

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 2018

SPONSOR: Committee on Judiciary and Senator Diaz de la Portilla

SUBJECT: Sales disclosures

DATE: March 25, 2003 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Greenbaum</u>	<u>Roberts</u>	<u>JU</u>	<u>Favorable/CS</u>
2.	<u>                    </u>	<u>                    </u>	<u>BI</u>	<u>                    </u>
3.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>
4.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>
5.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>
6.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>

## I. Summary:

This bill creates disclosure requirements for a transferor of residential, undeveloped, and commercial real property not excluded by provisions of the bill and additional requirements upon an agent of that transferor. These disclosure requirements go to restrictions on or limitations in the use of the property arising from physical characteristics or location identified in governmental documents. This bill provides the means of preparing the disclosure and the process of disseminating the disclosure to the transferee. Provides criteria for third parties to procure and deliver the disclosed information.

This bill creates s. 475.423, Florida Statutes.

## II. Present Situation:

Section 475.422, F.S., requires those licensed under part I, chapter 475, F.S., i.e., real estate brokers and salespersons, to disclose upon written request, copies of termite and roof inspection reports ordered by or in the possession of the licensee, provided that such reports were conducted within the year preceding the effective date of the purchase contract. The statutes do not require additional disclosures on behalf of a transferor or an agent of a transferor.

## III. Effect of Proposed Changes:

This bill creates disclosure requirements for a transferor of residential, undeveloped, and commercial real property and additional requirements upon an agent of that transferor. Certain transfers of real property are excluded from the operation of this section:

- By court order;
- As a result of events leading to foreclosure or default;

- By a fiduciary in the course of administering a guardianship, conservatorship, trust or a decedent's estate;
- Among co-owners;
- Made to a spouse or relative of one of the transferors;
- As part of a marriage dissolution judgment;
- When a transferor is a governmental entity; and
- When the property in question is a mobile or manufactured home.

Those transactions subject to the bill require the following disclosures as to whether the property is located:

- Within a special flood zone hazard area designated by the FEMA;
- On soils with very severe constraints for development pursuant to USDA maps;
- In an area impacted by sinkhole activity;
- Within one quarter ( $\frac{1}{4}$ ) mile of a wellhead protection area according to FDEP maps;
- In a priority wetland zone according to FFWCC maps;
- In a strategic habitat conservation area according to FFWCC maps;
- Within two (2) statute miles of an airport influence area or a landing facility approved by the FAA;
- Within one quarter mile ( $\frac{1}{4}$ ) of an environmental site, limited to filed governmental reports, including leaking underground storage tanks, solid waste landfills, incinerators or transfer stations, national priority list sites, or CERCLIS sites under review by the USEPA; and
- Within a mapped radon gas potential zone according to USEPA maps.

This bill requires such disclosures to be made on a Property Identification Disclosure Statement as described in the bill. This bill provides that the transferor or the agents of a transferor are not liable when information contained in the disclosure is in error, inaccurate, or omitted if such erroneous, inaccurate, or omitted information was not within the personal knowledge of the transferor or transferor's agent, was based on timely information from public agencies, and ordinary care was exercised in obtaining and transmitting the information.

This bill provides for third parties, including certain licensed professionals or persons with certain expertise, to fulfill the disclosure requirements on behalf of a transferor. Such third parties must maintain \$20 million in insurance protection as protection for omissions and errors.

The bill provides an affirmative defense that acts done pursuant to the requirements of this bill are done in "good faith" and defines that term. Compliance with the requirements of this bill discharges the transferor from any further requirement to disclose such information that subsequently becomes available regarding the property. This bill provides for the method of delivery and limits the delivery of the disclosures to certain agents of the transferor.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

**B. Public Records/Open Meetings Issues:**

None.

**C. Trust Funds Restrictions:**

None.

**D. Constitutional Issues:**

This bill appears to have retroactive application to existing contracts for the transfer of real property. Such retroactive application may give rise to an issue of impairment of existing contract through statutory enactment. Courts have addressed this issue by applying a test that balances the nature and extent of the impairment with the importance of the state's objective. *See Yellow Cab Company of Dade County v. Dade County*, 412 So.2d 395, 396, (Fla. 3d DCA 1982) citing *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So.2d 774 (Fla. 1979) (we must weigh the degree to which a party's contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy).

**V. Economic Impact and Fiscal Note:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

The imposition of additional disclosure requirements upon transferors of real property will require additional expenditures by the parties. Additionally, a person's failure to comply with the requirements of this bill through negligence or willful disregard makes that person liable for actual damages suffered by the transferee. The requirement that third parties preparing the disclosure statement carry \$20 million in insurance to protect the transferor from errors and omissions by the third party may limit the availability of third parties to provide such service.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

This bill addresses, in some respect, the doctrine of "caveat emptor," that is, let the buyer beware, as it impacts the sale of real property. Florida is one of several states that restrict the

concept when it applies to the sale of residential real property. See Steven Tyszka, *Remnants of the Doctrine of Caveat Emptor May Remain Despite Enactment of Michigan's Seller Disclosure Act*, 41 Wayne L. Rev. 1497 (1995) and Kenneth Nakasone, Note, *Seller Beware: New Law Protects Hawai'i Home Buyers*, 18 U. Haw. L. Rev. 981 (1996).

Florida restricted the use of the doctrine in the case *Johnson v. Davis*, 408 So.2d 625 (Fla. 1985), *rehearing denied*, (Fla. 1986). In that case, the court 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 known to the buyer, the seller is under a duty to disclose them to the buyer.” *Johnson* at 629. In *Johnson*, the seller of the home indicated that stains in a window corner had resulted from a minor roof leak which been corrected. *Johnson* at 626. Subsequent to the purchase of the home, a heavy rain resulted in a great deal of water flowing into the home from the window frame. *Id.* Inspection of the roof revealed it to be inherently defective and the replacement costs to be approximately \$15,000. *Id.* The trial court record indicated the seller made affirmative statements concerning the soundness of the roof prior to the receipt of the deposit. *Id.* The court affirmed the trial court’s judgment awarding the deposit amount, costs and interest, to the buyers for the false representations of the seller upon which the buyer relied. *Id.* at 629.

Florida courts have declined to apply *Johnson* to commercial transactions. See *Wasser v. Sasoni*, 652 So.2d 411 (Fla. 3d DCA 1995); *Futura Realty v. Lone Star Building Centers (Eastern), Inc., et al.*, 578 So.2d 363 (Fla. 3d DCA 1991); *Azam, et al., v. M/I Schottenstein Homes, Inc.*, 761 So.2d 1195 (Fla. 4<sup>th</sup> DCA 2000).

#### **VIII. Amendments:**

None.