the fuel type(s) that is used. Note that unless a fireplace is used as a primary source of heat, it is generally not necessary to list “wood” as a heating fuel. Later subparagraphs ask for information on fireplaces.

### **Subparagraph (B): System Types**

There may be multiple systems in use in the same home, so be sure to note all of them. For example, forced hot air for main living area, supplemented by a wood stove, and with electric baseboard in the basement.

### **Subparagraph (C): Status**

The seller should include sections of the property that are not heated, such as basements, garages or workrooms that do not have heating vents, radiators, etc. Date of last service should generally be used to disclose service as part of a service contract or a repair. A simple filter replacement or cleaning, with no other service, probably should not be noted here as it may be misleading to buyers.

### **Subparagraph (D): Fireplaces and Chimneys**

Note that this would require disclosure of active fireplaces as well as those that are non-functional or may be used only for gas or electric inserts. This subsection is designed to cover any type of chimney, not just those used with a fireplace. This would include external exhausts from various types of heating systems such as furnaces or gas water heaters.

### **Subparagraph (E): Heating Fuel Tanks**

Disclose the existence of any tanks on the property, including both underground and above-ground tanks. These would include both oil tanks and propane tanks, as well as any other types of tanks that might be present. Even though tanks might be visible (e.g., heating oil tanks in the basement of the home) they should be disclosed here. The seller should note any tanks that may be leased or are otherwise not fully owned by them.

## **Paragraph 14: AIR CONDITIONING SYSTEM**

It may be possible to have multiple types of air conditioning systems. For example, there may be central air conditioning in the main living area, but window units in a garage or workroom area. Sellers should be sure to disclose all air conditioning systems, not just the primary one. If the system has multiple zones, this should be explained. Having multiple window units would not be considered a multiple-zone air conditioning system.

## **Paragraph 15: ELECTRICAL SYSTEM**

Provide information about the fuses and circuit breakers on the property. The question about knob & tube wiring is included, in part, because of reports that certain insurers may not be willing to write policies for homes with this sort of wiring. While there may not be any inherent “defects” in the wiring, a buyer may be forced to replace this sort of wiring as a condition of acquiring insurance.

## **Paragraph 16: OTHER EQUIPMENT AND APPLIANCES**

The general intent of this paragraph is to identify any issues with major systems or appliances that *might* be included in the sale. This should help buyers to understand what additional costs may be expected from repairs or replacements to the home after purchase. As a general matter, any problems with the listed items that *might* be included in the sale of the property should be noted in the disclosure form. It cannot be emphasized enough that *ONLY* the items actually included in the Agreement of Sale via negotiation will be part of the sale.

**Practice Tip:** As an agent working for either side in the transaction, licensees should *always* be sure to clarify that this paragraph does not control the terms of the Agreement of Sale. The clearer this can be communicated to the parties, the less likely it is for a licensee to get pressured to “make it right” when the terms of the Agreement don’t reflect what the parties thought they would get according to the disclosure form.

## **Paragraph 17: POOLS, SPAS AND HOT TUBS**

Obviously, not every property is going to have a pool or hot tub on it. Even if there is no pool or hot tub, every question will need to be answered, although it might be “N/A” for all or most of them.

## **Paragraph 18: WINDOWS**

Sellers may not have technical knowledge of the different parts of the windows on their property, but should be able to indicate if any have been replaced or if there are any problems.

## **Paragraph 19: LAND/SOILS**

### **Subparagraph (A): Property**

In areas where there has historically been underground coal mining, sellers may not necessarily be aware of past or proposed mining activity if there have not been any subsidence problems or other related issues. Contact information for the Mine Subsidence Insurance Fund is included for buyers who may wish to make inquiries on the topic.

Pennsylvania has a set of complex rules regulating the application of material commonly called “sewage sludge.” These rules generally require permits for the companies that provide the material, as well as permits to actually apply it in a specific area. There have been some concerns raised that certain substances in the sewage sludge products might cause health problems to those exposed to the materials. While these claims have not necessarily been substantiated, this question has been added to the disclosure form to better inform potential buyers of any relevant information so they can decide whether any further investigation is necessary.

**Note:** This material is more generally known as “biosolids.” Certain types of highly processed biosolids are treated thoroughly enough that they are commercially available as household fertilizer products. Use of these products does not need to be disclosed, as they have been processed and treated to the point that they are acceptable for ordinary use.

### **Subparagraph (B): Preferential Assessment and Development Rights**

This can be particularly important to buyers, as violation of certain restrictions could expose a buyer to substantial penalties. Additionally, a “Note to Buyer” about the Pennsylvania Right to Farm Act is included. This is designed to address situations in which buyers not accustomed to the seasonal smells or sounds of farming or other related activities move to a property in a rural area and attempt to curtail the activities of pre-existing agricultural operations. This Note informs potential buyers that the Act may give agricultural producers certain rights to continue their activities in these circumstances.

**Practice Tip:** Many homes are being built on land recently used for farming or bordered by active agricultural operations. Agents representing buyers moving into these areas may want to point out some of the potential issues that buyers might have to deal with and let the buyers decide if they need to do any further investigation into the activities on neighboring properties.

### **Subparagraph (C): Property Rights**

This is the seller’s opportunity to disclose the transfer, sale and/or lease of any timber, coal, oil, natural gas, or other rights. It is important to note that this includes any Marcellus Shale drilling and development. While it is important to disclose this information here, the seller is strongly encouraged to complete the Oil, Gas and Mineral Rights Disclosure and Addendum (PAR Form OGM). Once

completed, the OGM should be uploaded to the MLS (where applicable) and shared with potential buyers whenever the Seller's Disclosure Statement is provided.

## **Paragraph 20: FLOODING, DRAINAGE AND BOUNDARIES**

### **Subparagraph (A): Flooding/Drainage**

This subparagraph is targeted at flooding issues relating to the land, even if the flooding hasn't affected the dwellings. Even if there has never been water in the home, a seller is still obligated to disclose any flooding or drainage issues relating to other parts of the property. Any mitigation efforts for flooding and drainage, including the location and condition of structures used to convey stormwater, should also be disclosed.

### **Subparagraph (B): Boundaries**

As pointed out in the "Note to Buyer," most properties have various sorts of easements. These easements often do not affect normal usage of the property and may not be known to sellers. A buyer can determine the easements by reviewing the title of the property prior to closing.

Information regarding private roads and common areas can be quite important to buyers. There can often be substantial costs incurred for upkeep and maintenance of private roads and common areas, and buyers will generally want to know those costs up front.

**Practice Tip:** Buyers should be encouraged to obtain and review any maintenance agreements or other agreements that will require financial participation in the upkeep of a road or common area. If there are no written agreements, buyers may want to consider taking steps to get agreements in writing before closing on the property to avoid any unpleasant surprises after taking possession.

## **Paragraph 21: HAZARDOUS SUBSTANCES AND ENVIRONMENTAL ISSUES**

While much of this paragraph is self-explanatory, two areas are discussed in more detail:

### **Subparagraph (A): Mold**

This paragraph asks for disclosure of any mold testing or indoor air quality testing. The general purpose of this question is to have sellers disclose whether they have had any specific concerns about mold or air quality so buyers can use that knowledge to help them decide whether they believe there is a heightened reason to have this sort of testing done on their own.

**Note:** The form does not contain a specific request for sellers to provide copies of past reports. As part of the general wrap up to the paragraph, of course, sellers are required to explain their responses, and should generally provide at least some basic information. Whether the buyer wishes to request the results of earlier inspections is up to the buyer. As a general matter, just knowing that there was enough concern to get the property tested may be sufficient reason for the buyers to get their own inspections.

**Practice Tip:** Remember that this question asks for testing regarding mold *or* indoor air quality. While many indoor air quality tests these days relate to mold issues, there may have been other air quality tests conducted. For example, property owners concerned about health

issues from pollution, allergies, or other airborne contaminants may have had air quality testing done for totally unrelated reasons. Sellers should be reminded to disclose these types of tests if they have occurred.

Common household mold or mildew (e.g., the stuff found on shower walls, outdoor decks, or siding) is often cleaned by homeowners as part of their normal household cleaning. The paragraph is targeted more at disclosure of larger cleanups and more formal remediation efforts.

**Practice Tip:** While “general household cleaning” doesn’t necessarily need to be disclosed, sellers should always keep in mind that overdisclosure is almost always better than underdisclosure. If there is any concern by sellers that some sort of mold-like substance is beyond “normal,” they may want to consider noting it on the form just to be cautious. Remember that many home inspectors, also trying to be overly cautious, may note “potential” mold-related issues that they may have considered routine in the past.

### **Subparagraph (F): Hazardous Substances**

While several substances are listed as examples, this does not limit the extent of disclosure that is required. Knowledge of any hazardous substance on the property or in the home must be disclosed. If knowledge of any substance is also covered under one of the more specific questions below (e.g., lead-based paint), sellers should answer “yes” to this question and direct buyers to the more specific response.

## **Paragraph 22: MISCELLANEOUS**

This paragraph covers a number of items that don’t fit well into other categories. Primarily, these items cover issues that are not related to the physical aspects of the property. Zoning issues, municipal or other assessments, lawsuits, title problems, inspection and similar issues may create a “material defect” by substantially reducing the value of the property, even if they are defects that aren’t physically visible.

Sellers are asked to disclose knowledge of any insurance claims that have been filed “relating to the property.” Insurance companies in many markets are tightening up their underwriting rules, and buyers are sometimes finding that they are unable to obtain insurance for certain properties or are only able to obtain insurance at substantially higher rates. While every insurance company has differing underwriting guidelines, many are using the past claims history of the buyer and claims history of the property as part of their guidelines. Knowledge that claims have been filed regarding the property may help buyers to decide if any further investigation is necessary. Keep in mind that this may include claims by a prior owner, or even by a third party. Depending on the length of time the seller has owned the property, claims by prior owners might be looked at by the insurance company in making a determination.

**Practice Tip:** Buyers can use this question as a “cross-check” to some of the other items in the disclosure form. For example, if the seller discloses an insurance claim for mold in the basement but they don’t disclose a water problem, then the buyers may want to investigate the origin of the mold. On the other hand, if the sellers report consistent water infiltration issues but no insurance claims, the buyers may need to do further research into the

circumstances. It is worth remembering that insurance companies sometimes track inquiries in addition to claims, so even if no claims were filed, simply asking if a particular event is claim-worthy could be entered into the records for the property.

This question is not limited to property insurance claims, nor is it limited to claims filed by the current owner of the property (the seller). Other types of claims may also affect the insurer's underwriting decision. For example, numerous claims for personal property losses due to burglaries may indicate an unacceptable risk to an insurer.

**Note:** This disclosure does not ask sellers to itemize the claims that have been filed, although sellers might generally choose to explain what the claims were when they explain any affirmative answers in the last section of the paragraph. It will be up to the buyers to decide if they want any additional information from the sellers on the claims that have been filed.

## **Paragraph 23: ATTACHMENTS**

Like the Agreement of Sale and many other PAR forms, this form gives you the opportunity to indicate that one or more addenda are attached. The Seller's Property Disclosure Statement Addendum (PAR Form SDA) is pre-printed in the section as a likely form that might be attached. This form can be used to supply additional information for a single-unit property and/or individualized information for each unit in a multi-unit property. Other addenda or attachments should be indicated on the additional lines that are provided.

**Note:** Sellers are responsible for updating the information on this disclosure form if they are aware of any changes that must be made. This could include updating the current form or filling out a new form to be provided to potential buyers. It also may mean that the seller must provide updated information to potential buyers who have already received the disclosure. This wouldn't require the seller to seek out all recipients of the form, but the seller would want to provide it to all serious bidders prior to the submission of an offer

## **Signatures and Acknowledgments**

### **Seller Signature Lines**

The seller is required to sign the disclosure form to represent the accuracy of the information provided. Note that the seller is also asked to initial each page of the disclosure form, similar to many PAR multi-page contracts.

**Practice Tip:** The law doesn't require sellers or licensees to conduct investigations into the condition of the property in order to fill out the disclosure form. That having been said, sellers (and licensees) are required to disclose information they are aware of, regardless of how they became aware of it. If inspections by a potential buyer reveal defects that ordinarily must be included in the disclosure form, these items must be added to the form for future buyers if the first transaction falls through. Sellers and licensees need to carefully consider what sort of information should be added to the disclosure form in this circumstance. This may need to be done in consultation with brokerage counsel, as there are a number of related legal issues that can arise.

There is a special signature block for a seller acting as an executor, administrator, or trustee. Sellers in these transactions are exempt from the legal requirements to provide a disclosure form, but they are still asked to disclose any known material defects in some format.

### **Receipt and Acknowledgement by Buyer**

Buyers are asked to initial each page of the disclosure statement and to sign at the end of the form to acknowledge that the form was provided. As is also noted in the introductory paragraphs, buyers are once again reminded that this disclosure form is not to be used as a substitute for appropriate inspections, and that the disclosure statement does not create a warranty from the seller.

### **Remedies**

One of the more common questions from buyers to PAR is about the availability of a remedy to a buyer who feels that a seller has misrepresented the property in a disclosure statement. The law states that a buyer has two years from the date of the transaction to file suit based on a misrepresentation or failure to disclose. Damage awards in these cases are limited to the actual damages incurred by the buyer, and there is *not* a right to rescind or cancel the contract. The law also provides, however, that there is no limitation on buyers also bringing suit on different legal grounds such as common law fraud. As a general matter, buyers may often need to balance their “actual damages” against the costs of pursuing the seller. Brokers and agents may be well-served by advising unhappy buyers to seek experienced real estate counsel in these matters. Aside from keeping the licensee away from possibly giving bad advice, one or both of the agents often get joined in these sorts of cases, so it may be better to not put oneself in a position of providing what looks like self-serving advice if a case is later filed that joins the broker.