HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 589 Marketable Record Titles to Real Property
SPONSOR(S): Domino
TIED BILLS: **IDEN./SIM. BILLS:** SB 1438

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Business Regulation		Gallen	Liepshutz
2) Judiciary			
3)			
4)			
5)			

SUMMARY ANALYSIS

Under Florida's Marketable Record Titles Act (MRTA), any owner of real property who, alone or with predecessors in title, has held any estate in land of record for 30 years or more will have a marketable record title. A marketable record title means the land is free and clear of all claims. The law extinguishes certain interests in real property, including covenants or restrictions. Interests in real property may be *preserved* when a notice of record is filed within the 30 year statutory period.

Prior to the 1997 legislative session, homeowner associations did not have the authority to preserve existing covenants or restrictions. As a result, many covenants and restrictions were extinguished.

The bill creates a mechanism for homeowners associations to *reinstate* covenants or restrictions that have been extinguished under MRTA. Existing law does not permit a homeowners association to reinstate covenants or restrictions that have expired under MRTA.

The reinstatement of extinguished covenants or restrictions may deprive homeowners of property rights without due process of law; therefore, a constitutional concern may arise.

The bill provides that insurance policies issued prior to the effective date of this act must include reinstated covenants or restrictions as exceptions to title. The retroactive application to existing contracts may create an unconstitutional impairment of contracts.

The bill does not appear to have a direct economic impact on state or local government.

The bill takes effect July 1, 2004.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

1. Reduce government?	Yes[]	No[]	N/A[x]
2. Lower taxes?	Yes[]	No[]	N/A[x]
3. Expand individual freedom?	Yes[]	No[]	N/A[x]
4. Increase personal responsibility?	Yes[]	No[]	N/A[x]
5. Empower families?	Yes[]	No[]	N/A[x]

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

B. EFFECT OF PROPOSED CHANGES:

Marketable Record Titles Act

When purchasing real property a title search is performed in order to examine the public records to determine whether any interest or claim, including covenants or restrictions, exist in the properties chain of title.

Under Florida's Marketable Record Titles Act (MRTA), an owner of real property who, alone or with predecessors in title, has held any estate in land of record for 30 years or more will have a marketable record title to the property.[1] Marketable record title means the land is free and clear of all claims.

MRTA declares a marketable title on a recorded chain of title which is more than thirty years old and it nullifies all interests which are older than the root of title. "Root of title" means any title transaction[2] purporting to create or transfer the estate claimed by any person and which is the last title transaction to have been recorded at least 30 years prior to the time when marketability is being determined.

The purpose of the act is to extinguish old claims and defects, including covenants or restrictions, against the title to real property and limit the period of search.

However, MRTA allows for covenants or restrictions of real property to be *preserved* by filing a record of notice. If a record of notice is not filed within the 30 year statutory period the covenants or restrictions on the property will extinguish.

The exceptions to MRTA include:

> (1) Estates or interests, easements and use restrictions disclosed by and defects inherent in the muniments[3] of title on which said estate is based beginning with the root of title; provided, however, that a general reference in any of such muniments to easements, use restrictions or other interests created prior to the root of title shall not be sufficient to preserve them unless specific identification by reference to book and page of record or by name of recorded plat be made therein to a recorded title transaction which imposed, transferred or continued such

[1] Ch. 712, F.S

[2] "Title transaction" means any recorded instrument or court proceeding which affects title to any estate or interest in land and which describes the land sufficiently.

[3] "Muniments of title" are instruments of writing and written evidences, including deeds, wills, and court judgments, which the owner of lands, possessions, or inheritances has by which owner is entitled to defend title. Muniments of title need not be recorded to be valid, notwithstanding that recording statutes do give good-faith purchasers certain rights over the rights of persons claiming under unrecorded muniments of title.

easement, use restrictions or other interests; subject, however, to the provisions of subsection (5).

(2) Estates, interests, claims, or charges, or any covenant or restriction, preserved by the filing of a proper notice in accordance with the provisions hereof.

(3) Rights of any person in possession of the lands, so long as such person is in such possession.

(4) Estates, interests, claims, or charges arising out of a title transaction which has been recorded subsequent to the effective date of the root of title.

(5) Recorded or unrecorded easements or rights, interest or servitude in the nature of easements, rights-of-way and terminal facilities, including those of a public utility or of a governmental agency, so long as the same are used and the use of any part thereof shall except from the operation hereof the right to the entire use thereof. No notice need be filed in order to preserve the lien of any mortgage or deed of trust or any supplement thereto encumbering any such recorded or unrecorded easements, or rights, interest, or servitude in the nature of easements, rights-of-way, and terminal facilities. However, nothing herein shall be construed as preserving to the mortgagee or grantee of any such mortgage or deed of trust or any supplement thereto any greater rights than the rights of the mortgagor or grantor.

(6) Rights of any person in whose name the land is assessed on the county tax rolls for such period of time as the land is so assessed and which rights are preserved for a period of 3 years after the land is last assessed in such person's name.

(7) State title to lands beneath navigable waters acquired by virtue of sovereignty.

(8) A restriction or covenant recorded pursuant to chapter 376 {land reclamation} or chapter 403 {environmental control}.

All other “estates, interests, claims, or charges” are extinguished by marketable record title.

Homeowner’s Associations

In Florida, many homeowner associations are governed and financed by covenants or restrictions that have been recorded by the developer against the individual parcels of land. Like any other private covenant or restriction affecting real property, these recorded documents are subject to extinguishment under MRTA if no notice is timely recorded to preserve them.

Prior to the 1997 legislative session, homeowner associations did not have the authority under MRTA to preserve existing covenants or restrictions. As a result, many covenants and restrictions were extinguished due to the failure of individual parcel owners to file a notice as required by MRTA.

In 1997, the Legislature amended MRTA to permit homeowner associations to file notice on behalf of the association members. A homeowners association (or individual) desiring to *preserve* any covenant or restriction may preserve and protect it from extinguishment by filing a record of notice during the statutory 30 year period.[4] The record of notice will preserve the covenant or restriction for a period of no more then 30 years after the filing unless filed again as required by statute. A record of notice is

[4] The major notice requirements include: name and address of claimant or homeowners’ association, name and address of the property owner, an affidavit from homeowners’ association stating the action taken (if applicable), a description of all land affected, a statement of claim showing description and extent of claim or copy of covenant or restriction, provide an instrument of record if record exists, and the notice must be acknowledged in the same manner as deeds. Additionally, a notice must be filed with the clerks of the circuit court in order for the notice to be entered, filed, and indexed, in the same manner as a deed. 712.06, F.S.

acknowledged in the same manner that deeds are acknowledged for record and will be part of the public record in order to provide notice for future buyers.

A record of notice may be filed by a homeowners association[5] only if the preservation of the covenant or restriction is approved by at least two-thirds of the members of the board of directors of a homeowners association. Additionally, homeowners associations may amend their governing documents. Governing documents of an association include the recorded declaration of covenants, the articles of incorporation, and bylaws, and all adopted and recorded amendments of such documents.[6]

Existing law does not permit a homeowners association to *reinstate* covenants or restrictions that have expired under MRTA.

Effect of Proposed Changes

The bill provides a mechanism to *reinstate* covenants or restrictions that have expired under the Marketable Record Titles Act (MRTA). Currently, MRTA allows for covenants or restrictions of real property to be *preserved* by filing a record of notice; however, if a record of notice is not filed within the 30 year statutory period the covenants or restrictions on the property will extinguish.

The bill provides an extension of the 30 year statutory period to file notice. The bill states that if the 30 year period for filing notice expired prior to July 1, 2006, then the period will be extended to July 1, 2006. The bill limits the covenants or restrictions that may be reinstated to those that have been "routinely enforced" by a homeowners association.

There is some ambiguity as to how this provision should be interpreted. The current language has the potential to allow any interest in real property that has been extinguished under MARTA to be reinstated. However, the bill is intended to only allow those covenants or restrictions that have been routinely enforced by a homeowners association to be reinstated.

Reinstating covenants or restrictions without the consent of the property owner and just compensation, or without proper notice and ability to challenge, may be a violation of state and federal due process.[7]

The bill provides that covenants or restrictions that have been routinely enforced by a homeowner's association may be reinstated; however, the meaning of "routinely" enforced is subject to interpretation and appears to be ambiguous.

The definition of "title transaction" is expanded to include recorded amendments to covenants or restrictions. Designating recorded amendments as title transactions would protect those covenants or restrictions from extinguishment for 30 years upon recordation.

The bill provides that any title transaction recorded by a homeowners association will serve as a "root of title." This, effectively, would deem recorded amendments to covenants or restrictions as roots of title. However, under MRTA, the root of title is designed to trace ownership of real property in order to extinguish interests recorded prior to the root of title. Therefore, it appears that a title transaction created by an amendment to a covenant or restriction can't serve as a root of title without conflicting with the purpose of the root of title.

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[5] "Homeowners' association" means a Florida corporation responsible for the operation of a community which the voting membership is made up of parcel owners or their agents, and in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lie on the parcel.

[6] Ch. 720, F.S

[7] Art. I, Sec. 9, Florida Constitution; Amendment V, United States Constitution

The bill authorizes homeowner associations to enforce covenants against a parcel, parcel owner, or an occupant. Currently homeowners associations are authorized to enforce use restrictions that are imposed on the parcels. This clarifies existing enforcement powers of the homeowners association.

Other definitions amended by the bill have the effect of clarifying homeowners associations enforceability rights regarding covenants and restrictions.

The bill expands the exceptions to MRTA, providing exceptions for; (1) estates, interests, claims, or charges, or any covenant or restriction preserved or *reinstated* that are properly noticed and filed, and (2) estates, interests, claims, rights, obligations, or charges arising out of a declaration of condominium or the cooperative documents creating or governing a cooperative, including exhibits and amendments.

The exceptions created under MRTA protect interests, such as covenants or restrictions, from being extinguished.

The Real Property Probate and Trust Law Section of the Florida Bar has expressed the concern that the term "reinstated" as used in the bills exception provision implies that any extinguished interest may be reinstated, therefore, not limiting the reinstatement to covenants or restrictions routinely enforced by a homeowners association.

The bill exempts homeowners associations that preserve or reinstate covenants or restrictions from having to rerecord every 30 years as provided by statute, as long as notice of record complies with this act.

The bill amends Chapter 720 [Homeowner Associations] to reflect the changes to MRTA. Additionally, the bill provides that the reinstatement of an extinguished covenant or restriction must be approved in writing by a majority of all voting interests of the association present or represented by a limited proxy at a noticed meeting with a quorum present.

As provided in the bill, title insurance policies issued before the effective date of this law must include reinstated covenants or restrictions as exceptions to title. As a result, property owners will not be insured against losses resulting from any reinstatement. The retroactive application to existing title policies may be an impairment of contracts in violation of the contracts clause of the federal and state constitution.[8]

C. SECTION DIRECTORY:

Section 1: Amends s. 712.01, F.S.; Definitions.

Section 2: Amends s. 712.03, F.S.; Provides additional exemptions to MRTA.

Section 3: Amends s. 712.06, F.S.; Provides reinstated interests must be recorded to be effective; provides homeowners associations are not required to rerecord once interests are properly recorded.

Section 4: Amends s. 712.09, F.S.; Provides an extension of the 30-year period for filing notice; provides that title transactions properly recorded by homeowners associations may serve as a root of title.

Section 5: Amends s. 720.301, F.S.; Provides that the definitions in this section apply to the entire chapter.

[8] Article 1, Section 10, United States Constitution; Article 1, Section 10, Florida Constitution.

Section 6: Creates s. 720.313, F.S.; Provides that homeowners associations may reinstate extinguished covenants or restrictions; provides that properly recorded reinstated covenants or restrictions are deemed title transactions; provides that title policies issued prior to the effective date of this act must include reinstated covenants or restrictions as exceptions to title.

Section 7: Provides an effective date of July 1, 2004.

II. 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:

The bill provides that title insurance policies issued prior to the effective date of this act must include reinstated covenants or restrictions as exceptions to title. Although this protects the title insurance industry, it appears to have an adverse affect on property owners. This bill has the potential to create civil litigation expenses for any property owner that has covenants or restrictions reinstated on their property. Property owners may be subject to depreciation in the value of their property due to reinstated encumbrances on property.

D. FISCAL COMMENTS:

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable because the bill does not require the counties or cities to spend funds or take an action requiring the expenditure of funds.

2. Other:

Article I, Section 9, of the Florida Constitution provides, "No person shall be deprived of life, liberty, or property without due process of law."[9] The bill provides a mechanism to reinstate covenants or restrictions (i.e. encumbrances) on property that have been extinguished by law. Reinstating extinguished property interests without the consent of the property owner, without just compensation, or without proper notice and ability to challenge may be a violation of constitutional due process.

Article I, Section 10, of the Florida Constitution provides, "No…law impairing the obligation of contracts shall be passed." [10] This bill provides a retroactive provision that may violate the constitutional prohibition against the impairment of contracts. The bill provides that title insurance policies issued before the effective date of this law must now include reinstated covenants or restrictions as exceptions to title.

The United States Supreme Court has expressed that in a contract clause case the first inquiry is whether the state law has, in effect, operated as a substantial impairment of a contractual relationship since severity of the impairment measures the height of the hurdle the state legislation must clear. Allied Structural Steel Co. v. Spannaus, 98 S.Ct. 2716, (1978). State statutes that impair contractual obligations are measured on a sliding scale of scrutiny. The degree of contractual impairment permitted is determined by the importance of the governmental interests advanced.[11] The Florida Supreme Court enumerated several factors it might weigh when determining whether a contractual impairment is permitted:

1.) Whether the law was enacted to deal with a broad economic or social problem;
2.) Whether the law operates in an area that was already subject to state regulation at the time the contract was entered into; and
3.) Whether the effect on the contractual relationship is temporary; not severe, permanent, immediate, and retroactive.[12]

The courts would have to weigh the severity of the impairment to determine whether the retroactive application of this provision is a violation of the federal or state prohibition against impairment of contracts.

B. RULE-MAKING AUTHORITY:

None

C. DRAFTING ISSUES OR OTHER COMMENTS:

Technical errors:

(1) Section 4, page 5, line 123; the reference to 712.03 (3) should be replaced with 712.01 (3).
(2) Section 4, page 4, line 91; it appears the term "restate" should be replaced with "reinstate."
(3) Section 4, page 5, line 128; it appears the term "restated" should be replaced with "reinstated."

The Real Property Probate and Trust Law Section of the Florida Bar have expressed opposition to the bill as written. They have stated that the bill is constitutionally infirm and impairs property rights.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

[9] see also Amendment V, United States Constitution
[10] see also Art. I, Sec. 10, United States Constitution.
[11] Yellow Cab Co. of Dade County v. Dade County, 412 So.2d 395 (Fla. 3d DCA 1982)
[12] Pompanio v. Cladridge of Pompano Condominium, Inc, 378 So.2d 774 (Fla. 1980)