

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1049 Flood Disclosure in the Sale of Real Property

SPONSOR(S): Hunschofsky and others

TIED BILLS: **IDEN./SIM. BILLS:** SB 484

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Regulatory Reform & Economic Development Subcommittee		Larkin	Anstead
2) Civil Justice Subcommittee			
3) Commerce Committee			

SUMMARY ANALYSIS

Property owners in Florida must disclose significant or material known defects or problems with real property to prospective buyers. In addition, s.161.57, F.S., requires sellers to disclose the potential for coastal erosion for properties located seaward of the costal construction control line under certain conditions. However, current Florida law does not require disclosure related to prior flooding of property. This may leave buyers who are not familiar with the area at a significant disadvantage. Given its history of extreme weather, several areas of Florida could be at risk for flooding, which is typically not covered by homeowner’s insurance or hurricane insurance.

Thirty-two states have flood disclosure laws, while eighteen states, including Florida, do not require a seller to disclose a property’s prior flood history to a prospective buyer.

The bill creates a flood disclosure requirement for every residential real property transaction.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Disclosure of Known Defects

As to sales of real property, Florida historically followed the legal theory of *caveat emptor* (“let the buyer beware”). Under this theory, the seller had no duty to disclose defects in the property and the buyer accepted the property “as-is.”¹

The law changed in 1985 when the Florida Supreme Court ruled that “where the seller of a home knows of facts materially affecting the value of the property which are **not readily observable** and are not known to the buyer, the seller is under a duty to disclose them to the buyer.”² This duty applies even where the buyer has agreed to purchase residential property “as-is.”³

In the context of flood disclosures, the appellate courts are split as to whether a tendency to flood is readily observable. For example, in one case, the buyers of a home in the East Everglades area of Miami-Dade County⁴ bought the home during the dry season and the sellers did not disclose that the land on which the home sat flooded annually in the rainy season. The flooding, according to the court, was so severe that “snakes and even alligators (two at least), have gathered at the property to escape the waters.”⁵ The court found that seasonal flooding of the neighborhood was common knowledge and information that was readily available to the buyers had they exercised “diligent attention.”⁶ The lawsuit against the seller was dismissed.

In another case, the buyers sued the seller who failed to disclose that the property was in the Coastal Barrier Resource Area (CBRA), and thus was ineligible for flood insurance. The trial court found the information regarding the CBRA was publicly available, and dismissed the case. However, the appellate court reversed and ruled for the buyers.⁷

The duty to disclose latent defects will generally not apply to an “as-is” contract for non-residential property. Florida courts will continue to apply the doctrine of *caveat emptor* to an “as-is” contract for non-residential property unless one of the following exceptions apply:

- Where some artifice or trick has been employed to prevent the purchaser from making independent inquiry;
- Where the purchaser does not have equal opportunity to become apprised of the fact; and
- Where a party undertakes to disclose facts and fails to disclose the whole truth.⁸

Numerous laws have created specific legal disclosure requirements for a seller that are in addition to the disclosure required by case law, including:

- Associations -- A seller of property in a condominium, cooperative, or homeowners association must make extensive specific disclosures of information related to the association.⁹
- Coastal -- A sale of a property located partially or totally seaward of the coastal construction control line requires a written disclosure statement at time of contract. Also, the seller must

¹ *Banks v. Salina*, 413 So. 2d 851, 852 (Fla. 4th DCA 1982).

² *Johnson v. Davis*, 480 So. 2d 625, 629 (Fla. 1985).

³ *Rayner v. Wise Realty Co. of Tallahassee*, 504 So. 2d 1361 (Fla. 1st DCA 1987).

⁴ *Nelson v. Wiggs*, 699 So. 2d 258 (Fla. 3rd DCA 1997).

⁵ *Id.* at 259.

⁶ *Id.* at 260.

⁷ *Newbern v. Mansbach*, 777 So.2d 1044 (Fla. 1st DCA 2001).

⁸ *Florida Holding 4800, LLC v. Lauderhill Mall Investment, LLC*, 317 So.3d 121, 124 (Fla. 4th DCA 2021).

⁹ See, ss. 718.503 (condominiums), 719.503 (cooperatives), and 720.401 (homeowners association), F.S.

furnish the buyer with a survey or affidavit showing the line, although the buyer may waive this requirement.¹⁰

- Code enforcement -- If a code enforcement proceeding is pending at the time of sale, the seller must disclose it to the buyer.¹¹
- Lead paint -- Federal law requires all sellers or landlords of residential real property built before 1978 to give the buyer or tenant a federally produced form disclosure. The contract or lease must allow for a 10-day inspection period.¹²
- Property tax -- The seller must disclose that a transfer of ownership may lead to an increased property tax assessment related to the Save Our Homes Amendment.¹³
- Radon gas -- A specific disclosure relating to the risks of radon gas must be made in writing in connection with the sale of any building.¹⁴
- Sewer lines -- The seller must disclose known defects in the property's sanitary sewer lateral line.¹⁵
- Sinkhole damage -- The seller of real property upon which a sinkhole claim has been made by the seller and paid by the insurer must disclose to the buyer of such property, before the closing, that a claim has been paid and whether or not the full amount of the proceeds was used to repair the sinkhole damage.¹⁶
- Subsurface rights -- The seller must provide a prospective purchaser of residential property with a disclosure summary if the seller or an affiliated or related entity has previously severed or retained or will sever or retain any of the subsurface rights or right of entry.¹⁷

Correspondingly, statutes provide that certain disclosures are not required, including:

- That an occupant is or has been infected with HIV or AIDS.¹⁸
- That the property was or may have been the site of a homicide, suicide, or other death.¹⁹

States that Require Flood Disclosure

Thirty-two states have flood disclosure laws.²⁰ However, eighteen states do not require a seller to disclose a property's prior flood history to a prospective buyer, including Florida.²¹ According to the Natural Resources Defense Council, homeowners who unknowingly purchase a home with undisclosed flood damage were subsequently inundated with bills up to tens of thousands of dollars to repair such damage.²²

¹⁰ S. 161.57, F.S. The written disclosure states the following: "The property being purchased may be subject to coastal erosion and to federal, state, or local regulations that govern coastal property, including the delineation of the coastal construction control line, rigid coastal protection structures, beach nourishment, and the protection of marine turtles. Additional information can be obtained from the Florida Department of Environmental Protection, including whether there are significant erosion conditions associated with the shoreline of the property being purchased."

¹¹ S. 162.06(5), F.S.

¹² 24 CFR Part 35 and 40 CFR Part 745. See also United States Environmental Protection Agency, Lead-Based Paint Disclosure Rule (updated Aug. 7, 2023), <https://www.epa.gov/lead/lead-based-paint-disclosure-rule-section-1018-title-x>.

¹³ S. 689.261, F.S. The written disclosure states that: "BUYER SHOULD NOT RELY ON THE SELLER'S CURRENT PROPERTY TAXES AS THE AMOUNT OF PROPERTY TAXES THAT THE BUYER MAY BE OBLIGATED TO PAY IN THE YEAR SUBSEQUENT TO PURCHASE. A CHANGE OF OWNERSHIP OR PROPERTY IMPROVEMENTS TRIGGERS REASSESSMENTS OF THE PROPERTY THAT COULD RESULT IN HIGHER PROPERTY TAXES. IF YOU HAVE ANY QUESTIONS CONCERNING VALUATION, CONTACT THE COUNTY PROPERTY APPRAISER'S OFFICE FOR INFORMATION."

¹⁴ S. 404.056(5), F.S.

¹⁵ S. 689.301, F.S.

¹⁶ S. 627.7073(2)(c), F.S.

¹⁷ S. 689.29, F.S.

¹⁸ S. 689.25(1)(a), F.S.

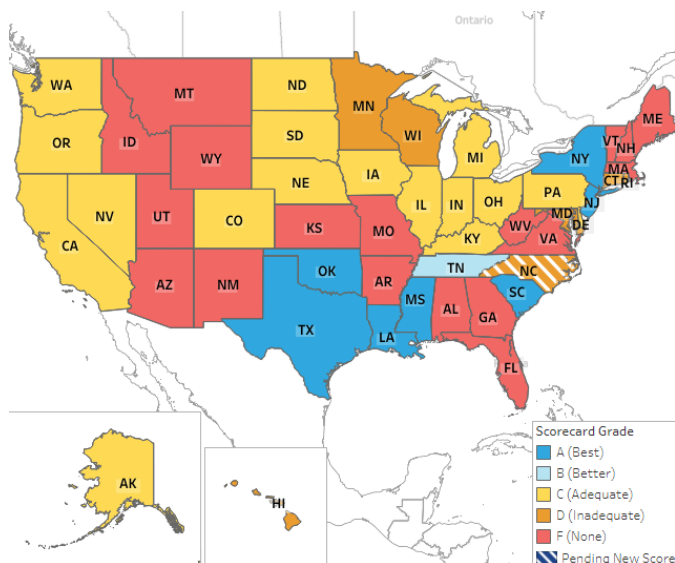
¹⁹ S. 689.25(1)(b), F.S.

²⁰ *How States Stack up on Flood Disclosure*, Natural Resources Defense Council (Aug. 31, 2023), www.nrdc.org/resources/how-states-stack-flood-disclosure (last visited Feb. 2, 2024).

²¹ Thomas Frank, *More States Are Requiring Flood Risk Disclosures. Florida Is Conspicuously Not among Them*, *Scientific American*, (Oct. 5, 2023), www.scientificamerican.com/article/more-states-are-requiring-flood-risk-disclosures-florida-is-conspicuously-not-among-them/ (last visited Feb. 2, 2024).

²² *Supra* note at 20.

In an effort to let homeowners know which states have flood disclosure laws, the Natural Resources Defense Council graded the states from A (as the best) to F (having no flood disclosure laws):²³



Floods

Usually, homeowner's insurance²⁴ and hurricane insurance does not cover flood related damage.²⁵ Nonetheless, thirty-six percent of homeowners believe that homeowner's insurance covers flood-related damage.²⁶ Florida has an average of 59.21 inches of rain each year.²⁷ Florida's flat terrain makes it more susceptible to flooding.²⁸ In the next 30 years, one-third of properties in Florida are at risk of flooding.²⁹

Inability of Buyers to Access Federal Data on Flood-Prone Homes

The Federal Emergency Management Agency (FEMA) responds to emergencies caused by natural disasters including flooding. Like all federal agencies, they keep records related to their regulatory function. One form of data held by FEMA is properties categorized as a "severe repetitive loss property." That designation covers homes that have flooded twice, with damage totaling the value of the property, or flooded four times with at least \$5,000 of damage each time. There are about 45,000 of these properties in the United States, as of the end of 2022, with about 3,100 in Florida alone, according to FEMA data. Florida added about 120 of those homes from 2021 to 2022. FEMA's policy is to share past flood history only with a property owner that holds an active flood insurance policy on a property, so prospective buyers may know the details of their property's flood history only after they have closed the deal.³⁰

²³ *Id.*

²⁴ Jason Metz, *Does Homeowners Insurance Cover Water Damage from Rain or a Leak?* Forbes (Oct. 27, 2023), www.forbes.com/advisor/homeowners-insurance/water-damage/ (last visited Feb. 2, 2024).

²⁵ *Hurricane Insurance*. Federal Emergency Management Agency, https://community.fema.gov/PreparednessCommunity/s/ContactUs?language=en_US (last visited Feb. 3, 2024).

²⁶ Jason Metz, *72% of Homeowners Don't Understand Essential Home Insurance Coverage*. Forbes (May 26, 2023), www.forbes.com/advisor/homeowners-insurance/survey-homeowners-insurance-knowledge/#:~:text=36%25%20of%20homeowners%20think%20that,damage%2C%20but%20it%20does%20not (last visited Feb. 2, 2024).

²⁷ *Flood History*. Florida Flood Insurance (June 1, 2022), www.floridafloodinsurance.org/flood-history/ (last visited Feb. 3, 2024).

²⁸ *Id.*

²⁹ Manuel Bojorquez, *More than One-Third of Florida Properties Face Looming Flood Risk, but Some Residents Are Unaware*. CBS News (June 1, 2023), www.cbsnews.com/news/florida-insurance-flooding-properties/ (last visited Feb. 3, 2024).

³⁰ Alex Harris, *Thousands of Florida homes flood repeatedly. You're not allowed to know which ones*. Miami Herald (Jan. 14, 2024), <https://www.wusf.org/politics-issues/2024-01-14/thousands-of-florida-homes-flood-repeatedly-youre-not-allowed-to-know-which-ones> (last visited Feb. 2, 2024).

Effect of the Bill

The bill creates a requirement for certain flood-related disclosures in every residential real estate transaction.

The bill provides that a seller must provide a purchaser of a residential real property with a flood disclosure summary at the time or before the sales contract is executed. The bill requires such flood disclosure summary form to contain, or have something substantially similar to the following:

- A statement in conspicuous type that says, "Flood Insurance: Homeowner's insurance policies do not include coverage for damage resulting from floods. Please discuss the need to purchase separate flood insurance coverage with your insurance agent."
- Section completed by the seller with the following questions for which the only allowable responses are "Yes" or "No":
 - Are you aware of damage caused by flooding during your ownership of the property?
 - Have you ever filed a claim for flood damage to an insurance provider or accepted federal assistance for flood damage?
 - Do you maintain flood insurance on the property?

The bill provides if the seller says "yes" on the section of the form which asks if the seller has ever filed a claim for flood damage with an insurance provider or accepted federal assistance for flood damage, the seller must:

- Identify each insurance provider with whom they filed a claim for such flooding.
- Explain the nature of all federal assistance they were provided for such flooding or both.

The bill defines flooding as a general or temporary condition of partial or complete inundation of the property caused by any of the following:

- The overflow of inland or tidal waters.
- The unusual and rapid accumulation of runoff or surface waters from any established water source, such as a river, stream, or drainage ditch.
- Excessive rainfall.

The bill provides an effective date of July 1, 2024.

B. SECTION DIRECTORY:

Section 1: Creates s. 689.302, F.S., relating to disclosure of flood risks to prospective purchaser.
Section 2: Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Home buyers may avoid flood-related costs. While, property owners who are trying to sell their house may have a decrease in the market value of their property because of the required flood disclosure.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES