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REAL ESTATE TRANSACTION NONDISCLOSURE

House Bill 5938 as introduced First Analysis (6-25-98)

Sponsor: Rep. James M. Middaugh
First Committee: Commerce
Second Committee: Judiciary

THE APPARENT PROBLEM:

Current laws provide regulations for real estate agents requiring them to provide prospective buyers with certain information about a property. Failure to provide required information can result in liability for the real estate agent. Some have suggested that recent changes to the Sex Offenders Registration Act create a possible duty on the part of real estate agents to disclose whether a registered sex offender lives in the neighborhood to prospective home buyers.

As originally written, a registration under the Sex Offenders Registration Act was confidential and was not open to inspection, except for law enforcement purposes, and the registration and all included materials were exempt from disclosure under the Freedom of Information Act. However, in 1996 the legislature enacted Public Act 494 which took effect on April 1, 1997. The current law requires the Department of State Police to maintain a computerized data base of registered individuals, indexed by zip code area, and containing the name, aliases, address, physical description, birth date, and listed offenses of each individual residing within a zip code area. The department must make the compilation available to state police posts, local law enforcement agencies, and sheriffs' departments (via the Law Enforcement Information Network [LEIN], or in printed form), and the local police agencies, together with the department, also must make the information available in print or electronic form for public inspection. Under Public Act 494, if a court determines that the public availability of any information concerning registered individuals violates the U.S. or state constitution, the department must revise the compilation to remove that information. Confusion exists because the act also contains provisions making the disclosure of information contained in the registry a misdemeanor and allowing an individual whose registration is revealed a cause of action against the responsible party for treble damages.

Given the position of real estate agents and the expectation that they will make certain information about properties they are attempting to sell available to prospective buyers, there is some concern that some buyers may expect that an agent will provide them with information regarding any registered sex offenders living nearby. Because the information in the sex offender registration act list is publicly available and there is some confusion over whether information from the list may be merely inspected by members of the public or may be divulged or published, it is possible that a home buyer could sue his or her real estate agent for failing to inform the buyer about the fact that a registered sex offender lived near the home. Rather than place real estate agents at risk of being responsible for providing information from the sex offender list for prospective buyers, it has been suggested that such lawsuits should be legally barred.

THE CONTENT OF THE BILL:

House Bill 5938 would amend the Occupational Code to expand the list of circumstances under which an action could not be brought against a real estate broker, associate, or salesperson. Under current law, real estate agents are protected from liability for failing to provide certain information to prospective buyers. Specifically, an action cannot be brought against a real estate agent who fails to disclose that a former occupant has or is suspected of having a disability when such a disclosure would constitute unlawful discrimination; or, for failing to disclose that the property was or was suspected to have been the site of a homicide, suicide, or other occurrences that have no material effect on the condition of the property. The bill would also prohibit an action from being brought for failure to disclose any information from the compilation of offenders that is provided by the Sex Offenders Registration Act.

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BACKGROUND INFORMATION:

In 1994, the legislature created the Sex Offenders Registration Act, Public Act 295 of 1994. Beginning October 1, 1995, the act required people convicted of listed offenses (see below) to register and comply with the act for 25 years after the date of initial registration, or for life if convicted of a second offense. A registration includes a recent photograph; the person's name, Social Security number, and address or expected address; a brief summary of the individual's convictions for listed offenses, including where the offenses occurred and the original charge, if the conviction was for a lesser offense; a complete physical description of the person; and the individual's blood type and whether a DNA identification profile of the person is available.

Under the act, listed offenses mean accosting, enticing, or soliciting a child for immoral purposes; involvement in child sexually abusive activity or material; a third or subsequent violation of any combination of the following: engaging in indecent or obscene conduct in a public place, indecent expose, or a local ordinance substantially corresponding to either of these offenses; criminal sexual conduct in the first, second, third, or fourth degree; assault with intent to commit criminal sexual conduct; an attempt or conspiracy to commit an offense enumerated above; or, any offense substantially similar to a listed offense under the laws of the United States, any other state, or any country.

Under the original sex offender registration law passed in 1994, any individual whose registration was revealed in violation of the act had a civil cause of action against the responsible party for treble damages. Further, a willful violation of the act by a registrant was a felony, punishable by up to four years' imprisonment, a maximum fine of \$2,000, or both. A person other than a registrant who knew of a registration and divulged, used, or published information about the registration was guilty of a misdemeanor punishable by up to 90 days' imprisonment, a maximum fine of \$500, or both. The current law, Public Act 494 of 1996, specifies that these penalty provisions do not apply to the compilation or to any information from the compilation that is provided or made available under the act.

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:**For:**

Although arguably there is already a prohibition against providing prospective buyers with information from the registry, the law should clearly indicate that a real estate agent is not to be required to provide prospective home buyers with this information. The information indicating that someone listed on the registry lives nearby is not a physical feature of the property and, in addition, may be inaccurate and therefore not in fact relevant to the buyer's decision. Furthermore, it is unreasonable to expect a real estate agent to provide such information since it would also require the agent to attempt to determine to what extent the fact that a convicted sex offender lived near a particular property would affect a purchaser's decision. For example, when should a real estate agent be expected to provide information that a listed offender lived nearby -- when the offender was living next door, on the same block, in the same neighborhood, within a certain number of miles? If real estate agents were liable for failing to provide such information, it would be difficult to say where the risk of liability would end -- some people might feel that the prospect of living within a five-mile radius of the residence of a convicted sex offender would be unacceptable, while others might only be concerned about living next door, and still others might not care at all since these offenders have already paid their debt to society. Rather than requiring a real estate agent to provide this information, it is much more reasonable, given that the information is available to the public, to place the responsibility of seeking out this information on those home buyers who feel that they need to know whether any persons on the list live nearby before buying a property.

Against:

The bill is unnecessary; the Sex Offenders Registration Act already prohibits publishing or disclosing information from the registry and provides a civil cause of action for such disclosures.

Response:

Even if such lawsuits could be successfully defended, there is a reasonable concern that such lawsuits might be filed. Defending lawsuits can be costly, and even if won can create damaging publicity and increased insurance costs. Besides, even if the interpretation of the law is that the publication of such information is prohibited, it is better to protect those engaged in the business of selling real estate from such lawsuits by

enacting the bill into law and thereby eliminating the threat.

POSITIONS:

The Michigan Association of Realtors supports the bill.
(6-24-98)

Analyst: W. Flory

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.