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HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUDICIAL OVERSIGHT
ANALYSIS

BILL #: HB 1679

RELATING TO: Recreational Facilities

SPONSOR(S): Representative Miller

TIED BILL(S): none

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

(1) JUDICIAL OVERSIGHT
(2) SMARTER GOVERNMENT
(3)
(4)
(5)

I. SUMMARY:

This bill creates a new section of Florida Statutes, to provide that the owner of recreational facilities located within a residential subdivision governed by a homeowners' association may not sell or destroy such recreational facilities or other property unless the right to purchase such recreational facilities is first given to the homeowners' association and then to the owners of lots within the subdivision.

This bill does not appear to have a fiscal impact on state or local government.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes []	No [x]	N/A []
2.	Lower Taxes	Yes []	No []	N/A [x]
3.	Individual Freedom	Yes []	No [x]	N/A []
4.	Personal Responsibility	Yes []	No []	N/A [x]
5.	Family Empowerment	Yes []	No []	N/A [x]

For any principle that received a "no" above, please explain:

This bill would impose additional restrictions upon the use or sale of real property.

B. PRESENT SITUATION:

Section 720.31, F.S., sets forth statutory provisions regarding recreational leaseholds related to a homeowners' association. It provides that any lease of recreational or other commonly used facilities serving a community, which lease is entered into by the association or its members before control of the homeowners' association is turned over to the members other than the developer, must provide as follows:

- That the facilities may not be offered for sale unless the homeowners' association has the option to purchase the facilities, provided the homeowners' association meets the price and terms and conditions of the facility owner by executing a contract with the facility owner within 90 days, unless agreed to otherwise, from the date of mailing of the notice by the facility owner to the homeowners' association. If the facility owner offers the facilities for sale, he or she must notify the homeowners' association in writing stating the price and the terms and conditions of sale. The term "offer" means any solicitation by the facility owner directed to the general public.

- If a contract between the facility owner and the association is not executed within such 90-day period, unless extended by mutual agreement, then, unless the facility owner thereafter elects to offer the facilities at a price lower than the price specified in his or her notice to the homeowners' association, he or she has no further obligations under this provision.

- If the facility owner thereafter elects to offer the facilities at a price lower than the price specified in his or her notice to the homeowners' association, the homeowners' association will have an additional 10 days to meet the price and terms and condition of the facility owner by executing a contract.

If a facility owner receives a bona fide offer to purchase the facilities that he or she intends to consider or make a counteroffer to, his or her only obligation is to notify the homeowners' association that he or she has received an offer, to disclose the price and material terms and conditions upon which he or she would consider selling the facilities, and to consider any offer made by the homeowners' association. The facility owner is under no obligation to sell to the homeowners' association or to interrupt or delay other negotiations, and he or she shall be free at

any time to execute a contract for the sale of the facilities to a party or parties other than the homeowners' association.

These requirements do not apply to:

- Any sale or transfer to a person who would be included within the table of descent and distribution if the facility owner were to die intestate.
- Any transfer by gift, devise, or operation of law.
- Any transfer by a corporation to an affiliate. The term "affiliate" is defined to mean any shareholder of the transferring corporation; any corporation or entity owned or controlled, directly or indirectly, by the transferring corporation; or any other corporation or entity owned or controlled, directly or indirectly, by any shareholder of the transferring corporation.
- Any transfer to a governmental or quasi-governmental entity.
- Any conveyance of an interest in the facilities incidental to the financing of such facilities.
- Any conveyance resulting from the foreclosure of a mortgage, deed of trust, or other instrument encumbering the facilities or any deed given in lieu of such foreclosure.
- Any sale or transfer between or among joint tenants in common owning the facilities.
- The purchase of the facilities by a governmental entity under its powers of eminent domain.

Notably, s. 720.31, F.S., may not apply to recreational facilities located within a residential subdivision, but which are not paid for or through the homeowners' association.

C. EFFECT OF PROPOSED CHANGES:

This bill creates a new section of Florida Statutes, to provide that the owner of recreational facilities located within a residential subdivision governed by a homeowners' association may not sell or destroy such recreational facilities or other property unless the right to purchase such recreational facilities is first given to the homeowners' association and then to the owners of lots within the subdivision as follows:

- If the owner offers the recreational facilities within a residential subdivision for sale or wishes to destroy such property, she or he shall notify the officers of the homeowners' association by certified mail, stating the price, terms, and conditions of the sale, and shall notify the owners individually by a notice prominently displayed at the entrance to the subdivision.
- The owners, by and through the association or individually if the association declines to act, shall have the right to purchase the recreational facilities, provided the homeowners meet the price, terms, and conditions of the owner of the facilities by executing a contract with the owner within 45 days after the date of receipt of the notice, unless agreed to otherwise. If a contract between the owner of the facilities and the association is not executed within such 45-day period, the owners may individually sign a contract within 10 days after the 45-day period. Unless the owner of the facilities thereafter elects to offer the recreational facilities at a price lower than the price specified in her or his notice to the officers of the homeowners'

association and in the posted notice, the owner of the facilities has no further obligations under this subsection and her or his only obligation shall be as set forth in subsection (2).

- If the owner of the facilities thereafter elects to offer the recreational facilities at a price lower than the price specified in her or his notice to the homeowners, the homeowners, by and through the association, shall have an additional 10 days to meet the price, terms, and conditions of the owner of the facilities by executing a contract. The individual owners shall have 10 days to accept such offer if the association declines to act.

If no destruction of the recreational facilities is involved, this section does not apply to:

- Any sale or transfer to a person who would be included within the table of descent and distribution if the owner of the facilities were to die intestate;
- Any transfer by gift, devise, or operation of law;
- Any transfer by a corporation to an affiliate. As used in this section, the term "affiliate" means any shareholder of the transferring corporation; any corporation or entity owned or controlled, directly or indirectly, by the transferring corporation; or any other corporation or entity owned or controlled, directly or indirectly, by any shareholder of the transferring corporation;
- Any transfer by a partnership to any of its partners;
- Any conveyance of interest incidental to financing;
- Any conveyance resulting from the foreclosure of a mortgage, deed of trust, or other instrument encumbering the facilities or any deed given in lieu of such foreclosure;
- Any sale or transfer between or among joint tenants or tenants in common; or
- The purchase of a mobile home park by a governmental entity under its powers of eminent domain.

This act will take effect upon becoming a law.

D. SECTION-BY-SECTION ANALYSIS:

See “Present Situation” and “Effect of Proposed Changes”.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

This bill prohibits destruction of certain improvements to real property, and requires a landowner to offer neighbors a first right of refusal in that land. These restrictions perhaps may give rise to a concern that they possibly impair property rights and may rise to the level of a taking, although there is no clear precedent in this regard.

In *Kirby Forest Industries, Inc. v. U.S.*, 467 U.S. 1 (1984), the United States Supreme Court discussed takings in general, stating:

> We have frequently recognized that a radical curtailment of a landowner's freedom to make use of or ability to derive income from his land may give rise to a taking within the meaning of the Fifth Amendment, even if the Government has not physically intruded upon the premises or acquired a legal interest in the property. Thus, we have acknowledged that a taking would be effected by a zoning ordinance that deprived "an owner of economically viable use of his land." *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). And we have suggested that, under some circumstances, a

> land-use regulation that severely interfered with an owner's "distinct investment-backed expectations" might precipitate a taking. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). . . . At least in the absence of an interference with an owner's legal right to dispose of his land, even a substantial reduction of the attractiveness of the property to potential purchasers does not entitle the owner to compensation under the Fifth Amendment.

Kirby Forest Industries, Inc. v. U.S., 467 U.S. 1, 14-15 (U.S.Tex. 1984) (footnote omitted).

In general, the right to "take, hold and dispose of property, either real or personal", is a fundamental right. *Corfield v. Coryell*, 6 Fed. Cas. 546, 552 (No. 3, 230) (CCED Pa. 1825) (by Justice Bushrod Washington, sitting as Circuit Justice). "It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property." *Shelley v. Kraemer*, 334 U.S. 1, 11 (1948). "The right to devote one's real estate to any legitimate use is protected by the Constitution of the State of Florida. The only basis upon which the landowner's right to the unfettered use of his land must yield is the necessity to protect the public health, safety and general welfare." *Miller v. MacGill*, 297 So.2d 573, 576 (Fla. 1st DCA 1974) (footnotes omitted). "The right of alienation has been an inseparable incident to an estate in fee ever since the statute quo emptores." *Davis v. Geyer*, 9 So.2d 727, 729 (Fla. 1942).

Section 723.07(1), F.S., provides that a mobile home park owner must allow the mobile home park residents a chance to purchase their mobile home park if it is listed for sale. The section is very similar to that provided for homeowners' associations under s. 720.31(1), F.S. (see discussion herein). One district court of appeal has stated, but not ruled, that the requirement may not be permissible, stating:

> We are not confronted in this proceeding with, nor do we purport to pass upon, any question of whether section 723.071(1) offends, either in a constitutional or common law setting, the right of mobile home park owners to enjoy unrestricted alienation of their real property. We must acknowledge, however, that most regulatory statutes affecting realty, which have withstood attack, focus upon the use of property, and not its alienation. *See, e.g. Hillsborough County v. Westshore Realty, Inc.*, 444 So.2d 25 (Fla. 2d DCA 1983); *Miller v. MacGill*, 297 So.2d 573 (Fla. 1st DCA 1974); *see also Seagate Condominium Association, Inc. v. Duffy*, 330 So.2d 484, 486, n. 2 (Fla. 4th DCA 1976) ("There is a distinction between restraints on alienation and restraints on use."); *Kass v. Lewin*, 104 So.2d 572 (Fla.1958).

Brate v. Chulavista Mobile Home Park Owners Ass'n, Inc., 559 So.2d 1190, 1192 (Fla. 2nd DCA 1990), *review denied,* 574 So.2d 140 (Fla. 1990). This bill expands the restraint upon alienation beyond that in *Brate*.

Section 723.061(2), F.S., simply requires that a mobile home park owner notify the homeowners' association of the existence of an offer on the property. It is very similar to s. 720.31(2), F.S. (discussed above). In specifically finding s. 723.061(2), F.S., unconstitutional, the First District Court of Appeal stated:

> Having carefully considered the principles set out in *Yee v. City of Escondido, California*, *Nollan v. California Coastal Commission*, *Hodel v. Irving*, *Seawall Associates v. City of New York*, and the other cases cited by the parties, we find that section 723.061(2) constitutes an unconstitutional taking of property without compensation. We agree with the trial court that the statute goes far beyond the legitimate goal of reasonably accommodating conflicting interests, in effect coercing

> mobile home park owners to surrender indefinitely their rights to possess and occupy their land and to exclude others. Once the park owners have rented their property to mobile home owners, they are required by section 723.061(2) to continue doing so unless they buy all the mobile homes or pay to have them moved. A statute that requires any form of remuneration to recover the right to possess and occupy one's own property would seem to be confiscatory, but the evidence presented to the trial court demonstrated that neither the "buy out" option nor the "relocation" option is even economically feasible. Therefore, as a practical matter, the challenged statute authorizes a permanent physical occupation of the park owner's property and effectively extinguishes a fundamental attribute of ownership, the right to physically occupy one's land. Unlike section 723.033, the regulatory scheme contained in section 723.061(2) does not substantially advance a legitimate state interest, but instead singles out mobile home park owners to bear an unfair burden, and therefore constitutes an unconstitutional regulatory taking of their property. *See Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), and cases cited therein.

Aspen-Tarpon Springs Ltd. Partnership v. Stuart, 635 So.2d 61, 67-68 (Fla. 1st DCA 1994) (footnoted omitted).

On the other hand,

> [t]he ancient rule against restraints on alienation is founded entirely upon considerations of public policy, specifically, the idea that the free alienability of property fosters economic and commercial development. 2 Archbold's Blackstone, Ch. XIX (1825); Simes & Smith, The Law of Future Interests, s 1135 (2nd ed., 1956); Manning, 'The Development of Restraints on Alienation Since Gray,' 48 Harv.L.Rev. 373, 403 (1935); IV Restatement, Property, 2129--33, 2379--80 (1944); 61 Am.Jur.2d, Perpetuities and Restraints on Alienation, s 93 (1972). Competing policy considerations, however, have, almost from the inception of the rule, caused exceptions to be carved out of it. Our courts have traditionally undertaken to determine the validity of restraints by measuring them in terms of their duration, type of alienation precluded, or the size of the class precluded from taking. 4A Thompson, Real Property, s 2016 (1961); 61 Am.Jur.2d, Perpetuities and Restraints on Alienation, ss 102--104 (1972). The rule has long been recognized as precluding only Unlimited or Absolute restraints on alienation. Robinson v. Randolph, 21 Fla. 629, 58 Am.Rep. 692 (1885); *Davis v. Geyer*, 151 Fla. 362, 9 So.2d 727 (1942).
>
> The test which our courts have adopted and applied with respect to restraints on alienation and use is reasonableness. *E.g.*, *Points v. Barnes*, 301 So.2d 102 (4th DCA Fla.1974); *Robinson v. Speer*, 185 So.2d 730 (1st DCA Fla.1966); *Blair v. Kingsley*, 128 So.2d 889 (2nd DCA Fla.1961). The question for us here, therefore, is whether appellant's leasing restriction is reasonable given the context in which it was promulgated, i.e., the condominium living arrangement.

Seagate Condominium Ass'n, Inc. v. Duffy, 330 So.2d 484, 485-486 (Fla. 4th DCA 1976)

The only case found discussing the constitutionality of a mandatory first right of refusal found that a first right of refusal “may affect slightly an owner’s ability to alienate property”, but that such restriction does not amount to a taking. *State of Minnesota v. Block*, 660 F.2d 1240, 1256 (8th Cir. 1981, *certiorari denied*, 455 U.S. 1007.

Art. 1, s. 10, Fla.Const., provides that no "law impairing the obligation of contracts shall be passed." This bill may possibly modify existing contractual relationships between the owners of recreational facilities and the neighboring residents, and thus it may perhaps give rise to a constitutional concern that the bill impairs the obligation of contracts. However, in evaluating modifications of contractual rights in the relationship between mobile home parks and mobile home owners, the Florida Supreme Court has stated that the regulations enacted in Chapter 723, F.S., do not unconstitutionally impair contract obligations: "It may be assumed that the parties made their contract with knowledge of the power of the State to change the remedy or method of enforcing the contract, which may be done by a State without impairing contract obligations." *Palm Beach Mobile Homes, Inc. v. Strong*, 300 So.2d 881, 887 (Fla. 1974), quoting from *Mahood v. Bessemer Properties, Inc.*, 18 So.2d 775 (Fla. 1944).

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

Section 70.001(2), F.S., provides:

> When a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property, the property owner of that real property is entitled to relief, which may include compensation for the actual loss to the fair market value of the real property caused by the action of government, as provided in this section.

Should a court find that the provisions of this bill place an "inordinate burden" or impair a "vested right", a property owner could be entitled to compensation from the state.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by: Staff Director:

Nathan L. Bond, J.D. Lynne Overton, J.D.