

**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 Judiciary Committee

**BILL:** CS/SB 292

**INTRODUCER:** Judiciary Committee and Senators Dockery and Joyner

**SUBJECT:** Adverse Possession/Property

**DATE:** March 21, 2010      **REVISED:** \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Treadwell	Maclure	JU	<b>Fav/CS</b>
2.	_____	_____	CA	_____
3.	_____	_____	FT	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**Please see Section VIII. for Additional Information:**

A. COMMITTEE SUBSTITUTE.....  Statement of Substantial Changes

B. AMENDMENTS.....  Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

**I. Summary:**

This bill amends the current statutory process for gaining title to real property via an adverse possession claim without color of title. More specifically, the bill:

- Includes “occupation and maintenance” as one of the forms of proof of possession of property subject to adverse possession claims;
- Requires the property appraiser to provide notice to the owner of record that an adverse possession claim was made;
- Specifies that the Department of Revenue must develop a uniform adverse possession return;
- Requires the adverse possessor to provide a “full and complete” legal description on the return;
- Compels the adverse possessor to attest to the truthfulness of the information provided in the return under penalty of perjury;
- Requires an adverse possessor to describe, on the return, how he or she is using the property subject to the adverse possession claim;
- Includes emergency rulemaking authority for the Department of Revenue related to the adverse possession return;

- Specifies when the property appraiser may add and remove the adverse possessor to and from the parcel information on the tax roll; and
- Requires property appraisers to include a notation of an adverse possession claim in any searchable property database maintained by the property appraiser.

The bill also provides for priority of property tax payments made by owners of record by allowing for refunds of tax payments made by adverse possessors who submit a payment prior to the owner of record.

This bill substantially amends section 95.18, Florida Statutes, and creates section 197.335, Florida Statutes.

## II. Present Situation:

### Origins of Adverse Possession

The doctrine of adverse possession “dates back at least to sixteenth century England and has been an element of American law since the country’s founding.”<sup>1</sup> The first adverse possession statute appeared in the United States in North Carolina in 1715.<sup>2</sup>

Adverse possession is defined as “[a] method of acquisition of title to real property by possession for a statutory period under certain conditions.”<sup>3</sup> An adverse possessor must generally establish five elements in relationship to possession. The possession must be:

- Open;
- Continuous for the statutory period;
- For the entirety of the area;
- Adverse to the record owner’s interests; and
- Notorious.<sup>4</sup>

In most jurisdictions, state statutory law prescribes the limitations period – the period in which the record owner must act to preserve his or her interests in the property – while the state’s body of common law governs the nature of use and possession necessary to trigger the running of the statutory time period.<sup>5</sup> As legal scholars have noted, “[a]dverse possession decisions are inherently fact-specific.”<sup>6</sup> Therefore, an adverse possessor must establish “multiple elements whose tests are elastic and provide the trier of fact with flexibility and discretion.”<sup>7</sup>

<sup>1</sup> Alexandra B. Klass, *Adverse Possession and Conservation: Expanding Traditional Notions of Use and Possession*, 77 U. COLO. L. REV. 283, 286 (Spring 2006).

<sup>2</sup> Brian Gardiner, *Squatters’ Rights and Adverse Possession: A Search for Equitable Application of Property Laws*, 8 IND. INT’L & COMP. L. REV. 119, 129 (1997).

<sup>3</sup> *Id.* at 122 (quoting BLACK’S LAW DICTIONARY 53 (6th ed. 1990)).

<sup>4</sup> *Id.*

<sup>5</sup> Klass, *supra* note 1, at 287.

<sup>6</sup> Geoffrey P. Anderson and David M. Pittinos, *Adverse Possession After House Bill 1148*, 37 COLO. LAW 73, 74 (Nov. 2008).

<sup>7</sup> *Id.*

## Adverse Possession in Florida

In Florida, there are two ways to acquire land by adverse possession, which are prescribed by statute.<sup>8</sup> First, an individual adversely occupying property may claim property under color of title if he or she can demonstrate that the claim to title is the derivative of a recorded written document and that he or she has been in possession of the property for at least seven years.<sup>9</sup> It is irrelevant whether the recorded document is legally valid or is fraudulent or faulty. To demonstrate possession, the adverse possessor must prove that he or she cultivated or improved the land, or protected the land by a substantial enclosure.<sup>10</sup> Alternatively, in the event a person occupies land continuously without color of title – i.e., without any legal document to support a claim for title – the person may seek title to the property by filing a return with the county property appraiser’s office within one year of entry onto the property, and paying all property taxes and any assessed liens during the possession of the property for seven consecutive years.<sup>11</sup> Similar to claims made with color of title, the adverse possessor may demonstrate possession of the property by showing that he or she:

- Protected the property by a substantial enclosure (typically a fence); or
- Cultivated or improved the property.<sup>12</sup>

Florida courts have noted that “[p]ublic policy and stability of our society . . . requires strict compliance with the appropriate statutes by those seeking ownership through adverse possession.”<sup>13</sup> Adverse possession is not favored, and all doubts relating to the adverse possession claim must be resolved in favor of the property owner of record.<sup>14</sup> The adverse possessor must prove each essential element of an adverse possession claim by clear and convincing evidence.<sup>15</sup> Therefore, the adverse possession claim cannot be “established by loose, uncertain testimony which necessitates resort to mere conjecture.”<sup>16</sup>

## Abuse of the Adverse Possession Process

Despite certain policy considerations supporting the application of adverse possession in Florida,<sup>17</sup> abuse of the statute may be occurring in certain contexts because the adverse possessor

<sup>8</sup> *Candler Holdings Ltd. I v. Watch Omega Holdings, L.P.*, 947 So. 2d 1231, 1234 (Fla. 1st DCA 2007). In addition to adverse possession, a party may gain use of adversely possessed property by acquiring a prescriptive easement upon a showing of 20 years of adverse use.

<sup>9</sup> Section 95.16, F.S. See also *Bonifay v. Dickson*, 459 So. 2d 1089 (Fla. 1st DCA 1984). The Florida Legislature, by acts now embodied in statute, reduced the period of limitations as to adverse possession to seven years but left at 20 years the period for acquisition of easements by prescription. *Crigger v. Florida Power Corp.*, 436 So. 2d 937, 945 (Fla. 5th DCA 1983).

<sup>10</sup> Section 95.16, F.S.

<sup>11</sup> Section 95.18(1), F.S. The 1939 Legislature added to what is now s. 95.18(1), F.S., a provision which required that an adverse possessor without color of title must file a tax return and pay the annual taxes on the property during the term of possession. Chapter 19254, s. 1, Laws of Fla. (1939). A 1974 amendment to the statute eliminated the requirement that taxes be paid annually. Chapter 74-382, s. 1, Laws of Fla.

<sup>12</sup> Section 95.18(2), F.S.

<sup>13</sup> *Candler Holdings Ltd. I*, 947 So. 2d at 1234.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* (citing *Bailey v. Hagler*, 575 So. 2d 679, 681 (Fla. 1st DCA 1991)).

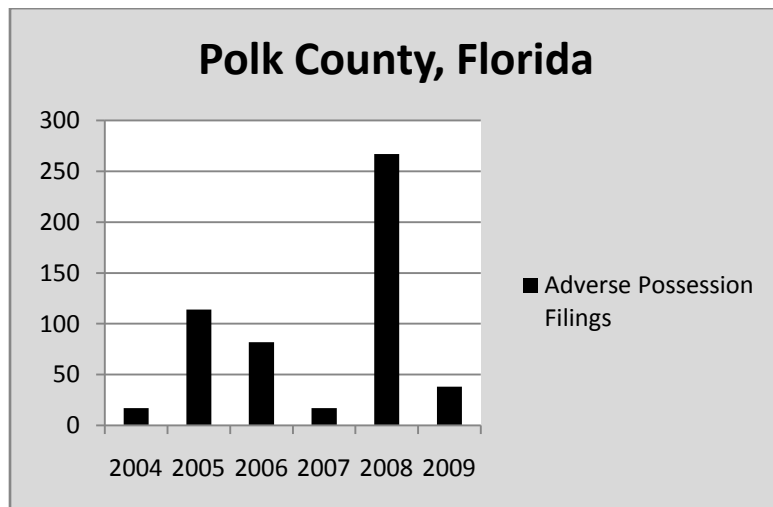
<sup>16</sup> *Id.* (quoting *Grant v. Strickland*, 385 So. 2d 1123, 1125 (Fla. 1st DCA 1980)).

<sup>17</sup> See Comm. on Judiciary, Fla. Senate, *Review of the Requirements for Acquiring Title to Real Property through Adverse Possession* (Interim Report 2010-123) (Oct. 2009), 2, available at <http://www.flsenate.gov/data/Publications/2010/Senate/>

may acquire title to property in instances where the record owner attempts to pay taxes and monitors the property. Some landowners in Florida<sup>18</sup> have expressed concern that individuals are capitalizing on the current adverse possession laws to gain title to adjoining properties, and that the burden to overcome these claims unfairly rests with the property owner of record. For example, in some counties, adjoining landowners have filed numerous adverse possession returns on several properties and have paid property taxes on those parcels in an attempt to claim title to the property by adverse possession despite any good faith claim to title. There is no boundary line dispute or other good faith belief that the title to the property lawfully belongs to the adverse possessor. In order to protect the owner’s property interests, he or she may be required to initiate litigation to eject the adverse possessor or to receive a judgment declaring his or her rights to the property. Significant legal fees and other costs may be associated with countering adverse possession claims.

**Adverse Possession Trends in Florida**

Some counties in Florida have experienced an influx of adverse possession claims, while other counties have received very few filings, or none at all, in recent years. For example, the following figure illustrates the number of adverse possession returns submitted to the Polk County Property Appraiser’s Office in recent years.<sup>19</sup>



Currently, Polk County has more than 500 adverse possession returns on record. In Orange County, there are 51 adverse possession returns on record out of 434,940 total parcels. The Brevard County Property Appraiser’s Office has between 100 and 150 adverse possession returns on record. Although the incidence of adverse possession claims appears to be more prevalent in rural areas in Florida, urban areas also experience adverse possession claims.

reports/interim\_reports/pdf/2010-123ju.pdf.

<sup>18</sup> Senate professional staff interviewed landowners subject to adverse possession claims, as well as real property practitioners, to gauge their experiences with the process. In some instances the record landowner may reside in another state. This absence from Florida may further impair the landowner’s ability to oppose an adverse possession claim.

<sup>19</sup> Data provided by the Polk County Property Appraiser’s Office.

## Senate Review of the Adverse Possession Framework

During the 2010 interim, the Florida Senate Committee on Judiciary (committee) studied the current adverse possession framework in Florida and identified potential reforms to the adverse possession process for landowners, particularly those who are subject to adverse possession claims.<sup>20</sup> Problems associated with the current adverse possession framework identified by the report include:

- **Notice to owners of record.** In some counties, owners of record may not receive notice that an adverse possession claim is being pursued against their property. The report recommended requiring the adverse possessor or the property appraiser to provide actual or constructive notice to the owner of record of the disputed property, if the owner can be determined, upon the submission of an adverse possession return to the property appraiser.
- **Enhancements to adverse possession return.** The adverse possession return, the first step in initiation of the adverse possession process, is not used uniformly throughout the state and does not require adverse possessors to submit significant information that protects the interests of owners of record without interfering with a person's right to pursue legitimate adverse possession claims. To address these concerns, the report recommended:
  - Adopting a uniform return for adverse possession claims to promote uniformity throughout the state;
  - Providing that the adverse possessor must give a detailed description of his or her possession and use of the disputed property on the return; and
  - Requiring adverse possessors to attest to the truthfulness of the information required in the return under penalty of perjury.
- **Adverse possession notations.** Some property appraisers do not provide a clear notation in the public property database maintained on their websites of an adverse possession claim. In these counties, a property owner cannot search the property appraiser's website to quickly discern whether an adverse possession claim has been filed against a particular parcel. The report recommended requiring property appraisers to include clear notations that adverse possession filings have been made in their public searchable property databases.
- **Administration of adverse possession claims.** Property appraisers do not currently have guidance regarding how to administer the adverse possession return once it has been submitted by the adverse possessor. The report noted that the Legislature could explore the option of prescribing the process for adding the adverse possessor to the parcel information on the tax roll, as well as when a property appraiser may remove the adverse possessor from that parcel information and remove the adverse possession return from the official records.

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<sup>20</sup> Comm. on Judiciary, Fla. Senate, *supra* note 17.

- **Priority of tax payments.** Under the current statutory framework, if an adverse possessor makes an annual property tax payment prior to the owner of record, the tax collector cannot accept a subsequent payment from the owner of record. The report noted that the Legislature could explore the option of establishing priority of tax payments to improve an owner of record's ability to pay taxes on his or property even if the adverse possessor makes the first tax payment.

The committee report included additional options available to the Legislature to discourage abuse of the adverse possession process and to improve the administration of these claims for the benefit of record landowners, adverse possessors, and those governmental entities that are responsible for the administration of these claims.

### III. Effect of Proposed Changes:

The bill amends the current process for gaining title to real property via an adverse possession claim without color of title.

#### **Possession of the Property**

The bill makes several changes to the current language included in the adverse possession (without color of title) statute for clarity, including a change designed to account for the establishment of "possession" in urban areas, and to make clear that property will be deemed to be possessed by the adverse possessor when:

- It is protected by a substantial enclosure;
- It has been usually cultivated or improved; or
- It has been occupied or maintained.

In effect, a person claiming adverse possession may establish possession under the statute by satisfying any of these three criteria. Because properties subject to adverse possession claims in urban areas may not, in some instances, be amenable to protection by a substantial enclosure, or cultivation or improvement, the bill allows the adverse possessor to establish possession by occupying or maintaining the property.

#### **Adverse Possession Return**

The bill makes several changes to the information contained in the adverse possession return submitted by an adverse possessor to initiate the adverse possession claim. The bill requires the Department of Revenue (DOR) to develop a uniform adverse possession return to be used throughout the state. In addition to the information contained on the current form developed by DOR, the bill requires the adverse possessor to provide a "full and complete" legal description on the return.<sup>21</sup> The adverse possessor must also attest to the truthfulness of the information contained on the form under penalty of perjury.<sup>22</sup>

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<sup>21</sup> The Department of Revenue created a sample form return for use by property appraisers, which included the following information: date of filing; date of entering into possession of the property; name and address of the claimant; legal description of the property; notarization clause; and receipt (to be completed by the property appraiser or a designated representative upon submission of the return). See Florida Dep't of Revenue, Form DR-452, *Form for Return of Real*

Finally, under the bill, the adverse possessor must provide a description of his or her use of the property in the return. For example, the adverse possessor may state in the return that he or she has fenced in the property subject to the claim, or is allowing his or her cattle to graze over the subject property. Upon submission of the return, the property appraiser must sign a receipt acknowledging submission of the return. The bill authorizes the property appraiser to refuse to accept a return if it fails to comply with the requirements prescribed in the bill.

### **Emergency Rulemaking Authority**

The bill grants the Department of Revenue (DOR) the authority to adopt emergency rules related to the changes to the adverse possession return. More specifically, the bill provides that the executive director of the DOR is authorized to adopt emergency rules for the purpose of implementing the additions and changes to the adverse possession return form created by DOR. These emergency rules may remain in effect for six months after the rules are adopted and may be renewed during the pendency of procedures to adopt final rules addressing the adverse possession return.

### **Notice to Owner of Record**

The bill requires the property appraiser to provide notice to the owner of record that an adverse possession return was submitted. The property appraiser must send to the owner of record a copy of the return, via regular mail. The property appraiser is also required to inform the owner of record that, under the provisions created in the bill and discussed in greater detail below, any tax payment made by the owner of record prior to April 1 following the year in which the tax is assessed will have priority over any tax payment made by the adverse possessor.

### **Property Appraiser's Administration of the Return**

Under the bill, upon receipt of the adverse possession return, the property appraiser must add a notation that an adverse possession claim has been initiated at the beginning of the first line of the legal description on the tax roll. Until a recent bulletin by the Department of Revenue advising otherwise, some property appraisers were adding the adverse possessor as an additional "owner" on the tax roll.<sup>23</sup> The property appraiser is also required to maintain the adverse possession return in the property appraiser's records.

The bill also delineates when the property appraiser may remove the adverse possessor from the parcel information contained in the tax roll. Under the bill, the property appraiser must remove the notation to the legal description on the tax roll that an adverse possession return has been submitted if:

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*Property in Attempt to Establish Adverse Possession without Color of Title* (rev. Aug. 1993).

<sup>22</sup> A person who knowingly made a false declaration on the return would be guilty of the crime of perjury by false written declaration, which is a third-degree felony, punishable by imprisonment not to exceed five years and a fine not to exceed \$5,000. Section 92.525(3), F.S.

<sup>23</sup> Florida Dep't of Revenue, *Florida Department of Revenue Property Tax Information Bulletin: Return of Real Property in Attempt to Establish Adverse Possession without Color of Title, Form DR-452* (Jan. 25, 2010).

- The adverse possessor notifies the property appraiser in writing that he or she is withdrawing the claim;
- The owner of record provides a certified copy of a court order, entered after the date of the submission of the return, establishing title in the owner of record;
- The property appraiser receives a recorded deed, filed after the date of the submission of the return, transferring title of the same property subject to the claim from the adverse possessor to the owner of record; or
- The tax collector or owner of record submits to the property appraiser a receipt demonstrating that the owner of record has made an annual tax payment for the property subject to the adverse possession claim during the period that the person is claiming adverse possession.

If any one of these events occurs, the property appraiser must also remove the adverse possession return from the property appraiser's records.

### **Adverse Possession Filing Notation**

The bill requires every property appraiser who maintains a public searchable database to provide a clear and obvious notation in the parcel information of the database maintained by the property appraiser that an adverse possession return has been submitted for the particular parcel. Those property appraisers who do not currently offer a searchable database to the public are not subject to this requirement, unless they offer a searchable database to the public in the future.

### **Priority of Tax Payments**

The bill provides for priority of property tax payments made by owners of record whose property is subject to an adverse possession claim. Under current law, if an adverse possessor makes a tax payment prior to the owner of record, the tax collector is not authorized to accept a subsequent payment by the owner of record. Conversely, under the bill, if an adverse possessor makes an annual tax payment on property subject to the adverse possession claim, and the owner of record subsequently makes a tax payment prior to April 1, the tax collector is required to accept the owner of record's payment. Within 60 days, the tax collector must then refund the adverse possessor's tax payment. The bill specifies that the refund to the adverse possessor is not subject to approval from the Department of Revenue.<sup>24</sup>

The bill also specifies that, upon receipt of a subsequent payment for the same annual tax assessment for a particular parcel, the tax collector must determine if an adverse possession return has been submitted on the particular parcel. If a return has been submitted, the tax collector must refund the payment made by the adverse possessor and afford the owner of record priority of payment as specified in the bill.

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<sup>24</sup> Currently, certain refunds of \$400 or more must be approved by the Department of Revenue prior to the tax collector's remittance of the refund. *See* s. 197.182(1)(i), F.S.



### **Effective Date**

The bill has an effective date of July 1, 2010, and applies to adverse possession claims in which the return was submitted on or after this date, except for the procedural provisions governing the property appraiser's administration of the adverse possession claims included in proposed s. 95.18(4)(c) and (d) (requiring the property appraiser to add a notation of the adverse possession filing and maintain a copy of the return) and (5), F.S. (delineating when the property appraiser may remove the adverse possession notation). These provisions will apply to adverse possession claims in which the return was submitted before, on, or after July 1, 2010.

### **Other Potential Implications:**

Establishment of priority of tax payments made by owners of record whose properties are subject to an adverse possession claim would represent a significant policy shift that could effectively preclude an adverse possessor from obtaining title to property, because the adverse possessor may be unable to satisfy the tax-payment element of the adverse possession statute. The current statutory framework contemplates that the tax payment is a necessary step for the person claiming adverse possession to gain title to the property. Therefore, current practice by tax collectors is to accept a payment made by an adverse possessor if made prior to a payment by the owner of record.

## **IV. Constitutional Issues:**

### **A. Municipality/County Mandates Restrictions:**

By requiring a property appraiser to send a notice by regular mail to the owner of record when an adverse possession return is submitted, local governments are required to take action requiring the expenditure funds. However, the measure would appear to be exempt from the State Constitution's restrictions governing local mandates because the fiscal impact appears to be insignificant due to the minimal number of adverse possession claims generally submitted in a county each year.<sup>25</sup>

### **B. Public Records/Open Meetings Issues:**

None.

### **C. Trust Funds Restrictions:**

None.

### **D. Other Constitutional Issues:**

This bill specifically applies some of its procedural provisions retroactively to existing cases in which a person has submitted an adverse possession return to the property appraiser. Retroactive operation is disfavored by courts and generally "statutes are prospective, and will not be construed to have retroactive operation unless the language

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<sup>25</sup> FLA. CONST. art. VII, s. 18(d).

employed in the enactment is so clear it will admit of no other construction.”<sup>26</sup> The Florida Supreme Court has articulated four issues to consider when determining whether a statute may be retroactively applied:

- Is the statute procedural or substantive?
- Was there an unambiguous legislative intent for retroactive application?
- Was a person’s right vested or inchoate?
- Is the application of the statute to these facts unconstitutionally retroactive?<sup>27</sup>

The general rule of statutory construction is that a procedural or remedial statute may operate retroactively, but that a substantive statute may not operate retroactively without clear legislative intent. Substantive laws either create or impose a new obligation or duty, or impair or destroy existing rights, and procedural laws enforce those rights or obligations.<sup>28</sup> The provisions that this bill applies retroactively relate to the property appraisers’ administration of the return by adding or removing the return from their records. These procedural steps by the property appraiser would not appear to impair the vested rights of persons pursuing adverse possession claims.

Additionally, the bill makes it clear that it is the Legislature’s intent to apply the law retroactively. “Where a statute expresses clear legislative intent for retroactive application, courts will apply the provision retroactively.”<sup>29</sup> A court will not follow this rationale, however, if applying a statute retroactively will impair vested rights, create new obligations, or impose new penalties.<sup>30</sup> This bill does not appear to do any of these things.

Accordingly, the retroactive application of certain procedural provisions included in the bill does not appear to raise constitutional concerns.

## V. Fiscal Impact Statement:

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

Some landowners whose properties are subject to adverse possession claims may be relieved from certain litigation costs associated with opposing the claim.

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<sup>26</sup> Norman J. Singer and J.D. Shambie Singer, *Prospective or retroactive interpretation*, 2 SUTHERLAND STATUTORY CONSTR. s. 41:4 (6th ed. 2009).

<sup>27</sup> *Weingrad v. Miles*, 2010 WL 711801, \*2 (Fla. 3d DCA 2010) (internal citations omitted).

<sup>28</sup> See *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994); *In re Rules of Criminal Procedure*, 272 So. 2d 65, 65 (Fla. 1972).

<sup>29</sup> *Weingrad*, 2010 WL 711801 at \*3.

<sup>30</sup> *Id.* at \*4.

**C. Government Sector Impact:**

Those property appraisers maintaining a public database may experience a minimal fiscal impact associated with the new requirement to provide a clear-and-obvious notation in the parcel information of any public searchable property database maintained by the property appraiser that an adverse possession return has been submitted. In addition, the property appraiser may experience a minimal increase in administrative costs associated with providing notice to the owner of record that the claim has been filed, as well as determining when an adverse possessor may be removed from the parcel information on the tax roll.

Tax collectors may also experience an increase in administrative costs associated with processing payments by adverse possessors and remitting refunds to adverse possessors when duplicate tax payments are made by owners of record. Because the number of adverse possession filings in most counties is minimal, these costs are not likely to be significant.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:****A. Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)**CS by Judiciary on March 18, 2010:**

The committee substitute:

- Includes “occupation and maintenance” as an option for proof of possession necessary to satisfy an adverse possession claim without color of title;
- Requires the property appraiser (rather than the adverse possessor as required under the bill) to provide notice to the owner of record that an adverse possession claim was made;
- Specifies that the Department of Revenue must develop a uniform adverse possession return;
- Requires the adverse possessor to provide a “full and complete” legal description on the return;
- Compels the adverse possessor to attest to the truthfulness of the information provided in the return under penalty of perjury;
- Requires an adverse possessor to describe, on the return, how he or she is using the property subject to the adverse possession claim;
- Includes emergency rulemaking authority for the Department of Revenue related to the adverse possession return;

- Specifies when the property appraiser may add and remove the adverse possessor to and from the parcel information on the tax roll;
- Requires property appraisers to include a notation of an adverse possession claim in any searchable property database maintained by the property appraiser;
- Requires the tax collector to determine if a subsequent payment on the same annual tax assessment is for a parcel subject to an adverse possession claim;
- Provides for priority of property tax payments made by owners of record by allowing for refunds of tax payments made by adverse possessors who submit a payment prior to the owner of record; and
- Provides for retroactive application of certain provisions governing the administration of adverse possession claims by the property appraiser.

B. Amendments:

None.