REAL ESTATE LEASING COMMITTEE LEGISLATIVE UPDATE

VIA ZOOM

MAY 28, 2020

SB 374: Housing Discrimination: The bill "extinguishes" "discriminatory restrictions" from certain real estate documents, such as deeds, and clarifies that under the Florida Fair Housing Act a victim of housing discrimination is not required to exhaust administrative remedies before filing a civil action.

Current federal and state law prohibit discrimination on the basis of race and several other characteristics in the sale, lease, or use of real property. Nonetheless, discriminatory restrictive covenants and other instruments remain in the records of many counties and can still be found in a title search. Moreover, current law does not appear to provide a way to strike or otherwise disavow these provisions in the public records.

The bill "extinguishes" "discriminatory restrictions" from title transactions, such as deeds, and expressly states that the restrictions are unlawful, unenforceable, and null and void. The bill also provides for summary removal of discriminatory restrictions from the governing documents of a property owners' association.

Additionally, the bill clarifies that under the Florida Fair Housing Act (FFHA) an alleged victim of housing discrimination may file a civil action regardless of whether:

- He or she has filed a complaint with the Florida Commission on Human Relations.
- The Commission has resolved a complaint (if the victim chose to file one); or
- Any particular amount of time has passed since the victim filed a complaint with the Commission.

Alternatively, a victim may proceed directly to filing a petition with the Division of Administrative Hearings.

If approved by the Governor, these provisions take effect upon becoming law. See Senate analysis attached.

HB 469: Real Estate Conveyances: The bill provides that no subscribing witnesses are required for a lease of real property or any instrument pertaining to a lease of real property. The bill eliminates the requirement that two subscribing witnesses be present when the lessor, or lessor's lawfully authorized agent, signs a lease with a term of more than 1 year.

If approved by the Governor, these provisions take effect July 1, 2020

SB 1362 — Rental Agreements upon foreclosure: SB 1362 by Senator Rodriguez and Representative Sirois is the Section initiative to repeal s. 83.561 The bill provides for the protections of the federal Protecting Tenants at Foreclosure Act (PTFA) to take effect as a state law if the federal act is repealed.

Under the PTFA, a person who acquires a foreclosure property ("successor in interest") must give the tenant at least 90 days' notice before evicting him or her. And if the tenant had signed a "bona fide" lease before foreclosure, the successor in interest must allow him or her to remain for the term of the lease, even if that exceeds 90 days, unless the successor in interest sells to a person who intends to occupy the property as a primary residence.

Additionally, the bill repeals this state's current statute that protects the rights of tenants of foreclosed properties, which affords less protection than the federal statute.

If approved by the Governor, these provisions take effect July 1, 2020, except where otherwise provided.

CS/HB 103 — Out of State Subpoenas: The bill expands the methods by which a law enforcement officer may affect service of an investigative subpoena, court order, or search warrant on an out-of-state corporation that provides electronic communication services or remote computing services. As expanded, service of the documents may be had on the corporation's registered agent under the laws of the state in which service will be affected. The bill also states that out-of-state corporations doing business in Florida through the Internet may be served at any location where the corporation regularly accepts service.

The bill also specifies the means to enforce a subpoena on an in-state or out-of-state corporation that provides electronic communication services or remote computing services. If a corporation fails to comply with a properly served subpoena, the bill allows a court, upon petition from the authority seeking the subpoena, to hold the non-complying corporation in indirect criminal contempt and subject the entity to fines.

If approved by the Governor, these provisions take effect July 1, 2020.

Public Nuisances: CS/CS/HB 625 by Representative Newton The bill amends s. 60.05, F.S., which generally provides for the enjoinment of public nuisances, to do the following:

- Provide specific authorization for a sheriff to enjoin a public nuisance.
- Extend and increase the frequency of notice, so a property owner has sufficient time to receive a notice and correct the use of the property.
- Provide more detail on what must be provided in the notice and the manner of serving the notice; and
- Afford property owners the ability to respond to notices with details of actions taken to abate a nuisance that may result in an extended timeframe for abatement before an application for a temporary injunction is filed.

The bill also amends s. 823.05, F.S., relating to abatement or enjoinment of specified public nuisances, to do the following:

- Delete the requirement that a criminal gang or member or associate of such gang must use a location "on two or more occasions" to engage in criminal gang-related activity for such use to qualify as a public nuisance that can be abated or enjoined; and
- Provide that any place or premises that has been used on more than two occasions within six months as the site of dealing in stolen property, assault, aggravated assault, battery, aggravated battery, burglary, theft, or robbery by sudden snatching, may be declared a public nuisance and may be abated or enjoined.

The bill also amends s. 893.138, F.S., relating to local administrative actions to abate specified public nuisances, to authorize a declaration of a public nuisance and abatement if a place or premises has been used on more than two occasions within six months as the site of any combination of the following offenses: murder; attempted felony murder; aggravated battery with a deadly weapon; or aggravated assault with a deadly weapon without intent to kill.

Finally, the bill amends ss. 823.05 and 893.138, F.S., to provide that a rental property that is declared a nuisance may not be abated or subject to forfeiture under the Florida Contraband Forfeiture Act if the offense was committed by someone other than the property owner, and the owner commences rehabilitation of the property within 30 days of it being declared a nuisance.

If approved by the Governor, these provisions take effect July 1, 2020.

CS/HB 783: Uniform Commercial Real Estate Receivership Act by Representative Beltran
The bill adopts the Uniform Commercial Real Estate Receivership Act and authorizes a court to appoint a receiver, who acting as the court's agent, takes possession of, manages, and, in some cases, transfers or sells property that is in danger of waste, loss, or diminution in value.

The bill covers interests in real property, as well as personal property related to the use or operation of real property. However, the bill does not apply to residential real property of an individual owner or the owner's family.

The bill in large part, codifies the common law of receivership, in some cases clarifying or providing more specific procedures for the rules governing receiverships.

If approved by the Governor, these provisions take effect July 1, 2020.

SB 1084: Emotional Support Animals by Senator Diaz. The bill amends Florida's Fair Housing Act by prohibiting a housing provider, to the extent required by federal law, rule, or regulation, to deny housing to a person with a disability or a disability-related need who has an animal that is required as support. It defines emotional support animal as an animal that is not required to be trained to assist a person with a disability but, by virtue of its presence, provides support to alleviate one or more identified symptoms or effects of a person's disability.

The bill prohibits a housing provider from charging a person with an emotional support animal additional fees. It does allow a housing provider to prohibit the animal if it poses a direct threat to the safety, health, or property of others and to request written documentation that reasonably supports that the person has a disability. The supporting information may be provided by any federal, state, or local government agency, specified health care practitioners, telehealth providers, or out-of-state practitioners who have provided in-person care or services to the tenant on at least one occasion. If a person requests to keep more than one emotional support animal, the housing provider may request information regarding the specific need for each animal and may require proof of licensing and vaccination requirements for each animal.

The bill prohibits a housing provider to request information that discloses the diagnosis or severity of a person's disability or any medical records relating to the disability. The housing provider is authorized to develop a routine process for reasonable accommodation requests relating to emotional support animals but prohibits the denial of a request based only on a tenant's failure to use a specific form or process.

The bill creates a new cause for disciplinary action against a health care practitioner's license for providing supporting information for an emotional support animal, without personal knowledge of the patient's disability or disability-related need. It also creates the misdemeanor crime of providing false or fraudulent emotional support animal information or documentation and requires a convicted person to perform 30 hours of community service for an organization serving persons with disabilities, or another entity or organization the court determines appropriate.

If approved by the Governor, these provisions take effect July 1, 2020

On April 2, 2020, Florida's governor ordered a 45-day suspension of all evictions (and foreclosures) due to non-payment of rent related to the COVID-19 emergency. The governor's order doesn't waive a tenant's obligation to pay rent—it merely blocks a landlord's ability to evict a tenant for the next 45 days. The Bill has been extended to June 2, 2020.

CARES Act - The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (the coronavirus stimulus bill) recently passed by the federal government places a 120-day moratorium on evictions of tenants who reside in federally subsidized housing or properties containing federally backed mortgage loans. According to the National Housing Law Project, nearly 70 percent of the mortgages held on single-family homes throughout the U.S. are federally backed. The moratorium expires July 24, 2020. See Summary attached.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Rules

BILL:	SB 374
INTRODUCER:	Senator Rouson
SUBJECT:	Housing Discrimination
DATE:	February 3, 2020 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stallard	Cibula	JU	**Favorable**
2.	Ponder	McVaney	GO	**Favorable**
3.	Stallard	Phelps	RC	**Favorable**

I. Summary:

SB 374 amends ss. 760.34, F.S., and 760.35, F.S., to allow a person alleging housing discrimination under the Florida Fair Housing Act (FFHA) to file a civil action regardless of whether the aggrieved person has exhausted his or her administrative remedies. Accordingly, the aggrieved person may file a civil action regardless of whether:

- He or she has filed a complaint with the Florida Commission on Human Relations (Commission);
- The Commission has resolved a complaint (if the aggrieved person chose to file one); or
- Any particular amount of time has passed since the aggrieved person filed a complaint with the Commission.

The bill prohibits an aggrieved person from filing a civil action under the FFHA in two instances: (i) if the claimant has consented to a conciliation agreement obtained by the Commission, other than to enforce the terms of the conciliation agreement; or (i) if an administrative law judge has commenced a hearing.

The bill, in making the FFHA substantially equivalent to the federal Fair Housing Act, enhances the opportunity for the Commission to continue to receive its federal funding of approximately of approximately $597,189 (based on a six-year average of funding).

The bill takes effect upon becoming law.

II. Present Situation:

The Florida Commission on Human Relations

The Commission was established by the Legislature in 1969 and is charged with enforcing the state's civil rights laws. The Commission investigates complaints of discrimination under the

Florida Fair Housing Act of 1983, the Florida Civil Rights Act of 1992, and the Whistle-Blower's Act of 1999. The Commission is certified as a "substantially equivalent" agency by the United States Department of Housing and Urban Development (HUD) and, through annual work share agreements, receives and investigates housing discrimination complaints referred by HUD. HUD provides funding to the Commission through the Fair Housing Assistance Program (FHAP) for processing complaints, training, technical assistance, and creating and maintaining data information systems.

The Florida Fair Housing Act

The FFHA is modeled after the federal Fair Housing Act.[1] The FFHA prohibits a person from refusing to sell or rent, or otherwise make unavailable, a dwelling to any person because of race, color, national origin, sex, handicap, familial status, or religion.[2] In addition, the FFHA affords protection to persons who are pregnant or in the process of becoming legal custodians of children of 18 years of age or younger, or persons who are themselves handicapped or associated with a handicapped person.[3]

A person alleging discrimination under the FFHA has one year after the discriminatory housing practice to file a complaint with the Commission.[4] The Commission has 100 days after receiving the complaint to complete its investigation and issue a determination.[5] The Commission may also decide to resolve the complaint and eliminate or correct the discriminatory housing practice through conciliation.[6] If, the Commission is unable to obtain voluntary compliance within 180 days after a complaint is filed, the aggrieved person may initiate a civil action or file a petition for an administrative determination.[7] If the Commission finds reasonable cause to believe that housing discrimination has occurred, the aggrieved person may request that the Attorney General bring an action against the respondent.[8] A civil action must be commenced within two years after the alleged discriminatory act occurred.[9] The court may "continue" (this means the case is held in abeyance pending the settlement) a civil case if conciliation efforts by the Commission or by the local housing agency are likely to result in a satisfactory settlement.[10] If the court finds that a discriminatory housing practice has occurred, the court must issue an order prohibiting the practice and providing affirmative relief.[11]

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[1] Chapter 760, part II, F.S., is the Florida Fair Housing Act. Florida Fair Housing Commission, Housing Act, https://fchr.myflorida.com/history-of-the-florida-commission-on-human-relations (last visited Dec. 4, 2019),
[2] Section 760.23(1), F.S.
[3] Sections 760.23(6)-(9), F.S.
[4] Section 760.34(1) and (2), F.S.
[5] Section 760.34(1), F.S.
[6] *Id.*
[7] Section 760.34(4), F.S.
[8] *Id.*
[9] Section 760.35(1), F.S.
[10] *Id.*
[11] Section 760.35(2), F.S.

Remedies available under the FFHA include fines and actual punitive damages.[12] The court may also award reasonable attorney fees and costs to the Commission.[13]

If the Commission is unable to obtain voluntary compliance or has reasonable cause to believe that a discriminatory act has occurred, the Commission may institute an administrative proceeding. Alternatively, the aggrieved person may request administrative relief under ch. 120, F.S., within 30 days after receiving notice that the Commission has concluded its investigation.[14]

The Commission, or any local agency certified as substantially equivalent, may institute a civil action in an appropriate court if it is unable to obtain voluntary compliance with the local fair housing law.[15] The local agency does not have to petition for an administrative hearing or exhaust its administrative remedies prior to bringing civil action.[16]

The Federal Fair Housing Act

Substantially Equivalent Agencies

HUD administers and enforces the federal Fair Housing Act (FHA).[17] The FHA recognizes that a state or local government may also enact laws or ordinances prohibiting unlawful housing discrimination.[18] HUD may certify a state or local government agency as "substantially equivalent" if HUD determines that the state or local law and the FHA are substantially equivalent with respect to:

- The substantive rights protected by such agency in the jurisdiction with respect to which certification is to be made;
- The procedures followed by such agency;
- The remedies available to such agency; and
- The availability of judicial review of such agency's action.[19]

HUD had developed a two-step process of substantial equivalency certification. The first step considers the adequacy of the law, meaning that the law which the agency administers facially provides rights, procedures, remedies, and the availability of judicial review that are substantially equivalent to those provided in the FHA.[20] A determination of the adequacy of a state or local fair housing law "on its face" is intended to focus on the meaning and intent of the text of the law, as distinguished from the effectiveness of its administration. Accordingly, this determination is not limited to an analysis of the literal text of the law. Regulations, directives,

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[12] Fines are capped in a tiered system based on the number of prior violations of the Fair Housing Act: up to $10,000 if the respondent has no prior findings of guilt under the Fair Housing Act; up to $25,000 if the respondent has had one prior violation of the Fair Housing Act; and up to $50,000, if the respondent has had two or more violations of the Fair Housing Act. Section 760.34(7)(b), F.S.
[13] Section 760.34(7)(c), F.S.
[14] Section 760.35(3), F.S.
[15] Sections 760.22(9) and 760.34(8), F.S.
[16] Section 760.34(8), F.S.
[17] 42 U.S.C. § 3601, et seq.
[18] 42 U.S.C. § 3610.
[19] *Id.*
[20] 24 C.F.R. § 115.201.

rules of procedure, judicial decisions, or interpretations of the law by competent authorities will be considered in making the determination.[21] The second step considers the adequacy of performance of the law, meaning that in operation the fair housing law provides rights, procedures, remedies, and the availability of judicial review that are substantially equivalent to those provided in the FHA.[22]

If a housing discrimination complaint is filed with HUD under the FHA and the complaint falls within the jurisdiction of a substantially equivalent agency, HUD must refer the complaint to the local or state agency and may take no further action, except under limited circumstances.[23]

The Commission serves as the certified substantially equivalent HUD agency in Florida.[24] Through annual work-share agreements with HUD, the Commission accepts and investigates housing discrimination cases from HUD. According to the Commission's Fiscal Year 2010-11 through Fiscal Year 2017-18 Annual Reports, housing complaints were, on average, 15 percent of all complaints received by the Commission.[25]

The Fair Housing Assistance Program

A substantially equivalent agency is eligible for federal funding through the Fair Housing Assistance Program (FHAP).[26] FHAP permits HUD to reimburse state and local agencies for services that further the purposes of the FHA. Financial assistance provides support for:

- The processing of dual-filed complaints;
- Training under the FHA and the agencies' fair housing law;
- The provision of technical assistance;
- The creation and maintenance of data and information systems;
- The development and enhancement of education and outreach projects, special enforcement efforts, partnership initiatives, and other fair housing projects.[27]

The Commission is reimbursed by HUD for closing housing cases, through deposit from HUD into the Human Relations Commission Operating Trust Fund within the Commission. In Fiscal Year 2018-2019, these payments totaled $507,061 for the 2018 grant period. This amount was 45.99 percent of the Commission's Operating Trust Fund for that year.[28] In Fiscal Year 2017-18,

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[21] 24 C.F.R. § 115.204.
[22] 24 C.F.R. § 115.201.
[23] 42 U.S.C. 3610.
[24] HUD additionally certified as substantially equivalent the Broward County Office of Equal Opportunity, Jacksonville Human Rights Commission, Office of Community Affairs – Human Relations Department (Orlando), Palm Beach County Office of Equal Opportunity, Pinellas County Office of Human Rights, and City of Tampa Office of Community Relations. United States Department of Housing and Urban Development, Fair Housing Assistance Program (FHAP) Agencies, https://www.hud.gov/program_offices/fair_housing_equal_opp/partners/FHAP/agencies#FL (last visited Dec. 4, 2019).
[25] Florida Commission on Human Relations, Annual Reports, available at https://fchr.myflorida.com/annual-reports/ (last visited Dec. 4, 2019)
[26] United States Department of Housing and Urban Development, Fair Housing Assistance Program (FHAP), https://www.hud.gov/program_offices/fair_housing_equal_opp/partners/FHAP (last visited Dec. 4, 2019).
[27] 24 C.F.R. § 115.300.
[28] Email from Christopher Turner, Deputy Director of External and Legislative Affairs, Florida Commission on Human Relations (Oct. 31, 2019) (on file with the Senate Committee on Judiciary).

these payments totaled $611,721, which was 49.89 percent of the Commission's Operating Trust Fund.[29] The six-year average of trust fund revenue received from HUD is $597,189.

Exhaustion of Administrative Remedies

A series of recent judicial decisions regarding the applicability of administrative remedies under the FFHA have threatened the Commission's status as a substantially equivalent HUD agency.

In 2004, the Fourth District Court of Appeal held in *Belletete v. Halford* that an aggrieved person must first exhaust administrative remedies under the FFHA before commencing a civil action in state court, citing the doctrine of exhaustion of administrative remedies.[30] The Court's holding was not based upon an analysis of the FFHA, which does not explicitly require exhaustion of administrative remedies. Rather, the court provided a brief analysis of what it considered to be an analogous provision of the Florida Civil Rights Act. The *Belletete* holding has been criticized by the Florida Attorney General, and has been rejected by the U.S. District Court for the Southern District of Florida.[31] Nevertheless, Florida state courts, both in and outside of the Fourth District Court of Appeal, have adopted the *Belletete* holding, and dismiss claims brought under the FFHA where the plaintiff has not exhausted the administrative process.[32]

In ongoing discussions since 2008, HUD has informed the Commission that the judicial interpretation of the FFHA in *Belletete* requiring the exhaustion of administrative remedies renders the Florida law fundamentally inconsistent with federal law. The FHA explicitly allows an aggrieved person to commence a civil action whether or not a complaint has been filed with HUD and without regard to the status of any such complaint.[33] Efforts to amend the FFHA during the 2014,[34] 2016,[35] 2018,[36] and 2019[37] legislative sessions were unsuccessful and courts continue to apply the *Belletete* rule in FFHA civil actions.

On July 2, 2015, HUD notified the Commission that it would suspend the Commission's participation in FHAP if the FFHA was not amended by January 25, 2016, to overcome the judicially-created requirement that a plaintiff exhaust their administrative remedies as a

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[29] Email from Christopher Turner, Deputy Director of External and Legislative Affairs, Florida Commission on Human Relations (April 5, 2019) (on file with the Senate Committee on Judiciary).

[30] *Belletete v. Halford*, 886 So. 2d 308, 310 (Fla. 4th DCA 2004); *See also Fla. Welding & Erection Serv., Inc. v. Am. Mut. Ins. Co. of Boston*, 285 So. 2d 386, 389-90 (Fla. 1973). The doctrine of the exhaustion of administrative remedies is the principle that if an administrative remedy is provided by statute, a claimant must first seek relief from the administrative body before judicial relief is available. Black's Law Dictionary (10th ed. 2014), exhaustion of remedies.

[31] In *Milsap v. Cornerstone Residential Management, Inc.*, 2008 WL 1994840 (S.D. Fla. 2008), the United States District Court for the Southern District of Florida, relying on *Belletete* as the only state court case on the issue, dismissed a familial status claim brought under the FFHA for failure to exhaust administrative remedies. On reconsideration, in which the Florida Attorney General intervened and argued *Belletete* was wrongly decided, the court reversed itself and reinstated the FFHA claims. *See*, 2010 WL 427436 (S. D. Fla. 2010).

[32] *Sun Harbor Homeowners Ass'n v. Bonura*, 95 So. 3d 262, 267 (Fla. 4th DCA 2012); *State v. Leisure Village, Inc.*, 40 Fla. L. Weekly D934 (Fla. 4th DCA 2015); *HOPE v. SPV Realty, L.C.*, Case No. 14-32184-CA-01 (Fla. 11th Cir. Ct. April 30, 2015).

[33] 42 U.S.C. § 3613.

[34] SB 410 (Senator Braynon) and HB 453 (Representative Watson).

[35] SB 7008 (Senate Governmental Oversight and Accountability) and HB 339 (Representative Rouson).

[36] SB 306 (Senator Rouson) and HB 853 (Representative Davis).

[37] 32 SB 958 (Senator Rouson) and HB 565 (Representatives Williams and Davis).

condition precedent to filing a housing discrimination claim under the FFHA.[38] In light of the legislative calendar, HUD agreed to extend the deadline to amend the FFHA until March 12, 2016.[39]

On March 16, 2016, HUD recognized pending litigation in the Third District Court of Appeal[40] and vowed to refrain from making any decision regarding suspension of the Commission's participation in FHAP during the pendency of the judicial proceedings.[41] In December 2016, the Third District Court of Appeal applied the *Belletete* rule and held that a plaintiff must exhaust all administrative remedies before commencing an action in civil court, determining that "[w]hether the [Florida Fair Housing Act] should be amended to conform precisely to the federal [Fair Housing Act] is a matter for the Legislature."[42]

On August 8, 2019, HUD notified the Commission that the FFHA, as interpreted by the courts, is not substantially equivalent to the federal Fair Housing Act.[43] The Commission continues to risk suspension in FHAP if the legislature does not amend the FFHA.

III. Effect of Proposed Changes:

The bill amends ss. 760.34, F.S., and 760.35, F.S., to provide that an aggrieved person is not required to exhaust his or her administrative remedies before commencing a civil action under the FFHA. Accordingly, the person may file a civil action regardless of whether:

- He or she has filed a complaint with the Commission;
- The Commission has resolved a complaint (if the aggrieved person chose to file one); or
- Any particular amount of time has passed since the aggrieved person filed a complaint with the Commission.

The bill prohibits an aggrieved person from filing a civil action under the FFHA in two instances: (i) if the claimant has consented to a conciliation agreement obtained by the Commission, other than to enforce the terms of the conciliation agreement; or (i) if an administrative law judge has commenced a hearing. These provisions are consistent with the federal Fair Housing Act.

The bill makes conforming changes to 760.07, F.S.

The act takes effect upon becoming law.

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[38] Letter from Sara K. Pratt, Deputy Assistant Secretary for Enforcement and Programs, to Michelle Wilson, Executive Director, Florida Commission on Human Relations (July 2, 2015) (on file with the Senate Committee on Judiciary).
[39] Letter from Lynn Grosso, Acting Deputy Assistant Secretary for Enforcement and Programs, to Michelle Wilson, Executive Director, Florida Commission on Human Relations (Mar. 16, 2016)(on file with the Senate Committee on Judiciary).
[40] *Housing Opportunities Project v. SPV*, 212 So. 3d 419 (Fla. 3rd DCA 2016).
[41] Letter from Sara K. Pratt, *supra*, note 46.
[42] *Housing Opportunities Project v. SPV*, 212 So. 3d 419 at 424
[43] Letter from Carlos Osegueda, Office of Fair Housing and Equal Opportunity Region IV Director, Subject: Post-Suspension Performance Assessment Report, (Aug. 8, 2019) (on file with the Senate Committee on Governmental Oversight and Accountability).

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in Article VII, s. 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The passage of the bill appears necessary to allow the Commission to continue to receive federal reimbursement for the Commission's resolution of housing discrimination cases. Without the bill, the Commission may be disqualified from receiving this federal funding.

VI. Technical Deficiencies:

None.

VII. Related Issues:

On April 5, 2019, HUD notified the Commission that it was suspended from participating in the FHAP for a period of 90 days, effective April 11, 2019, and ending on July 11, 2019.[44] The suspension was a direct result of the agency's failure to adequately address four identified deficiencies: (i) staffing and workload management; (ii) quality management and case processing; (iii) conciliation and public interest requirements; and (iv) budget and finance requirements.[45]

During the suspension period, HUD did not refer complaints to the Commission and did not accept cases for dual-filing from the Commission. HUD did pay the Commission for cases dual-filed and those completed during the suspension period which met quality and timeliness standards.

Between June 28, 2019, and July 16, 2019, pursuant to federal regulations, HUD conducted a remote performance assessment to determine whether the deficiencies resulting in suspension had been remedied and/or eliminated.[46] On August 8, 2019, HUD issued its Post-Suspension Performance Assessment Report (Post-Suspension Report) advising the Commission of its conclusion that the critical performance standards and benchmarks were not met, and that it would recommend withdrawal of the Commission's certification to the Assistant Secretary.[47] Within the Post-Suspension Report, HUD made note of the continuing substantial equivalency issues that remain because the Florida fair housing law has not been amended to cure the judicially created exhaustion requirement.[48] HUD acknowledged the Commission's efforts to file legislation to clarify the discrepancy and that substantial equivalency issue was not specifically a part of the Performance Improvement Plan or suspension.[49]

On September 25, 2019, Anna Maria Farias, the Assistant Secretary for Fair Housing and Equal Opportunity, notified the Commission of her decision to place the Commission on a one year probationary status instead of withdrawing the Commission's certification.[50] Within 30 days of the end of the one-year probationary period, HUD will re-assess the Commission's performance and make a decision regarding the Commission's continued participation in FHAP.

Currently, there are two separate issues affecting the Commission's certification in the FHAP. The bill addresses and cures one of these – the substantial equivalence issue. The second issue relates to the Commission's prior suspension and current probationary status. In this regard, the Commission advises that it is in frequent communication with HUD and continues to make strides in remedying the deficiencies and demonstrating its ability to serve the citizens of Florida. Additionally, for fiscal year 2019-2020, the Legislature authorized 8 additional full time

[44] Letter from Carlos Osegueda, Office of Fair Housing and Equal Opportunity Region IV Director, Subject: Suspension from the Fair Housing Assistance Program (April 5, 2019)(on file with the Senate Committee on Governmental Oversight and Accountability).
[45] *Id.*
[46] Letter from Carlos Osegueda, *supra*, note 43.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] Letter from Anna Maria Farias, Assistant Secretary for Fair Housing and Equal Opportunity (Sept. 25, 2019) (on file with the Senate Committee on Governmental Oversight and Accountability).

equivalent positions and appropriated associated funding to the Commission to address the staffing and workload issues which were identified deficiencies related to the suspension. The Commission instructions that all of these positions have been filled.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 760.07, 760.34, and 760.35.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

Posted: March 28, 2020
Last Updated: April 28, 2020

Summary and Analysis of Federal CARES Act Eviction Moratorium

On March 27, 2020, the president signed the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") into law. The law includes important, immediate protections for tenants and homeowners. The federal eviction moratorium for tenants living in certain types of housing is summarized below. NHLP is working on a separate analysis regarding the provisions for homeowners.

I. What does the federal eviction moratorium do?

The eviction moratorium restricts lessors of ***covered properties*** (discussed in more detail below) from ***filing*** new eviction actions for non-payment of rent, and also prohibits "charg[ing] fees, penalties, or other charges to the tenant related to such nonpayment of rent." Sec. 4024(b). The federal moratorium also provides that a lessor (of a covered property) may not evict a tenant after the moratorium expires except on 30 days' notice—which may not be given until after the moratorium period. *See* Sec. 4024(c).

The federal eviction moratorium does not prohibit filing of cases:

a) that were filed before the moratorium took effect or that are filed after it sunsets
b) that involve non-covered tenancies (see below), or
c) where the eviction is based on another reason besides nonpayment of rent or nonpayment of other fees or charges.

The moratorium does not explicitly state whether evictions "for nonpayment of rent or other fees or charges" includes evictions motivated by a tenant's nonpayment of rent (or other fees or charges) but formally based on a "no-cause" lease termination notice or refusal to renew a term tenancy. Sec. 4024(b)(1). However, advocates should assert that the moratorium bars the filing of ***any eviction case*** that is motivated (wholly or in part) by a tenant's nonpayment of rent or other fees or charges, whether or not the action is formally based on such non-payment. Allowing landlords to skirt the moratorium by evicting tenants for "no cause" would frustrate the purpose of the statute where the reason for the eviction is delinquent rent or fees. And, such a reading would lead to an absurd result, because a landlord could more quickly and easily evict a tenant without cause during the moratorium period than after the moratorium expires (at which point a 30-day notice would be required).

For cases that are not barred (or not clearly barred) by the federal moratorium, advocates should next check to see whether any state or local eviction moratorium protects the client. Advocates should also check to see if any state or local moratorium provides more expansive protections than provided by the federal moratorium.

II. What types of housing are covered by the federal eviction moratorium?

The eviction moratorium applies to "covered dwellings," which includes those dwellings on or in "covered properties." Sec. 4024(a). The Act defines a "covered property" as a property that: (1) participates in a "covered housing program" as defined by the Violence Against Women Act (VAWA) (as amended through the 2013 reauthorization); (2) participates in the "rural housing voucher program under section 542 of the Housing Act of 1949"; (3) has a federally backed mortgage loan; or (4) has a federally backed multifamily mortgage loan. *See* Sec. 4024(a)(2).

More discussion about each of these categories follows.

A. VAWA Covered Housing Programs

The eviction moratorium extends to federal housing rental programs covered by VAWA (34 U.S.C. § 12491(a)). The moratorium itself does not impact VAWA housing protections, but referencing the VAWA statute was presumably a quick way to extend coverage to most federally assisted rental housing programs. VAWA-covered housing programs include the following[1]:

Department of Housing and Urban Development (HUD)[2]

- Public housing (42 U.S.C. § 1437d)
- Section 8 Housing Choice Voucher program (42 U.S.C. § 1437f)[3]
- Section 8 project-based housing (42 U.S.C. § 1437f)
- Section 202 housing for the elderly (12 U.S.C. § 1701q)[4]
- Section 811 housing for people with disabilities (42 U.S.C. § 8013)
- Section 236 multifamily rental housing (12 U.S.C. § 1715z–1)
- Section 221(d)(3) Below Market Interest Rate (BMIR) housing (12 U.S.C. § 1715*l*(d))
- HOME (42 U.S.C. § 12741 et seq.)
- Housing Opportunities for Persons with AIDS (HOPWA) (42 U.S.C. § 12901, et seq.)

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[1] Each program includes its corresponding statutory cite for the reader's convenience when reading the VAWA statute at 34 U.S.C. § 12491(a).

[2] Note that the Housing Trust Fund (HTF) is not covered by the VAWA statute, even though HUD did use its rulemaking authority to cover HTF. *See e.g.*, Violence Against Women Reauthorization Act of 2013: Implementation in HUD Housing Programs, Final Rule, 81 Fed. Reg. 80,724, 80,732 (Nov. 16, 2016).

[3] The Veterans Affairs Supportive Housing (VASH) Voucher Program (featuring Housing Choice Voucher rental assistance with supportive services for veterans experiencing homelessness) is covered by VAWA and thus is covered by the eviction moratorium. VAWA 2013 covers "the programs under sections 1437d and 1437f of Title 42," and the VASH program is included at 42 U.S.C § 1437f(o)19.

[4] Note that, under HUD's interpretation, Section 202 Direct Loan properties without Section 8 contracts are not covered by VAWA housing protections. *See e.g.*, 81 Fed. Reg. at 80,732-33.

- McKinney-Vento Act homelessness programs (42 U.S.C. § 11360, et seq.)[5]

Department of Agriculture

- Section 515 Rural Rental Housing (42 U.S.C. § 1485)
- Sections 514 and 516 Farm Labor Housing (42 U.S.C. §§ 1484, 1486)
- Section 533 Housing Preservation Grants (42 U.S.C. § 1490m)
- Section 538 multifamily rental housing (42 U.S.C. § 1490p-2)

Department of Treasury

- Low-Income Housing Tax Credit (LIHTC) (26 U.S.C. § 42)[6]

For programs that fund units (rather than tenant-based subsidies), advocates can use resources such as the National Low-Income Housing Coalition's searchable map and database of affordable properties covered by federal eviction moratoriums to determine what type of housing a client is living in.

B. Rural Housing Voucher Program

The evictions moratorium also extends to "the rural housing voucher program under section 542 of the Housing Act of 1949 (42 U.S.C. 1490r)." Sec. 4024(a)(2)(A)(ii). The separate inclusion of this program was necessary because the Rural Housing Voucher Program was omitted from the covered housing programs in the 2013 VAWA reauthorization statute.

C. Properties with federally backed mortgage loans (1-4 units)

Federally backed mortgage loans are defined to include loans secured by any lien on residential properties having 1-4 units and that are "made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by any officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by [HUD] or a housing or related program administered by any other such officer or agency, or is purchased or securitized by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association." Sec. 4024(a)(4). Note that there is a differently worded definition of the term "federally backed mortgage loan" in Sec. 4022(a)(2) of the Act where the term is defined in terms of a finite list of federal agencies and loan programs[7] in contrast to the more sweeping

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[5]Due to what is presumably a drafting error in the VAWA 2013 statute, the VAWA statutory text at 34 U.S.C. § 12491(a)(3)(D) does not refer to a specific program, as there is no program at "subtitle A of title IV of the McKinney-Vento Homeless Assistance Act." However, HUD concluded in 2013 that "it was Congress's intent to include the programs found elsewhere in title IV, which include the Emergency Solutions Grants program, the Continuum of Care program, and the Rural Housing Assistance Stability program." The Violence Against Women Reauthorization Act of 2013: Overview of Applicability to HUD Programs, Notice, 78 Fed. Reg. 47,717, 47,719 n.4 (Aug. 6, 2013).

[6] Note that the LIHTC (26 U.S.C. § 42) is distinct from the Historic Tax Credit (HTC) (26 U.S.C. § 47). The HTC, on its own, is not covered by VAWA.

[7] The definition in Sec. 4022(a)(2) -- which applies to the provisions in the Act regarding payment relief and a foreclosure moratorium for homeowners -- includes all loans that are owned, insured or guaranteed by one of the following entities: HUD (including Federal Housing Administration loans, reverse mortgages and certain loans

language here. It is not entirely clear if these two definitions of the same term are intended to cover the same set of loans, but the definition of "federally backed mortgage loan" in the eviction moratorium provisions is arguably much broader, so advocates should assert that a tenant is protected by the moratorium even if the landlord's mortgage is not known to be a HUD, VA, USDA or Fannie Mae or Freddie Mac loan.

Landlords should know or have access to the information necessary to determine whether their properties have federally backed mortgage loans. Such resources include the note or mortgage instruments themselves, other closing documents, servicing notices, account statements, or other correspondence, as well as loan look-up websites for both Fannie Mae and Freddie Mac. Since tenants will often not have access to that information, advocates should assert that a landlord who files an eviction suit (for nonpayment of rent) during the federal moratorium period must plead and prove that the property is *not* subject to a federally backed mortgage loan.

If necessary, an advocate might be able to determine if a property has a federally-backed mortgage loan by reviewing the contents of any mortgages, deeds of trust, or other instruments recorded for a property. However, not all federally-related loans will have a public filing that identifies the loan as federally-backed. In many communities, only some—if any—land records may be available on line, and records offices may be closed to the public for reasons related to the pandemic. Even if available to the public, such records may not be up-to-date.

D. Properties with federally backed multifamily mortgage loans (5+ units)

A federally backed multifamily mortgage loan has the same definition as "federally-backed mortgage loan," but is secured by a property with five or more dwelling units. *See* Sec. 4024(a)(5).

III. How long is the federal eviction moratorium in effect?

The federal eviction moratorium took effect on March 27, 2020 and extends for 120 days. *See* Sec. 4024(b). Landlords that receive forbearances of federally backed multifamily mortgage loans must respect identical renter protections for the duration of the forbearance. *See* Sec. 4023(d).

For more resources and any updates to this memo, please visit NHLP's COVID-19 Resources Webpage.

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under programs for Native Americans and Native Hawaiians); the Department of Veterans Affairs, the Department of Agriculture and Fannie Mae or Freddie Mac.