

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:

The bill requires real estate brokers or individual sellers to collect information in regards to whether or not the property is located in one of the areas specified in the bill and requires real estate brokers or individual sellers to disclose of this information to a buyer. Requiring disclosures on residential 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 known 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

¹ See Craig W. Dallan, *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).

In addition to disclosing material facts affecting the property, s. 689.26, F.S., requires disclosures relating to covenants, assessments, and contract voidability. Section 689.25, F.S., relates to stigmatized or psychologically impacted property and provides for an exemption from disclosure for an occupant of real property who is or has been infected with HIV or AIDS.

Proposed Changes:

This bill requires the transferor (or his or her agent) to make certain disclosures in residential 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 or a water management district;
- 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;
- 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.

The disclosures must be made if 1) the transferor or his or her agent has actual knowledge of the condition requiring disclosure, or 2) information regarding the condition is readily available from other sources.

The requirements set forth in the 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.

The disclosures are required 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 agent) is not liable for erroneous, inaccurate or omitted information contained in their disclosure if those errors or omissions were caused by inaccurate or incomplete information provided by governmental entities and ordinary care was exercised in obtaining the information.

The 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, 2004, effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill is not expected to have any impact on state government revenues.

2. Expenditures:

The bill is not expected to have any impact on state government expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill is not expected to have any impact on local government revenues.

2. Expenditures:

The bill is not expected to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Requiring sellers of residential real property to satisfy the disclosure requirements of this bill will impose additional costs on residential real estate transactions. 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:

The bill does not require counties or municipalities to take an action requiring the expenditure of funds, does not reduce the authority that counties or municipalities have to raise revenues in the aggregate, and does not reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

N/A