

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 Judiciary

BILL: SB 814

INTRODUCER: Senator Yarborough

SUBJECT: Easements Affecting Real Property Owned by the Same Owner

DATE: January 26, 2024

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Bond</u>	<u>Cibula</u>	<u>JU</u>	Favorable
2.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 814 provides that a landowner may create a valid easement, servitude, or other interest that affects his or her own land. The bill conforms the law on easements and servitudes to modern practices and customs. The bill applies to existing easements or servitudes but it does not reinstate an easement or servitude that was invalidated in the past by a court.

The bill is effective upon becoming law.

II. Present Situation:

An easement is a nonpossessory interest in land of another. An easement is an interest in land, not merely a contract right. The nonpossessory feature of an easement differentiates it from an estate in land. Thus, the holder of an affirmative easement may only use the land burdened by the easement; the holder may not occupy and possess the realty as does an estate owner. An easement burdens land possessed by someone other than the easement holder. This characteristic is a corollary of the nonpossessory element of an easement. It emphasizes the distinction between possession and use and highlights the fact that a possessor and an easement holder can simultaneously use the same parcel of land.¹ An easement is a right or privilege by which the owner of one parcel of land, by reason of such ownership, has a right to the use of the real property of another for a special purpose.²

“Servitude” is the generic term that describes legal devices private parties can use to create rights and obligations that run with land. Rights and obligations that run with land are useful because they create land-use arrangements that remain intact despite changes in ownership of the land. Servitudes permit the creation of neighborhoods restricted to particular uses, providing a private alternative to zoning; they permit property to be used as a basis for financing infrastructure, providing a private alternative to taxation; and they permit the creation of stable arrangements

¹ “Easement” defined, THE LAW OF EASEMENTS & LICENSES IN LAND § 1:1.

² FLA.JUR.2D EASEMENTS §1.

for shared use of land, providing an alternative to acquisition of fee-simple interests for transportation corridors and natural-resource exploitation. Although these are the most common uses of servitudes, they are not exclusive. Servitudes may be used for any purpose that is not illegal or against public policy. Servitudes are widely used in land development because they can be individually tailored to meet the needs of particular projects. They are widely used for roads, utilities, pipelines, and natural-resource exploitation because they are less expensive than acquisition of a fee simple.³

The earliest form of easement or servitude was probably a road or access easement. Such easements, whether formal or informal, have existed by necessity since the time that civilization started recognizing real property rights and ownership.⁴ In the past two centuries, progress has led society to create arrangements in the nature of an easement that are for the common good. It is important to note, these easements are necessary for society to function, and affect nearly every parcel of property in Florida. These vital easements include road easements, utility easements (including gas, water, sewer, electrical, and communications easements), stormwater easements, and conservation easements. Such easements often created by a landowner in a form affecting the landowner's own real property. Generally, land owners want these easements so that their property is accessible and can use public utilities and services. Currently, a developer must create various access and utility easements as a condition of state and local laws and regulations regarding plat or condominium approval.⁵

At common law, a landowner may not create an easement or other servitude over his or her own lands.⁶ No apparent public policy argument continues to support this rule. This ancient common law concept has been ignored in the creation of numerous easements, servitudes, and other similar arrangements in Florida that are required by modern society. Recent appellate decisions have, however, used this ancient common law concept to invalidate easements and thus have caused real property lawyers to question whether the limited findings of those decisions could be used to challenge millions of vital consensual access and utility easements. Cases include:

- A developer in Brevard County who owned two adjoining commercial properties. He granted an easement from one parcel to the other parcel regarding use of the parking lot as a condition of a development permit. Many years later the separate parcels had separate owners who litigated the validity of the parking easement. The court found the easement invalid because the same person owned both parcels at the time of creation of the easement.⁷
- Poco Place is a short straight private road in Nokomis. It serves 6 homes, 3 on the North and 3 on South. Bayshore Road, a public road, is at the East end of Poco Place, and a waterfront on the intracoastal is at the West end of Poco Place. Owners of one of the waterfront lots physically blocked the road, blocking access to the waterfront. One of the inland parcel

³ Restatement (Third) of Property (Servitudes) § 1.1 (2000).

⁴ For instance, right-of-way easements appear in the Twelve Tables of Rome. Rosenberg, *Fixing a Broken Common Law*, 44 FSU LAW REV. 143, 144 at n. 5.

⁵ For instance, a condominium developer must create a nonexclusive easement for ingress and egress over streets, walks, and other rights-of-way serving the units of a condominium, part of the common elements necessary to provide reasonable access to the public ways, easements through the units for utilities, and easements for support of the structure, all of which must be created before the state will approve the developer to sell condominium units to the public. Sections 718.104(4)(n), 718.108(1), and 718.502(1)(b), F.S.

⁶ *Winthrop v. Wadsworth*, 42 So. 2d 541, 543-44 (Fla. 1949).

⁷ *One Harbor Financial Ltd. Co. v. Hynes Properties, LLC*, 884 So. 2d 1039 (Fla. 3rd DCA 2004).

owners responded by suing to enforce the easement rights. The court invalidated a portion of the easements creating Poco Place because that portion was created by a previous landowner in his own land.⁸

III. Effect of Proposed Changes:

The bill provides that an owner of real property may create an easement, servitude, or other interest in the owner's real property, and such easement, servitude, or other interest is valid notwithstanding that the owner owns all of the affected real property.

The bill states that it clarifies existing law and applies to, without limitation, any easement, including, but not limited to, utility easements, access easements, parking easements, negative easements, environmental easements, and solar easements; surface water management agreements; or any other rights in the nature of an easement, servitude, profit, use right, restriction, obligation, condition, reservation, or other covenant, contained in a written instrument, whether denominated as an easement, deed, plat, declaration, covenant, condition, restriction, servitude, or otherwise.

The bill further provides that it does not revive or reinstate any right or interest that has been fully and finally adjudicated as invalid before the effective date of the bill.

The bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

Where a statute may be applied retroactively, a court must first determine if the Legislature intended the statute to be retroactive. If so, the court must determine whether retroactive application would violate any constitutional principles. A court will reject such an application if the statute impairs a vested right, creates a new obligation, or

⁸ *King v. Roorda*, 355 So. 3d 1001 (Fla. 2d DCA 2023).

imposes a new penalty. The central focus of a court's inquiry is whether retroactive application of the statute "attaches new legal consequences to events completed before its enactment."⁹

The bill applies to existing easements, servitudes, and other similar agreements, but does not revive or reinstate any right or interest fully adjudicated before the effective date of the bill.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Passage of the bill has no apparent fiscal impact as it will confirm current legal relationships, although failure to pass the bill may lead to costly litigation.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

At line 24 the bill states that it "clarifies existing law." It may be more accurate to say that this bill clarifies that the ancient rule has been effectively abrogated by longstanding and widespread custom and use in the modern age.

VIII. Statutes Affected:

This bill creates section 704.09 of the Florida Statutes.

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.

⁹ *Menendez v. Progressive Exp. Ins. Co.*, 35 So. 3d 873, 877 (Fla. 2010).

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
