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In Florida, a peninsula surrounded by water with the second-lowest mean elevation in the country, there will be floods. A global study ranking cities most vulnerable to losses from flooding lists Miami first in the United States and sixth globally; Tampa-St. Petersburg is listed as 16th globally. Yet there are no state statutes or regulations in Florida that require a seller or landlord to make flood-related disclosures to homebuyers and renters. In contrast, while varying in scope, 29 states require flood-risk disclosures in real estate transactions. Though Florida should be leading in this arena, in an evaluation of nationwide flood disclosure laws, the Natural Resources Defense Council gave Florida the lowest grade possible because of the lack of measures in place to protect homebuyers and renters.

This article provides an overview of the state of flood risk disclosures in real property transactions in Florida, what an ideal disclosure for both rental agreements and sales of residential property would look like, and potential pathways for Florida to mandate flood risk disclosures. As the majority of states have recognized, by disclosing a property's flood risk, a seller or landlord equips a buyer or renter with the information to prepare for the future and mitigate potential losses. Most importantly, people will be able to make informed decisions about one of the biggest investments they will choose to make in their life — where to live.

Flood Risk Disclosures in Florida

• Flood Disclosures for Sale of Property — Historically, Florida courts’ approach to disclosures in residential real property transactions has been one of caveat emptor (“buyer beware”). It was not until the Florida Supreme Court landmark case of Johnson v. Davis, 480 So. 2d 625, 629 (Fla. 1985), that state-mandated disclosures were required in residential sales agreements, and those were limited to disclosure by the seller of all known facts “materially affecting the value of the property which are not readily observable and are not known to the buyer.”

In Nelson v. Wiggs, 699 So. 2d 258, 259 (Fla. 3d DCA 1997), the Third District Court of Appeal considered flooding as a disclosure required under Johnson when Florida homebuyers sought rescission of their home purchase after the seller failed to disclose that the property had a flooding problem. There, the court found that a buyer is required to “take reasonable steps to ascertain the material facts relating to the property and to discover them” and held that effects of seasonal flooding are considered “readily observable” by a buyer, and, therefore, do not need to be disclosed. The strongly worded dissent in Nelson took issue with the majority’s findings that the flooding conditions were readily observable, that the plaintiffs were required to conduct inspections beyond the customary, and that buyers are obligated “to canvass potential neighbors to determine whether there are ‘unseen’ problems with the neighborhood.” Recognizing the asymmetry of information, the dissent found that the flood conditions could not have been readily observable or accessible. Testimony evidenced that information regarding where to access records of flooding is not common knowledge to the average buyer. In further support, the dissent cited to an ordinance passed by Metropolitan Dade County, which required sellers of real property within the East Everglades area to include a warning in the documents of sale advising potential buyers that the “land is subject to periodic, natural flooding.” The very “existence of the ordinance,” the dissent argued, “demonstrates the [county’s] recognition that the flooding problem in this area is not commonly known, but rather is something which needs to be told to buyers.”

Florida’s current common law, effectively expects buyers to perform inspections beyond what is customary, to research and analyze flood maps and records, and to knock on the doors of their prospective neighbors in order to evaluate their flood risk. As the Nelson dissent recognized, these unreasonable expectations place an administrative and cost burden on buyers when the information is readily available from the seller; in addition, they raise complicated questions of the responsibilities of neighbors.

• Disclosure Requirements Under Rental Agreements — Required disclosures in Florida are even fewer for rental agreements and none address flooding. Landlords in Florida are required to communicate to prospective renters the following disclosures in their rental or lease agreement: 1) matters regarding where the security deposit is held (F.S. §83.49); 2) information regarding radon (F.S. §404.056(5)); and 3) the identity and
address of the landlord (F.S. §83.50). In addition, federal law requires that the presence of lead-based paint be disclosed to potential home occupants.\textsuperscript{18} Yet studies show that “disasters tend to disproportionately damage rental and low-income housing”\textsuperscript{19} Compounding this disadvantage, these same properties are “rebuilt more slowly, if at all” in comparison to owner-occupied housing.\textsuperscript{20} Given that renters are becoming “increasingly concentrated at the lowest income levels,” rental housing policies are particularly important.\textsuperscript{21}

Floridians live in the shadows of a dual crisis — accelerating rates of environmental changes due to climate change and an affordable housing crisis. It is important to afford renters the right to disclosures because among other things, community preparedness for flooding depends on everyone in the community being informed. The need for accurate and comprehensive information is critical to allow renters the opportunity to weigh their needs and constraints when deciding where to live. Further, by not disclosing flood risks, rents may be artificially inflated.\textsuperscript{22} This puts an inequitable burden on the renter population, where more than 56% of Florida renters are already cost-burdened, meaning they spend more than 30% of their income on housing.\textsuperscript{23}

Four states, Georgia, Oklahoma, New Jersey, and Oregon, have recognized the need to provide flood-risk disclosures for renters. Last year, the Texas Legislature considered Texas House Bill 993, introduced by Rep. Garnet Coleman, providing flood-risk disclosures for renters in response to the devastating effects of Hurricane Harvey.\textsuperscript{24} The bill followed the introduction of Texas Senate Bill 339, a separate piece of legislation that provided flood-risk disclosures to protect buyers, omitting the protections for renters, a more vulnerable population.\textsuperscript{25} Through the legislation, Rep. Coleman sought to rectify this “bias against renters” and their homes; unfortunately, Texas House Bill 993 died in the Senate after being passed by the House.\textsuperscript{26} In contrast, Texas Senate Bill 339 was passed and signed into law.\textsuperscript{27} Rep. Coleman hopes to reintroduce the bill again during the 2021 legislative session because “we’ll have heavy rains and apartments will flood again.”\textsuperscript{28}

As chronic flooding worsens in Florida, lower-income communities will become increasingly vulnerable, making it even more critical for not just homeowners, but also renters, to understand their flood damage exposure.

\textbf{Ideal Disclosure}

Real estate property disclosures...
are necessary to promote transparency and ensure informed decisions. The risks that floods pose to South Florida can be understood in terms of property damage (to both movable and immovable assets), as well as public health, where flooding may create harmful conditions and facilitate the transmission of disease. By disclosing a property’s flood risk, buyers and renters will be better equipped to prepare for the future and mitigate potential losses.

An ideal flood disclosure transmits the right information, to the right person, at the right time. Typically, flood-risk disclosures relate to three matters: the structure, the land, and insurance. A comprehensive disclosure should require a seller and a landlord to disclose to a buyer or renter whether there has ever been damage to any portion of the physical structure resulting from fire, windstorm, hail, tornado, hurricane, or any other natural disaster. A robust disclosure should state if any structure on the property has ever taken water by flooding (rising water or otherwise) and whether the seller or landlord has an elevation certificate.

With respect to the land, a disclosure should include if any flooding, water intrusion, accumulation, or drainage problem has occurred. The seller or landlord should be obligated to indicate the nature and frequency of the defect. The disclosure should include whether the property is currently located in or near a Federal Emergency Management Agency (FEMA) Designated Flood Hazard Zone, as well as information regarding the property’s floodway status and the depth of expected flooding on the property.

The seller or landlord should disclose whether flood insurance is currently required on the property. If so, the disclosure should include the amount of the premium currently paid, when the premium was last adjusted, and any claims filed with a flood insurance carrier or FEMA. Additionally, if a landlord has flood insurance on a property, the landlord should disclose whether the renter’s personal property is covered.

Sellers and landlords are best placed to transmit this information to potential buyers and renters. Timing is also critical for potential buyers and renters to be able to make informed decisions. Disclosures should be made at the beginning of the real estate transaction, where the information provided by the disclosure can be factored into the contract negotiation. Even the soundest disclosure becomes effectively worthless when provided at closing or lease execution, where buyers and renters may be under duress having made considered decisions between their options, paid for or sought technical assistance, negotiated terms, and arranged their finances for required loans and deposits.

**Where to Begin**

Considering Florida’s propensity for flooding, implementing a mandatory statewide flood-risk disclosure would benefit millions of residents, including vulnerable populations, and help protect billions of dollars of assets against the threat of flooding.

Recognizing this need, in January, Sen. Bobby Powell introduced Senate Bill 1842: Residential Property Disclosures in the Florida Legislature. S.B. 1842 aimed “to add a layer of protection to potential homeowners and safeguards sellers from liability through flooding disclosures” and would have required disclosures for residential property purchases relating to flood events. Unable to make it to the Florida Senate agenda, and without a sponsor from the Florida House, S.B. 1842 “died” in the Banking and Insurance Committee in March 2020. Undoubtedly bound to benefit millions of Floridians, the bill contained elements of an ideal disclosure as to the structure, the land, and insurance. However, it allowed for the disclosure to be presented at the time of the execution of the contract. As noted above, an ideal disclosure should be provided well before contract execution so buyers and renters can make informed decisions throughout the negotiation of the contract. Furthermore, the bill failed to include the most vulnerable — renters.

While the state failed to act in this area, counties can implement flood-risk disclosures on their own. For example, Leon County requires residential sellers and landlords to disclose known flood conditions to buyers and renters. Other counties could also implement mandatory disclosures to protect and inform their residents. Although this is not an ideal solution, because it would create a patchwork of protections across the state rather than a unified statute, it would be a start to protect Florida citizens.

Regional efforts are another avenue that may diminish concerns of patchwork protections. Florida has one structure in place, the Southeast Florida Regional Climate Change Compact (compact), to create a regional solution. The compact, consisting of four counties in South Florida: Miami-Dade, Broward, Palm Beach, and Monroe, was formed in 2010 to consolidate and coordinate action plans to effectively respond to climatic threats. Avenues like the compact could provide a tool to encourage a consistent, mandatory flood-risk disclosure policy within member counties.

**Conclusion**

Florida is on the frontline of climatic changes, placing people and homes at great risk. Florida should not, like Texas, wait for the tragedy of the next hurricane to inspire action to implement flood-risk disclosures. Most states have recognized the benefits of flood-risk disclosures compared to the costs of not having them. Mandatory flood-risk disclosures provide people, including the most vulnerable, with tools to minimize the harm caused by natural disasters like floods and the compounding hardships that ensue post-flood. Floridians should not be left behind.

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4 Id. On a grading scale of A to F, Florida received a grade of an “F.” Id.

5 This article explores the sale of residential properties and does not address commercial properties.

6 Id.; see also Fla. STAT. §475.278 (2019) (limited to noncommercial real estate transactions).

7 Id. at 261.

8 Id.

9 Id. at 260, 263-64.

10 Id. at 262. Testimony of a hydrologist established that “records of flooding [are] not common knowledge for everybody, but if you find the right people, the agencies that deal with it, it is pretty commonly known.” Id. Thus, the dissent found that “only people who see the flooding itself and ‘the right people’ would be aware of the flooding problem.” Id.

11 MIAMI-DADE COUNTY, FLA., CODE OF ORDINANCES §33B-54(a).

12 Nelson, 699 So. 2d at 263. The ordinance also provides that the periodic, natural flooding “poses a serious risk to persons and property in the area and makes the property unsuitable for residential, commercial, and industrial development.” Id. The property at issue in this case was in the East Everglades but was excluded from the ordinance for unknown reasons. Id.

13 Id.


15 Id. at 264.

16 Some questions include: What is the legal responsibility of a neighbor to provide accurate information to a potential buyer? How do the implicit biases of neighbors factor into the provision of accurate information? What considerations need to be made about safety issues of a potential buyer entering property in a stand-your-ground state?

17 Renters, unlike property buyers, are not even told if the property they reside in is in a special flood hazard area (SFHA).

18 See 42 U.S.C. §4852(d).


22 Harris, In Florida, Home Sellers Don’t Have to Disclose a History of Flooding (“Without consumer protections like flood disclosure, experts say the market for homes doesn’t reflect the reality that flood-prone homes are worth less money and are riskier investments.”).


26 H.B. 993, 2019 Leg., 86TH SESS. (Tex. 2019); Jen Rice, Texas Gave More Flood Risk Disclosure Protection to Home Buyers, But Not Renters, HOUSTON PUB. MEDIA (May 31, 2019), https://www.houstonpublicmedia.org/articles/news/2019/05/31/335237/texas-lawmakers-gave-more-flood-risk-disclosure-protection-to-home-buyers-but-not-renters/. See also Harris, In Florida, Home Sellers Don’t Have to Disclose a History of Flooding (noting that by mandating flood risk disclosures in the 500-year flood zone in addition to the 100-year flood zone, the Texas disclosure law nearly doubled the at-risk areas in the state).


29 An elevation certificate documents features of a building, including its location, flood zone, building characteristics, and the elevation. The certificate provides information necessary to ensure compliance with community floodplain management ordinances and to determine insurance rates. When applying for flood insurance through the National Flood Insurance Program, an applicant is required to provide an elevation certificate if the building was constructed after publication of the Flood Insurance Rate Map (FIRM) and is located in flood insurance zones as specified by FEMA. U.S. Dep’t of Homeland Security, Elevation Certificate and Instructions (2019).

30 This would include homes in the 100-year flood zone and the 500-year flood zone, as the Texas disclosure law does.

31 Special Flood Hazard Areas are areas where there is a 1% annual chance of flooding, termed by FEMA the 100-year flood zone. See FEMA, National Flood Insurance Program, https://www.fema.gov/national-flood-insurance-program.

32 This information is particularly important to low-income renters in Special Flood Hazard Area zones because they would not know they have access to subsidized rental insurance unless their landlord informs them, or they research it on their own.


34 S.B. 1842, 2020 LEG., REG. SESS. (Fla. 2020).

35 Email from Kersti Myles, Legis. Assistant to Sen. Bobby Powell, Fla. S., to Natalie Barefoot, Dir. of the Envtl. Justice Clinic, Univ. of Miami Sch. of Law (June 1, 2020, 5:58 PM EST) (on file with author).

36 Fla. S.B. 1842.

37 FLA. SENATE COMM. ON BANKING & INS., PCB 1842 (2020); see also Email from Kersti Myles to Natalie Barefoot.

38 LEON COUNTY, FLA., CODE OF ORDINANCES §12-8; see also Leon County Flood Protection, Flood Hazard Disclosure, available at http://www.leoncountyll.gov/floodprotection/disclosure.asp.

39 Voluntary disclosures have been used by other counties. Pinellas County introduced the Pinellas County Real Estate Flood Disclosure Program in joint efforts with the county, real estate professionals, municipalities, and the Pinellas Realtor Organization. The county developed a “real estate flood information and disclosure brochure,” which allows real estate professionals to disclose the property’s flood risk, evacuation level, as well as information on insurance requirements. See, e.g., Real Estate Disclosure Program, PINELLAS CTY. In addition, the Florida Association of Realtors provides a voluntary disclosure form for sellers to disclose information regarding water intrusion, drainage, and flooding; however, it is not mandatory and does not go far enough to ensure consumers are fully informed. National Association of Realtors, State Flood Hazard Disclosures Survey (Feb. 2019), available at https://www.nar.realtor/sites/default/files/documents/2019_State_Flood_Disclosures_Table_final.pdf.


41 Id.

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