

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for CS/CS/HB 735 Covenants and Restrictions

SPONSOR(S): Judiciary Committee

TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 1046

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Judiciary Committee		Stranburg	Camechis

SUMMARY ANALYSIS

The bill amends statutes related to real property. Specifically, the bill:

- Authorizes counties and municipalities to amend, release, or terminate a restriction or covenant affecting real property that they imposed or accepted during the approval of a development permit, provided that the county or municipality, when changing a covenant or restriction in this manner, treats the change as an ordinance for a zoning change;
- Prohibits a local government from adopting or promulgating any ordinance or regulation that purports to establish a common law customary use of property;
- Authorizes a lienholder in a real property mortgage foreclosure case to use any document filed under penalty of perjury in bankruptcy court as an admission by the defendant, which can create a rebuttable presumption that the defendant has waived any defense to the foreclosure;
- Replaces the term "homeowners' association" with "property owners' association," thus extending statutory provisions regarding preservation and revival of covenants and restrictions affecting real property to a broader range of associations, notably commercial property owners' associations;
- Authorizes real property parcel owners who were subject to covenants and restrictions but who do not have a homeowners' association to use the same mechanisms as a homeowners' association to revitalize extinguished covenants and restrictions;
- Simplifies the procedures for renewal of the covenants and restrictions of a homeowners association; and
- Requires a homeowners association to annually consider preservation of the covenants and restrictions and requires an association to file a summary preservation every five years.

The bill appears to have an indeterminate minimal positive impact on the clerks of circuit courts and an equal indeterminate negative impact on property owners' association related to recording fees to preserve covenants or restrictions.

The effective date of the bill is July 1, 2017.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

The Marketable Record Title Act - In General

The Marketable Record Title Act (MRTA) was enacted in 1963 to simplify and facilitate land transactions.¹ In general, MRTA provides that any person vested with any estate in land of record for 30 years or more has a marketable record title free and clear of most claims or encumbrances against the land. Current law includes 9 exceptions to the applicability of MRTA.²

MRTA and Local Government Restrictions

In a recent decision by the Third District Court of Appeal, the court held that government imposed encumbrances are not subject to extinguishment under MRTA.³ In the case, the current owner of land sought to redevelop the land. A former owner had agreed with the county to a 99-year restrictive covenant as a condition of the building permit. A trial court judgment had held that the covenant was extinguished by operation of MRTA.

The court of appeal reversed, ruling that a restrictive zoning covenant evidences the County's intent to regulate the property.⁴ The Third District had previously determined that a Zoning Appeals Board resolution, with a restrictive covenant, constitutes a governmental regulation with the force of law.⁵ The court concluded that as a governmental regulation, and not an estate, interest, claim, or charge affecting the property, the restrictive covenant was not subject to extinguishment pursuant to MRTA.⁶

The bill amends ss. 125.022 and 166.033, F.S., to provide that a county or municipality may amend, release, or terminate a restriction or covenant that it imposed or accepted at the approval or issuance of the development permit. The county or municipality may accomplish this through its police powers, which may not be delegated to a third party.

Any amendment, release, or termination of the restriction or covenant by a county or municipality must follow the procedural requirements found in ss. 125.66(4) and 166.041(3)(c), F.S., respectively. Current law on such procedural requirements (which are not changed by this bill) requires that, for changes involving less than 10 contiguous acres, the governing body of the county or municipality must mail notice to each real property owner whose land the agency will redesignate.⁷ The notice must state the substance of the proposed ordinance and set a time and place for one or more public hearings on the ordinance.⁸ The notice must be given at least 30 days prior to the date set for public hearing.⁹ When the changes involves 10 or more contiguous acres, the local governing body must hold two advertised public hearings on the proposed ordinance.¹⁰ At least one of these hearings must be held after 5 p.m. on a weekday, unless the governing body elects by a majority plus one vote to hold it at another time.¹¹ The meetings must be advertised in a newspaper of general paid circulation in the county or municipality and must be at least 2 columns wide by 10 inches long and follow a standard form given in

¹ *Blanton v. City of Pinellas Park*, 887 So.2d 1224, 1227 (Fla. 2004).

² s. 712.03, F.S.

³ *Save Calusa Trust v. St. Andrews Holding, Ltd.*, 193 So. 3d 910, 916 (Fla. 3d DCA 2016).

⁴ *Id.* at 915.

⁵ *Id.* referencing *Metro Dade Cty. v. Fontainebleau Gas & Wash, Inc.*, 570 So. 2d 1006 (Fla. 3d DCA 1990).

⁶ *Id.* at 916.

⁷ ss. 125.66(4)(a) and 166.041(3)(c)1, F.S.

⁸ *Id.*

⁹ *Id.*

¹⁰ ss. 125.66(4)(b)1 and 166.041(3)(c)2a, F.S.

¹¹ *Id.*

statute.¹² The first public hearing must be held at least 7 days after the first advertisement is published.¹³ The second hearing must be held at least 10 days after the first hearing and must be advertised at least 5 days prior to the hearing.¹⁴ In lieu of publishing, the local governing body may mail a notice to each person owning real property in the area covered by the ordinance.¹⁵ This notice must explain the proposed ordinance and notify the person of the time, place, and location of any public hearing on the proposed ordinance.¹⁶

The bill also repeals an apparently unnecessary statement in ss. 125.022 and 166.033, F.S., that allows a county or city to provide information to an applicant on what other state or federal permits may apply to the development.

The bill also amends MRTA at s. 712.04, F.S., to add that a marketable record title is free and clear of all zoning requirements or building or development permits that occurred before the effective date of the root of title. This freedom from encumbrances does not alter or invalidate a zoning ordinance, land development regulation, building code, or other ordinance, rule, regulation or law if such operates independently of matters recorded in the official records. The bill provides that this provision is also intended to clarify existing law and is remedial in nature, applying to all covenants or restrictions imposed or accepted before, on, or after the effective date of the bill.

Customary Use of Real Property

Florida courts have recognized the public may acquire rights to the dry sand areas of privately owned portions of the beach through methods of prescription, dedication, and custom. In *City of Daytona Beach v. Tona-Rama*,¹⁷ the Florida Supreme Court held

If the recreational use of the sandy area adjacent to the mean high tide has been ancient, reasonable, without interruption and free from dispute, such use as a matter of custom, should not be interfered with by the owner. However, the owner may make any use of his property which is consistent with such public use and not calculated to interfere with the exercise of the right of the public to enjoy the dry sand area as a recreational adjunct of the wet sand or foreshore area.

Subsequently, in *Reynolds v. County of Volusia*,¹⁸ the 5th DCA acknowledged the doctrine of customary use enunciated in *Tona-Rama*, but noted the doctrine requires the courts to ascertain in each case the degree of customary and ancient use the beach has been subjected to. In *Trepanier v. County of Volusia*,¹⁹ the 5th DCA further held

While some may find it preferable that proof of these elements of custom be established for the entire state by judicial fiat in order to protect the right of public access to Florida's beaches, it appears to us that the acquisition of a right to use private property by custom is intensely local and anything but theoretical. "Custom" is inherently a source of law that emanates from long-term, open, obvious, and widely-accepted and widely-exercised practice. It is accordingly impossible precisely to define the geographic area of the beach for which evidence of a specific customary use must be shown, because it will depend on the particular geography and the particular custom at issue.

¹² ss. 125.66(4)(b)2 and 166.041(3)(c)2b, F.S.

¹³ ss. 125.66(4)(b)1 and 166.041(3)(c)2a, F.S.

¹⁴ *Id.*

¹⁵ ss. 125.66(4)(b)3 and 166.041(3)(c)2c, F.S.

¹⁶ *Id.*

¹⁷ 294 So.2d 73 (Fla. 1974).

¹⁸ 659 So.2d 1186 (Fla. 5th DCA 1995)

¹⁹ 965 So.2d 276 (Fla. 5th DCA 2007)

The bill creates s. 163.035, F.S., relating to customary use ordinances. The bill prohibits a local government from adopting an ordinance or regulation that intends to establish a common law customary use of real property.

Real Property Mortgage Foreclosures

A mortgage foreclosure is an action by a lender against a debtor to force the sale of the real property that secures the loan as a means of enforcing the debt. Often, a debtor subject to foreclosure will file for bankruptcy as a means of obtaining an automatic stay of the foreclosure action plus a discharge of the mortgage debt. In some cases, debtors have stated an intention to surrender real property in bankruptcy proceedings but then later have actively contested the completion of foreclosure proceedings in state court.

The bill creates s. 702.12, F.S., relating to mortgage foreclosures. The bill allows a lienholder in a foreclosure action to submit any document the defendant filed under penalty of perjury in a bankruptcy case as an admission by the defendant.

The bill creates a rebuttable presumption in favor of the lienholder that the defendant has waived any defenses to the foreclosure. The presumption is achieved by submitting a document that evidences the defendant's intention to surrender to the lienholder the property that is the subject of the foreclosure and a final order entered in the bankruptcy case that discharged the defendant's debt or confirms the defendant's repayment plan. The bill also allows the lienholder to request that the court in the foreclosure action take judicial notice of any final order entered in a bankruptcy case.

The bill does not preclude the defendant from raising a defense based on actions taken by the lienholder after the filing of the document filed in the bankruptcy case that evidenced the defendant's intention to surrender the property to the lienholder.

This section applies to any foreclosure action filed on or after July 1, 2017.

MRTA and Property Owners Associations

One effect of MRTA is that homeowner association covenants can lose effect after 30 years. In order to protect such covenants, MRTA has long provided for renewal of such covenants. Renewal starts the 30 time period over again. However, many associations fail to timely file a renewal of their covenants, primarily due to neglect rather than intent. Formerly, MRTA would apply in such cases and accordingly the covenants and restrictions expired and were unenforceable. In 2004, Part III of ch. 720, F.S., was enacted to provide a means by which covenants and restrictions of a mandatory homeowners' association may be revived.²⁰ In 2007, nonmandatory homeowners' associations became eligible for revitalization.²¹ Revitalization requires the creation of an organizing committee, notice to all affected property owners, approval by a majority of the homeowners, approval by the Department of Economic Opportunity, and the recording of notice in the public records.²²

There are two categories of property owners who enact and enforce covenants and restrictions regarding their property and that of their neighbors who are impacted by MRTA, but have not been included in the laws regarding renewal or revival of their covenants and restrictions. These property owners are commercial landowners in office parks, industrial parks, and other commercial districts; and neighborhoods with enforceable covenants but no formal homeowners' association.

²⁰ ch. 2004-345, L.O.F.

²¹ ch. 2007-173, L.O.F.

²² part III of ch. 720, F.S.

Preservation and Revitalization of Covenants by a Commercial Property Owners' Association

The bill provides a definition for the term community covenant or restriction and substitutes the term property owners' association for homeowners' association. A property owners' association includes a homeowners' association as defined in s. 720.301, F.S., a corporation or entity responsible for the operation of real property in which the voting membership is made up of the owners of the real property or their agents, or a combination thereof, and in which membership is a mandatory condition of property ownership, as well as an association of parcel owners authorized to enforce a community covenant or restriction. The bill also makes changes in s. 712.01, F.S., to conform to these new terms.

The bill replaces all instances of the term "homeowners' association" found in ch. 712, F.S., with the term "property owners' association." The effect is to expand MRTA laws on preservation and revitalization of covenants or restrictions to these associations, that is, to expand the law to cover commercial associations.

The bill provides that Part III of ch. 720, F.S., comprised of ss. 720.403-.407, F.S., is intended to provide mechanisms for revitalization of covenants or restrictions by all types of communities and property associations, not just residential communities.

Revitalization of Residential Covenants Not Related to a Homeowners' Association

There are residential communities in which there were recorded covenants and restrictions similar to those found in a homeowners association, but no association was ever created. Under current law, individual owners can file notice of preservation of covenants before they expire, see ss. 712.05 and 712.06, F.S., but there are no means of revitalizing such covenants and restrictions.

The bill creates s. 712.12, F.S., relating to covenant or restriction revitalization by real property owners not subject to a homeowners' association. The bill provides that the real property owners may use the process available to a homeowners' association in ss. 720.403-.407, F.S., to revive covenants or restrictions that have lapsed under MRTA. The real property owners are excepted from needing to provide articles of incorporation or bylaws to revive the covenants or restrictions and only need the required approval in writing. The organizing committee of the community may execute the revived covenants in the name of the community and the community name can be indexed as the grantee of the covenants with the parcel owners listed as grantors. A real property owner who has ceased to be subject to covenants or restrictions as of July 1, 2017, may commence an action by July 1, 2018, to determine if revitalization would unconstitutionally deprive the parcel owner of right or property. Revived covenants or restrictions do not affect the rights of a real property owner which are recognized by a court order in an action commenced by July 1, 2018, and may not be subsequently altered without the consent of the affected parcel owner.

Amended Procedures for Preservation of Existing Covenants

Sections 712.05 and 712.06, F.S., provide that a homeowners' association wishing to timely renew its covenants may only do so under the following conditions:

- The board must give written notice to every parcel owner of the impending preservation of the covenants;²³
- The board must give written notice to every parcel owner of a meeting of the board of directors where the directors will decide whether to renew the covenants;²⁴
- The board of directors of the association must approve the renewal by a two-thirds vote,²⁵ and
- Notice of the renewal must be recorded in the Official Records of the county.²⁶

²³ s. 712.06(1)(b), F.S.

²⁴ s. 712.05(1), F.S.

²⁵ *Id.*

The bill changes this procedure to:

- Provide that compliance by a homeowners association with newly created s. 720.3032, F.S. (see discussion herein) may substitute for the requirements of ss. 712.05 and 712.06, F.S.;
- Repeal the requirement that the board achieve a two-thirds vote; and
- Repeal the requirement that affected property owners be furnished notice of the board meeting to vote on preservation.

Additional Requirements of the Board of Directors of a Homeowners' Association

While it is probably good practice for a homeowners association to regularly consider the need for preservation of the covenants and restrictions of the real property in their neighborhood, there is no statutory requirement that a board of directors of a homeowners association do so.

The bill amends s. 720.303(2), F.S., to require that the board of directors for a homeowners' association must consider whether to file a notice to preserve the covenants and restrictions affecting the community from extinguishment pursuant to MRTA. This must be considered at the first board meeting after the annual meeting of the members.

The bill creates s. 720.3032, F.S., to require that, at least once every five years, a homeowners' association must file in the official records of the county in which it is located a notice detailing:

- The legal name of the association;
- The mailing and physical addresses of the association;
- The names of the affected subdivision plats and condominiums, or the common name of the community;
- The name, address, and telephone number for the current community association management company or manager, if any;
- An indication as to whether the association desires to preserve the covenants or restrictions affecting the community from extinguishment pursuant to MRTA;
- The name and recording information of those covenants or restrictions affecting the community which the association wishes to preserve;
- A legal description of the community affected by the covenants or restrictions; and
- The signature of a duly authorized officer of the association.

A homeowners' association is not required to file this notice if it does not wish to preserve its restrictions and covenants.

The bill creates a statutory form for such information. The bill further provides that the filing of the completed form is considered a substitute for the notice required for preservation of the covenants pursuant to ss. 712.05 and 712.06, F.S. As such, every 5-year filing of the form will have the effect of starting the MRTA 30-year period anew.

The failure to file this notice does not affect the validity or enforceability of any covenant or restriction on real property. A copy of this notice must be included as a part of the next notice of meeting or other mailing sent to all members of the association. The original signed notice must be recorded in the official records of the clerk of the circuit court or other recorder for the county.

Other Changes Made by the Bill

The bill also:

- Provides a short title of the "Marketable Record Title Act" for ch. 712, F.S.;
- Makes changes to conform various statutory and definitional cross references.

B. SECTION DIRECTORY:

Section 1 amends s. 125.022, F.S., relating to county development permits.

Section 2 creates s. 163.035, F.S., relating to ordinances relating to customary use of real property.

Section 3 amends s. 166.033, F.S., relating to municipality development permits.

Section 4 creates s. 702.12, F.S., relating to actions in foreclosure.

Section 5 creates s. 712.001, F.S., creating a short title.

Section 6 amends s. 712.01, F.S., relating to definitions applicable to the Marketable Record Title Act.

Section 7 amends s. 712.04, F.S., relating to interests extinguished by marketable record title.

Section 8 amends s. 712.05, F.S., relating to the effect of filing notice to preserve a covenant or restriction.

Section 9 amends s. 712.06, F.S., relating to the contents of a notice to preserve a covenant or restriction and the recording and indexing of the notice.

Section 10 amends s. 712.11, F.S., relating to covenant revitalization.

Section 11 creates s. 712.12, F.S., relating to covenant or restriction revitalization by parcel owners not subject to a homeowners' association.

Section 12 amends s. 720.303(2), F.S., relating to board meetings of a homeowners' association.

Section 13 creates s. 720.3032, F.S., relating to notice of association information and preservation of covenants or restrictions from the Marketable Record Title Act.

Section 14 amends s. 702.09, F.S., relating to definitions applicable to foreclosure of mortgages and statutory liens.

Section 15 amends s. 702.10, F.S., relating to an order to show cause in a mortgage foreclosure.

Section 16 amends s. 712.095, F.S., to conform a cross reference.

Section 17 amends s. 720.403, F.S., relating to preservation of communities and revival of a declaration of covenants.

Section 18 amends s. 720.404, F.S., relating to eligible communities and requirements for revival of a declaration of covenants.

Section 19 amends s. 720.405, F.S., relating to the organizing committee and parcel owner approval for revival of a declaration of covenants.

Section 20 amends s. 720.407, F.S., relating to recording of a declaration of covenants.

Section 21 provides an effective date of July 1, 2017.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill requires the recording of documents in the public records of the county. Recording is subject to a fee of \$10.00 for the first page and \$8.50 for every subsequent page, payable to the recording department (in most counties, the clerk of the court).²⁷ The net revenues to county recorders, after deductions for incremental costs of recording and indexing documents, are unknown.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Section 13 of the bill requires associations to prepare and record a notice every 5 years. The recording fee is nominal (\$10 for the first page, \$8.50 for additional pages). Because the form is in statute, associations may be able to complete the task without assistance, or a community association manager can assist an association with preparation and filing without reference to a licensed attorney.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Impairment of Contracts

To the extent that a court may find that a covenant or restriction may be considered a contract between the parties, the changes made by this bill may affect such current contract rights and

²⁷ s. 28.24(12), F.S.
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obligations. Article I, s. 10 of the United States Constitution, and art. I, s. 10 of the state constitution both prohibit the Legislature from enacting any law impairing the obligation of contracts. Although written in terms of an absolute prohibition, the courts have long interpreted the provisions to prohibit enactment of any unreasonable impairment of contractual rights existing at the time that the law is enacted. The Florida Supreme Court in *Pomponio v. Claridge of Pompano Condominium, Inc.*²⁸ set forth the following test:

- Was the law enacted to deal with a broad, generalized economic or social problem?
- Does the law operate in an area which was already subject to state regulation at the time the parties' contractual obligations were originally undertaken, or does it invade an area never before subject to regulation by the state?
- Does the law effect a temporary alteration of the contractual relationships of those within its coverage, or does it work a severe, permanent, and immediate change in those relationships irrevocably and retroactively?

B. RULE-MAKING AUTHORITY:

The bill does not appear to create rulemaking authority or a need for rulemaking.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

²⁸ *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So.2d 774, 779 (Fla. 1979).