

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for CS/HB 1049 Flood Disclosure in the Sale of Real Property

SPONSOR(S): Judiciary Committee

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Judiciary Committee		Yeager	Kramer

SUMMARY ANALYSIS

Under Florida law, a seller of residential real property must make certain disclosures to a buyer. Currently, Florida courts are split as to whether a tendency to flood must be disclosed to a buyer of real property, and no Florida statute requires a flood disclosure in a real property transaction. 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.

The PCS creates s. 689.302, F.S., to require a seller of residential real property to complete and provide a form relating to flood disclosure to a purchaser of residential real property at or before the time the sales contract is executed. The PCS requires the flood disclosure to be made in the following form:

- The title of the form must be labeled "FLOOD DISCLOSURE."
- A flood insurance disclaimer must be provided which states as follows: "Flood Insurance: Homeowners' insurance policies do not include coverage for damage resulting from floods. Buyer is encouraged to discuss the need to purchase separate flood insurance coverage with Buyer's insurance agent."
- The seller must state whether he or she has filed a claim with an insurance provider relating to flood damage on the property, including, but not limited to, a claim with the National Flood Insurance Program.
- The seller must state whether he or she has received federal assistance for flood damage to the property, including, but not limited to, assistance from the Federal Emergency Management Agency.

For the purposes of the disclosure, the PCS 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.
- Sustained periods of standing water resulting from rainfall.

The PCS does not appear to have a fiscal impact on state and local government.

The PCS provides an effective date of October 1, 2024.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Disclosure of Property Defects

As to the sale of real property, Florida historically followed the doctrine of *caveat emptor*, which loosely translates to “let the buyer beware.” Under this doctrine, a seller of real property has no duty to disclose any defects in the property, and the buyer has the burden of making diligent inspections and inquiries for property defects.¹ Essentially, the buyer purchases real property “as-is.”

However, under Florida law, a seller of residential real property must make certain disclosures to a buyer. In *Johnson v. Davis*, the Florida Supreme Court held that “where the seller of a home knows of facts materially affecting the value of 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 The Court did not provide a definition as to what is “readily observable.”

Additionally, a seller of real property in Florida is required to make the following disclosures, where applicable:

- Associations – A seller of property in a condominium, cooperative, or homeowners’ association must make specific disclosures of information related to the association.³
- Coastal – A sale of a property located partially or totally seaward of the coastal construction control line requires a written disclosure statement at the time of contract.⁴
- Code enforcement – If a code enforcement proceeding is pending at the time of sale, the seller must disclose it to the buyer.⁵
- Lead paint – Federal law requires all sellers or landlords of residential real property built before 1978 to disclose any known information concerning potential lead-based paint hazards and available records.⁶
- 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.⁷
- 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.⁸
- Sewer lines – The seller must disclose known defects in the property’s sanitary sewer lateral line.⁹
- 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

¹ Gregory L. Pierson, *Striking Down the Impervious Shields: Why Caveat Emptor Must Be Abandoned in Commercial Real Estate Property Sales and Leases*, 47 STETSON L. REV. 112, 112 (2017).

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

³ S. 718.503, F.S., relating to condominiums; s. 719.503, F.S., relating to cooperatives; s. 720.401, F.S., relating to homeowners’ associations.

⁴ S. 161.57, F.S.; The seller must give a written disclosure in the following form: “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.” *Id.*

⁵ S. 162.06(5), F.S.

⁶ 24 CFR Part 35; 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>.

⁷ S. 689.261, F.S.; the written disclosure must state: “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.” *Id.*

⁸ S. 404.056(5), F.S.

⁹ S. 689.301, F.S.

closing, that a claim has been paid and whether or not the full amount of the proceeds was used to repair the sinkhole damage.¹⁰

- 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.¹¹

On the other hand, a seller of real property is not required to disclose that:

- An occupant is or has been infected with HIV or AIDS.¹²
- The property was or may have been the site of a homicide, suicide, or other death.¹³

Flood Disclosure

Currently, Florida courts are split as to whether a tendency to flood is “readily observable” and thus a fact that must be disclosed to a buyer of real property. In *Nelson v. Wiggs*, the buyers of a home in the East Everglades area of Miami-Dade County purchased the home during the dry season, and the seller did not disclose to the buyers that the land upon which the home sat flooded annually during the rainy season.¹⁴ In that case, the flooding was so severe that snakes and alligators gathered at the property to escape the waters.¹⁵ The Court dismissed the case against the seller, finding that seasonal flooding of the neighborhood was common knowledge and information that was readily available to the buyers had they exercised diligent attention.¹⁶

By contrast, in *Newbern v. Mansbach*, the buyers purchased a home in Destin, Florida, and the seller did not disclose that the property was located in the Coastal Barrier Resource Area (CBRA) and thus ineligible for flood insurance.¹⁷ The Court determined that CBRA designations are not easily understood by laypersons and that a prospective buyer may need assistance in interpreting the contents of public record, and thus the sellers should have disclosed such information to the buyers.¹⁸

States that Require Flood Disclosure

Thirty-two states require some form of flood disclosure in a real property transaction.¹⁹ However, eighteen states, including Florida, do not require a seller to disclose such information to a prospective buyer.²⁰ According to the Natural Resources Defense Council (NRDC), homeowners who unknowingly purchase a home with undisclosed flood damage are subsequently likely to be inundated with bills up to tens of thousands of dollars to repair such damage.²¹ In an effort to let homeowners know which states have flood disclosure laws, the NRDC has graded the states from A (as the best) to F (having no flood disclosure laws):²²

¹⁰ S. 627.7073(2)(c), F.S.

¹¹ S. 689.29, F.S.

¹² S. 689.25(1)(a), F.S.

¹³ S. 689.25(1)(b), F.S.

¹⁴ *Nelson v. Wiggs*, 699 So. 2d 258 (Fla. 3rd DCA 1997).

¹⁵ *Id.* at 259.

¹⁶ *Id.* at 260.

¹⁷ *Newbern v. Mansbach*, 777 So.2d 1044 (Fla. 1st DCA 2001); Pursuant to the Coastal Barrier Improvement Act of 1990, Congress mandated the exclusion of CBRAs from the Federal Flood Insurance Program. See 16 U.S.C. ss. 3501, 3504.

¹⁸ *Id.*

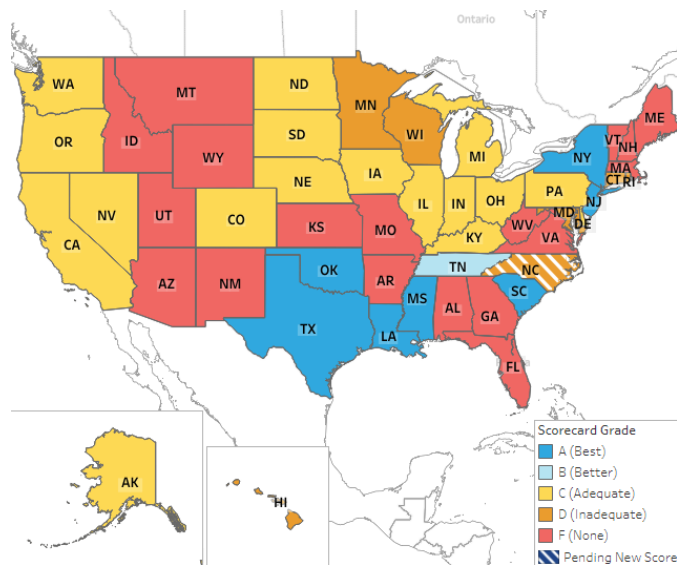
¹⁹ Natural Resources Defense Council (NRDC), *How States Stack up on Flood Disclosure*, (Aug. 31, 2023),

www.nrdc.org/resources/how-states-stack-flood-disclosure (last visited Feb. 2, 2024).

²⁰ 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).

²¹ NRDC, *supra* note 19.

²² *Id.*



Flood Insurance

Florida receives an average of 59.21 inches of rain each year, and the flat terrain makes Florida more susceptible to flooding.²³ As a result, one-third of properties in Florida are at risk of severe flooding in the next thirty years.²⁴ Usually, homeowner’s insurance and hurricane insurance do not cover flood-related damage.²⁵ Nonetheless, 36 percent of homeowners believe that homeowner’s insurance covers flood-related damage.²⁶

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 floods. Through the Flood Insurance Reform Act of 1004, Congress directed FEMA to develop a program to reduce future flood losses.²⁷ As part of this program, FEMA designates properties as a “severe repetitive loss property,” a designation that covers homes that have flooded twice, with damage totaling the value of the property, or which have 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.²⁸ Florida added about 120 of those homes from 2021 to 2022.²⁹ 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

Effect of the PCS

PCS for CS/HB 1049 creates s. 689.302, F.S., to require a seller of residential real property to complete and provide a form relating to flood disclosure to a purchaser of residential real property at or before the

²³ Florida Flood Insurance, *Flood History*, (June 1, 2022), www.floridafloodinsurance.org/flood-history/ (last visited Feb. 3, 2024).

²⁴ 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).

²⁵ 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).

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 Federal Emergency Management Agency, *Guidance for Severe Repetitive Loss Properties*, https://www.fema.gov/pdf/nfip/manual201205/content/20_srl.pdf (last visited Feb. 16, 2024).

²⁸ 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).

²⁹ *Id.*

³⁰ *Id.*

time the sales contract is executed. The PCS requires such flood disclosure to be made in the following form:

- The title of the form must be labeled "FLOOD DISCLOSURE."
- A flood insurance disclaimer must be provided which states as follows: "Flood Insurance: Homeowners' insurance policies do not include coverage for damage resulting from floods. Buyer is encouraged to discuss the need to purchase separate flood insurance coverage with Buyer's insurance agent."
- The seller must state whether he or she has filed a claim with an insurance provider relating to flood damage on the property, including, but not limited to, a claim with the National Flood Insurance Program.
- The seller must state whether he or she has received federal assistance for flood damage to the property, including, but not limited to, assistance from the Federal Emergency Management Agency.

For the purposes of the disclosure, the PCS 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.
- Sustained periods of standing water resulting from rainfall.

The PCS provides an effective date of October 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 of October 1, 2024.

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:

Property buyers may avoid flood-related costs, and property owners who are trying to sell their property 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