

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|---|--|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a “no” above, please explain:

Requiring disclosures on real property transactions does not support the principle of less government.

B. EFFECT OF PROPOSED CHANGES:

Caveat Emptor:

In real property transactions, the doctrine of *caveat emptor* or “buyer beware” stands for the rule that a buyer of real property assumes the risk of any defects in the property. The doctrine of *caveat emptor* originated in early Roman law, and England and the United States later embraced the rule.¹

Over the years, the concept of *caveat emptor* has eroded. Courts have developed implied warranties.² Many real property transactions now involve warranty deeds wherein the seller ensures that he or she has marketable title.³ Section 689.02, F.S., outlines the form for warranty deeds. *Caveat emptor* does not apply to claims that fall within the scope of warranty deeds or other covenants.

Current Disclosures Required Under Florida Law:

Sellers of real property are required to disclose known material facts affecting the value of their property. The Florida Supreme Court has held 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 know to the buyer, the seller is under a duty to disclose them to the buyer.”⁴ Florida courts have not extended this holding to apply to commercial real property transactions; thus the doctrine of *caveat emptor* still applies to commercial real property transactions.⁵

In addition to disclosing material facts affecting the property, Section 475.22, F.S., requires a licensed real estate broker or salesperson, upon written request from any party to the transaction, to furnish copies of termite and roof inspection reports that have been performed on the property within the preceding year.

¹ See Craig W. Dallon, *Theories of Real Estate Broker Liability and the Effect of the “As Is” Clause*, 54 FLA. L. REV. 395, 400-01 (2002)

² “[I]n every valid contract for the sale of lands, whatever may be the language in which it is couched, there is an implied undertaking to convey a good title, unless such an obligation is expressly excluded by the terms of the agreement.” *Wheeler v. Sullivan*, 106 So. 876, 878 (Fla. 1925). See also *Taylor v. Day*, 136 So. 701 (Fla. 1931)

³ “The usual common law covenants included in a warranty deed in Florida are the covenants of seisin, good right to convey, quiet enjoyment against encumbrances and that the grantor will warrant and defend the title.” *B.W.B. Corp. v. Muscare*, 349 So.2d 183, 184 (Fla. 3d DCA 1977).

⁴ *Johnson v. Davis*, 480 So.2d 625, 629 (Fla. 1985)

⁵ See *RNK Family Limited Partnership v. Alexander-Mitchell Associates*, 788 So.2d 1035, 1036 (Fla. 2d DCA 2001) (“caveat emptor is the current law in this state when generally dealing with the sale of commercial property.”); *JNC Enterprises, LTD, v. ICP1, Inc.*, 777 So.2d 1182, 1185 (Fla. 5th DCA 2001) (“doctrine of caveat emptor still prevails in Florida with regard to sales of commercial property.”); *Wasser v. Sasoni*, 652 So.2d 411 (Fla. 3d DCA 1995).

Proposed Changes:

This bill requires the transferor (or his or her agent) to make certain disclosures in residential, undeveloped, or commercial real property transactions. The required disclosures include whether the property is located:

- within a special flood hazard area designated by the Federal Emergency Management Agency;
- on soil with very severe constraints for development as identified by the U.S. Department of Agriculture;
- in an area impacted by sinkhole activity based on “readily available and officially adopted governmental maps and information”;
- within ¼ of a mile of a wellhead protection area according to the Florida Department of Environmental Protection;
- in a priority wetland zone designated by the Florida Fish and Wildlife Conservation Commission;
- in a strategic habitat conservation area identified by the Florida Fish and Wildlife Conservation Commission;
- within 2 statute miles of an airport influence area or a landing facility approved by the Federal Aviation Administration, the United States Department of Transportation’s Division of Aeronautics, and local land use commissions;
- within a ¼ of a mile of an environmental hazard site; or
- within a mapped radon gas potential zone identified by the United States Environmental Protection Agency.

These disclosing requirements also apply to transactions involving manufactured and mobile homes classified as personal property if they are intended for use as a residence. However the requirements set forth in this bill do not apply to the following real property transactions:

- transfers by court order, such as in probate court or through a foreclosure sale;
- transfers by a fiduciary in the course of administering a decedent’s estate, guardianship, conservatorship, or trust;
- transfers between co-owners;
- transfers to a spouse or a relative of one of the transferors;
- transfers between spouses due to a judgment of dissolution of marriage; or
- any transfers or exchanges involving a governmental entity.

These nine disclosures are to be made on a “Property Identification Disclosure Statement,” the form of which is set forth in the bill. Any waiver of these disclosure requirements by the parties is void as against public policy.

The bill provides that if disclosures are made after the execution of an offer to purchase, then the purchaser has 3 days (if personal delivery) or 5 days (if mail delivery) to provide the seller written notice to terminate the offer to purchase. Additionally, the transferor (or his or her agent) is not liable for erroneous, inaccurate or omitted information contained in their disclosure if those errors or omissions were not within their personal knowledge, was based on timely information from governmental entities, and ordinary care was exercised in obtaining the information.

This bill allows third parties, including certain licensed professionals or persons with certain expertise, to prepare the disclosure documents on behalf of the seller. These third parties are required to maintain \$20 million in insurance as protections for errors or omissions.

Finally, the bill provides that real property transfers subject to these disclosures will not be invalidated solely due to the failure of providing the mandated disclosures. However, anyone

who willfully or negligently violates these disclosing requirements shall be liable for the actual damages suffered by the buyer.

C. SECTION DIRECTORY:

Section 1: creates s. 475.423, F.S., relating to property identification disclosure statement.

Section 2: provides a July 1, 2003, 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:

Requiring sellers of real property to research and prepare the disclosures required by this bill will impose additional costs on real estate transactions.⁶ Willful or negligent failure to provide such disclosures subjects a seller to pay actual damages incurred by the buyer.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring expenditure of funds.

2. Other:

Impairment of Contracts:

The mandatory disclosure requirements of this bill apply to offers to purchase real property which were executed prior to the effective date of this bill. Such retroactive application may raise an issue

⁶ Property ID of Florida currently charges \$148.00 for a seller disclosure report similar to that which would be required under this bill. See http://www.propertyid.com/propertyid_index.html

of impairment of contracts through statutory enactment. The contract clause of Article I, Section 10 (of both the federal and state constitutions) prohibits states from passing laws which impair existing contract rights. Courts use a balancing test to determine whether a particular regulation violates the contract clause; measuring the severity of contractual impairment against the importance of the state interest advanced by the law. Courts will also look to see if the law is a reasonable and narrowly tailored means of promoting the state's interest.⁷

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

N/A

⁷ See *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *Pomponio v. Cladridge of Pompano Condominium, Inc.*, 378 So.2d 774 (Fla. 1980); and *Yellow Cab Co. of Dade County v. Dade County*, 412 So.2d 395 (Fla. 3d DCA 1982).