**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 Environmental Preservation and Conservation Committee

| | |
|---|---|
| BILL: | CS/SB 518 |
| INTRODUCER: | Judiciary Committee and Senator Baker |
| SUBJECT: | Marketable Record Title |
| DATE: | March 22, 2010 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Maclure | Maclure | JU | **Fav/CS** |
| 2. | Kiger | Kiger | EP | **Favorable** |
| 3. | | | GA | |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

## Please see Section VIII. for Additional Information:

| | | |
|---|---|---|
| A. COMMITTEE SUBSTITUTE..... | X | Statement of Substantial Changes |
| B. AMENDMENTS..... | | Technical amendments were recommended |
| | | Amendments were recommended |
| | | Significant amendments were recommended |

## I. Summary:

The Marketable Record Title Act (MRTA) provides that one who holds title to land, based on a root of title at least 30 years old, takes free and clear ownership of title and extinguishes all matters arising prior to the root of the title which are not referenced in the root of title. This bill creates an exception, by providing that a property interest held by the Board of Trustees of the Internal Improvement Trust Fund, any water management district, or the United States government is not extinguished under the operation of MRTA.

The bill also provides an alternative method for notifying the purported owner of the property that a person has filed a notice with the clerk of court preserving an interest in land under MRTA. As an alternative to the current process in which the clerk mails a copy of the notice to the owner, the bill authorizes the person attempting to preserve a land interest to publish the notice in a newspaper once a week for two consecutive weeks. The newspaper publication must, among other things, include the book and page number where the notice is recorded in the clerk's official records.

This bill substantially amends the following sections of the Florida Statutes: 712.03, 712.04, and 712.06.

## II. Present Situation:

### Marketable Record Title Act

#### *Overview & Exceptions*

Enacted in 1963, the Florida Marketable Record Title Act (MRTA or act) provides that one who holds title to land based on a root of title at least 30 years old takes free and clear ownership of title and extinguishes all matters arising prior to the root of the title which are not referenced in the root of title.[1] The act specifies that the extinguished interests are declared "null and void"[2]

As described by one court, the act's purpose is "to extinguish claims which are at least 30 years old and which predate the root of title of the property in question."[3] In this regard, the MRTA is a statute of limitation, "in that it requires stale demands to be asserted within a reasonable time."[4] The act is cited as an attempt to simplify title searches and stabilize property law in the state. Prior to the enactment of MRTA:

> [t]he same title chain was examined and re-examined many times over to ascertain flaws that might exist from the time of the original patent or deed to the date of examination. … Basically, MRTA states that if an interest has a record chain of title going back over a statutorily defined period of time, with no defects in the title during that time period, then all conflicting claims previous to such time period are extinguished.[5]

The MRTA delineates exceptions to marketability, which are rights or interests that are not affected or extinguished by the marketable record title.[6] Examples of some of the current statutory exceptions include:

- Interests, easement, and use restrictions disclosed by the documentary evidence of title;
- Interests preserved by filing a notice as provided under the act;
- Rights of a person in possession of the lands; and
- Interests arising from a title transaction that was recorded after the effective date of the root of title.[7]

Amid concerns about the effect of MRTA on the sovereignty of state lands, the Legislature in 1978 created a specific exception for "[s]tate title to lands beneath navigable waters acquired by virtue of sovereignty."[8] Uncertainty followed the 1978 enactment, however, in part because of

---

[1] Section 712.02, F.S.
[2] Section 712.04, F.S.
[3] *Berger v. Riverwind Parking, LLP*, 842 So. 2d 918, 920 (Fla. 5th DCA 2003).
[4] *City of Miami v. St. Joe Paper Co.*, 364 So. 2d 439, 442 (Fla. 1978).
[5] J. David Liebman, *Public Versus Private Ownership of Land in Florida: Ethical Considerations*, 20 STETSON L. REV. 187, 189 (1990). *See also* Gary A. Poliakoff and Donna D. Berger, *The Reinstatement of Covenants, Conditions, and Restrictions Extinguished by the Marketable Record Title Act*, 79 FLA. B.J. 14, 14 (May 2005) (noting that, as a result of the act, a title examination would not have "to search title back to the Spanish land grants").
[6] Section 712.03, F.S.
[7] Section 712.03(1)-(4), F.S.
[8] Chapter 78-288, Laws of Fla.; s. 712.03(7), F.S.

the fact that the legislation did not specify if it applied retroactively and in part because the new language did not address the state's title to sovereignty lands that had become dry.[9] The Florida Supreme Court resolved some of the uncertainty by ruling in 1986 that MRTA does not apply to sovereignty lands. Specifically, the court held that the "legislative purpose of simplifying and facilitating land title transactions does not require that the title to navigable waters be vested in private interests."[10]

An additional exception to MRTA that may exempt governmental interests is the specific exception for restrictions or covenants recorded under the state's pollutant discharge prevention and removal law or environmental control law.[11] Another exception under the act exempts recorded or unrecorded easements or rights of way from extinguishment, when any parts of them are in use. [12] These protected easements or rights-of-way could include those belonging to a public utility or a governmental agency. The easement exception may also implicate governmental entities that acquire conservation easements and land protection agreements.

In light of their vast landholdings, the state's water management districts and the Board of Trustees of the Internal Improvement Trust Fund are affected by MRTA, in terms of monitoring the status of title of land holdings, filing notices to protect interests, and defending interests in land holdings which may be challenged based on the act.

***Notice to Preserve Interest or Covenant***

A person claiming an interest in land, or a homeowners' association that wants to preserve a covenant or restriction, may file a notice with the clerk of the circuit court of the county in which the land is located. If the notice is filed during the 30-year period immediately after the effective date of the root of title and complies with the statutory requirements, the notice preserves the claim or covenant for at least 30 years.[13] The clerk shall record and index the notice in the same manner that deeds are handled, and the clerk shall charge the same price for recording a deed.[14] In addition, once the notice is filed, the clerk shall send a copy of the notice to the purported owner of the property, via registered or certified mail.[15] The person filing the notice must pay the clerk a fee for the cost of the mailing, as well as a fee for a certificate evidencing the mailing.[16]

**Water Management Districts; Board of Trustees of Internal Improvement Trust Fund**

There are five regional water management districts in the state, responsible for water supply, water quality, flood protection and floodplain management, and natural systems protection.

---

[9] David L. Powell, *Unfinished Business – Protecting Public Rights to State Lands from Being Lost under Florida's Marketable Record Title Act*, 13 FLA. ST. U. L. REV. 599, 615-16 (1985).
[10] *Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So. 2d 339, 344 (Fla. 1986).
[11] Section 712.03(8), F.S. The cited pollutant discharge prevention and removal law and environmental control law are chapters 376 and 403, F.S., respectively.
[12] Section 712.03(5), F.S.
[13] Sections 712.05(1) and 712.06(2), F.S.
[14] Section 712.06(2), F.S.
[15] In the case of a notice that pertains solely to preservation of a covenant or restriction, the clerk of court is not required to mail a copy of the notice to the purported owner of the property. Section 712.06(3), F.S.
[16] *Id*. The fee for the certificate of mailing is $7 (s. 28.24(8), F.S.), while the recording fee is based, in part, on the number of pages of the document (e.g., $5 for the first page, and $4 for each additional page) (s. 28.24(12), F.S.).

Water management districts are responsible for issuing several types of environmental permits, including, consumptive use permits and environmental resource permits. The Florida Constitution authorizes the districts to levy ad valorem taxes upon the assessed value of real property within each district's boundaries.[17]

The districts are also authorized to acquire land as part of their efforts to conserve and protect water resources. As the Office of Program Policy Analysis and Government Accountability reports:

> The districts have acquired large amounts of land to fulfill their statutory responsibilities to reduce the risk of flooding, protect and improve water quality, protect water recharge areas for water supply, and restore and protect natural systems as well as to provide public access and recreational opportunities. State law requires that district-owned lands be managed and maintained to ensure a balance between public access, recreational opportunities, and environmental restoration and protection. … [T]he five water management districts own 2.7 million acres of land, and serve as "lead manager" for 1.4 million of these acres (the remaining 1.3 million acres are managed by other state agencies and local governments).[18]

The Board of Trustees of the Internal Improvement Trust Fund, comprised of the governor and members of the Florida Cabinet, is responsible for the acquisition, administration, management, control, supervision, conservation, and disposition of all state lands, with some exceptions. It directs the acquisition and disposal of lands by the Division of State Lands. The division is responsible, among other duties, for maintaining the records of and setting the boundary lines of lands owned by the board. The division provides oversight for approximately 11 million acres of state lands, including uplands, offshore and coastal bays, and inland waters.[19]

## III. Effect of Proposed Changes:

### Exception to Marketable Record Title Act for Certain Governmental Interests

This bill provides that a property interest held by the Board of Trustees of the Internal Improvement Trust Fund, any water management district, or the United States government is not extinguished under the Florida Marketable Record Title Act (MRTA). The bill creates an exception for these land interests to the general rule under MRTA that a person who is vested with an estate in land of record for 30 years or more has record title free and clear from all claims. Thus, even if a person can establish a record chain of title extending over the 30-year

---

[17] Office of Program Policy Analysis and Government Accountability, The Florida Legislature, Government Program Summaries, *Department of Environmental Protection: Water Management Districts* (last updated Oct. 30, 2009), http://www.oppaga.state.fl.us/profiles/6145/ (last visited Mar. 14, 2010).

[18] Office of Program Policy Analysis and Government Accountability, The Florida Legislature, *Florida's Water Management District Land Management: Options for Legislative or District Governing Board Consideration*, Sunset Memorandum, 2 (Jan. 28, 2008), http://www.oppaga.state.fl.us/monitordocs/reports/pdf/07-S26.pdf.

[19] Office of Program Policy Analysis and Government Accountability, The Florida Legislature, Government Program Summaries, *Department of Environmental Protection: State Lands* (last updated Nov. 4, 2009), http://www.oppaga.state.fl.us/profiles/6143/ (last visited Mar. 14, 2010); Florida Cabinet, *Cabinet Process Summary*, http://www.myflorida.com/myflorida/cabinet/cabprocess.html (last visited Mar. 14, 2010).

period, a conflicting claim by the board, a water management district, or the federal government is not extinguished.

The bill amends s. 712.03, F.S., to add the newly created exception to the list of existing exceptions to MRTA prescribed in that section of statute. The bill also makes conforming and technical changes to s. 712.04, F.S.

**Alternative Method for Notifying Property Owner of Recorded Interest**

The bill revises the notification process that occurs when a person records a notice that is designed to preserve an interest in land from being extinguished under MRTA. Currently, once the notice is filed with the clerk of court, the clerk mails a copy of the notice to the purported owner of the property, with the mailing expenses being paid by the person who is trying to preserve an interest in the land. As an alternative to that notification process, the bill authorizes the person who is trying to preserve the interest to publish the notice in a newspaper after the notice is recorded with the clerk. The newspaper notice must be published once a week for two consecutive weeks, include the book and page number where the notice is recorded in the clerk's official records, and include the name of the county where the property is located.

Newspaper publication of the notice must comply with chapter 50, F.S. That chapter specifies, among other things, that an eligible newspaper must be published at least once per week, contain at least 25 percent of its words in English, and be available for sale to the public generally.[20] The bill does not, however, specify in what county the person trying to preserve an interest in the land must publish the notice. Under current law, the notice itself must be recorded with the clerk of court in the county or counties where the land is located.[21] If the Legislature's intention is that the newspaper notification also should occur in the county or counties in which the land is located, it may wish to specify so in the bill.

The bill also specifies that a person who is trying to preserve a land interest, and who elects to use newspaper notification as an alternative to the clerk-mailing process, must publish the newspaper notice "in the manner provided in s. 712.05[,F.S.]." However, this reference to s. 712.05, F.S., may be unclear, because that statutory section does not prescribe a manner of publishing notices. Rather, it provides the general authority to preserve an interest in land from being extinguished under MRTA through a notice process. The actual content of the notice and manner of recording the notice through the clerk of court are prescribed in s. 712.06, F.S.

**Effective Date**

The bill provides an effective date of July 1, 2010.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

None.

[20] Section 50.011, F.S.
[21] Section 712.06(2), F.S.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Unless the Legislature specifies otherwise, legislation is presumed to operate prospectively, particularly if retroactive application would impair existing rights.[22] This bill specifies that is takes effect on July 1, 2010. Because the bill is silent on the issue of retroactivity, it is presumed to operate prospectively. Thus, it does not appear that the bill attempts to revive or restore property interests held by the Board of Trustees of the Internal Improvement Trust Fund, any water management district, or the federal government which are already extinguished under the provisions of the Marketable Record Title Act (MRTA). To the extent the bill attempted to restore extinguished property interests, it might raise constitutional concerns regarding the impairment of vested rights of persons who enjoy free and clear ownership of title under the provisions and operation of MRTA.

## V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Persons who might otherwise have free-and-clear marketable title in property may not be able to extinguish interests in the property held by the Board of Trustees of the Internal Improvement Trust Fund, water management districts, or the federal government.

The bill also provides an alternative method for notifying the purported owner of the property when a person records a notice preserving an interest in land under the Marketable Record Title Act. To the extent that the newspaper advertisement process authorized by the bill is less expensive or more economically efficient than the current process of paying costs of mailing and a fee for the clerk of court to certify mailing of the notice, persons preserving an interest in land may benefit.

C. Government Sector Impact:

The water management districts and the Board of Trustees of the Internal Improvement Trust Fund may experience reduced litigation or other costs related to protecting property interests of the state.

[22] *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352 (Fla. 1994).

The bill authorizes newspaper publication as an alternative method for notifying the purported owner of the property when a person records a notice preserving an interest in land under the Marketable Record Title Act. To the extent that people avail themselves of this newspaper alternative instead of the current process of paying a fee to the clerk of court to mail the notice, clerks may collect less revenue related to the mailing service.

## VI. Technical Deficiencies:

Currently, s. 712.06(3), F.S., provides that the clerk of court shall mail a copy of the notice to the purported owner of the property *and* shall enter on the original notice, before recording it, a certificate showing that the mailing occurred. The bill (lines 48-50) amends part of this statute to provide that the person providing the notice "shall cause the clerk" to mail a copy of the notice. As a result of the wording change, when read in conjunction with existing provisions, the bill on line 52 suggests that the person filing the notice (rather than the clerk) shall enter on the original notice, before recording it, a certificate showing that the mailing occurred. Because the clerk is the one doing the mailing and because the clerk is responsible for recording documents, the Legislature may wish to amend line 52 to clarify that the clerk shall take these latter steps, or that the person providing the notice shall cause the clerk to take these steps.

## 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 amends s. 712.06, F.S., to provide an alternative method for notifying the purported owner of the property that a person has filed a notice with the clerk of court preserving an interest in land under MRTA. As an alternative to the current process in which the clerk mails a copy of the notice to the owner, the bill authorizes the person attempting to preserve a land interest to publish the notice in a newspaper once a week for two consecutive weeks.

### B. Amendments:

None.