

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 267 Real Property Liens and Conveyances

SPONSOR(S): Wood

TIED BILLS: None **IDEN./SIM. BILLS:** SB 404

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	12 Y, 0 N	Keegan	Bond
2) Local & Federal Affairs Committee	17 Y, 0 N, As CS	Nelson	Rojas
3) Judiciary Committee			

SUMMARY ANALYSIS

Current Florida law requires that the form of a warranty deed conveying real property include a blank space for the grantee's social security number. Providing this social security number on a warranty deed is not mandatory, and failure to do so does not affect the validity of the deed.

A lien is a form of security interest to ensure payment of a debt or other obligation. In general, a lien or other encumbrance against real property is legally binding against the owner of the property from the time the lien is created. However, certain unrecorded liens may also affect the title to real property.

The CS for HB 267 removes the requirement to include the space for a social security number on a warranty deed. The bill further requires that a lien against real property must be recorded in the official records of a county in order to be valid. This bill only applies to liens entered by a governmental or quasi-governmental entity for services, fines, or penalties, and does not affect liens for taxes, non-ad valorem or special assessments, or utilities.

The bill does not appear to have a fiscal impact on state government, and may have an indeterminate, minimal fiscal impact on local governments.

The CS for HB 267 has an effective date of October 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

The Statutory Warranty Deed Form

A warranty deed memorializes the transfer of real property,¹ and current Florida law provides a form for these deeds. However, this statutory form is not required for a deed to be valid.² If a warranty deed substantially conforms to the statutory form, the deed will convey real property.

The statutory warranty deed form includes a blank space for the social security number of the individual (or individuals) acquiring real property (known as a "grantee").³ This requirement originally was added to the warranty deed form in 1988.⁴ There is no penalty for failure to include a grantee's social security number on a warranty deed,⁵ and it is commonly omitted.

This blank space requirement was created legislatively in the course of alimony and child support reform.⁶ The apparent purpose of the space was to allow more effective recordkeeping of real property for the purpose of collecting overdue child support.⁷ However, the requirement does not achieve this goal because the social security number is not indexed. There is no other obvious use for a social security number on a deed.

Lien Recording Requirements

A lien is a form of security interest to ensure payment of a debt or other obligation.⁸ Liens include mortgages,⁹ construction liens, and other liens authorized judicially, statutorily or consensually. In general, a lien or other encumbrance against real property is legally binding against the owner of the property from the time the lien is created.¹⁰ However, a lien normally is not effective against the rights of another lienholder unless that lienholder has notice of the lien.¹¹

A lienholder may comply with this notice requirement by recording the lien in the official records, which are retained by the clerk of court in the county where the property is located.¹² The law recognizes the date a lien is recorded as the presumptive date the lien becomes effective against other parties, determining priority of the lien, i.e., "first in time, first in line."¹³

Florida has a recording statute which provides:

¹ Section 689.03, F.S.

² Section 689.03, F.S.; 19 FLA. PRAC. SERIES, §3:8 (2012-2013 ed.).

³ Section 689.02(2), F.S.

⁴ S.B. 487, 1987-1988 Reg. Sess. (Fla. 1988).

⁵ Section 689.02(2), F.S.

⁶ Chapter 88-175, L. O. F.

⁷ Florida Dept. of Revenue, Office of Child Support Enforcement, *1988 HRS Legislative Proposal* (1988) (on file with the State Archives of Florida.)

⁸ 19 FLA. PRAC. SERIES, *Florida Real Estate* § 37:1 (2012-2013 ed.).

⁹ Under Florida law, a mortgage is a specific lien on the property and not a conveyance of the legal title or the right to possession. *See*, s. 697.02, F.S.

¹⁰ *Id.*

¹¹ *Argent Mortg. Co., LLC v. Wachovia Bank, N.A.*, 52 So.3d 796, 799 (Fla. 5th DCA 2010).

¹² *City of Palm Bay v. Wells Fargo Bank*, 57 So.3d 226 (Fla. 5th DCA 2011); *Argent Mortg. Co., LLC v. Wachovia Bank, N.A.*, 52 So.3d 796, 799 (Fla. 5th DCA 2010); s. 695.11, F.S.; s. 28.222, F.S.

¹³ *Id.*

No conveyance, transfer, or mortgage of real property, or of any interest therein, nor any lease for a property, or of any interest therein, nor any lease for a term of 1 year or longer, shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to law; nor shall any such instrument made or executed by virtue of any power of attorney be good or effectual in law or in equity against creditors or subsequent purchasers for a valuable consideration and without notice unless the power of attorney be recorded before the accruing of the right of such creditor or subsequent purchaser. See, s. 695.01, F.S.

However, there is a class of liens commonly referred to as “hidden liens,” which are not recorded in the official records.¹⁴ Local governments may impose liens on real property for improvements, services, costs of repairs and associated penalties levied in accordance with local building code enforcement.¹⁵ A number of local governments are of the opinion that s. 695.01, F.S., does not apply to their liens.¹⁶ When these liens are not recorded, a general title or public records search will not reveal that a lien is attached to the title of property.

According to the Real Property, Probate, and Trust Law (RPPTL) Section of the Florida Bar, liens assessed and maintained by a municipality, or one of its divisions, often are undetected due to:

- the difficulty in finding unrecorded liens;
- confusion regarding which branch of government has the right to impose the liens; and
- lack of knowledge concerning whom to contact to determine the existence of possible liens.

In an unscientific polling of local governments by the RPPTL Section, only 60.8 percent of the respondents recorded all of their liens. The result is that liens often are unpaid for extended periods, and through successive mortgages and transfers of ownership, with the burden of these liens falling on innocent purchasers. Non-record liens are not covered by Florida title insurance policies, except in rare instances.¹⁷

Courts have upheld hidden liens in various circumstances.¹⁸

Effect of Proposed Changes

The CS for HB 267 amends s. 689.02(2), F.S., to remove the specification that warranty deeds contain a blank space for the grantee’s social security number. This change will have no effect on any verifiable need for the social security number on these documents, and prevent the unnecessary use of such numbers. See, the **III. COMMENTS**, C. DRAFTING ISSUES OR OTHER COMMENTS section of this analysis, below, for a discussion of the use of social security numbers on official documents and how this practice may facilitate identity fraud.

¹⁴ Wanda Borges, *Hidden Liens: Who is Entitled to What?*, 103 COM. L.J. 284, 285 (1998).

¹⁵ Chapter 162, F.S., covers the powers of counties and municipalities to enforce municipal and county codes. Counties and municipalities are authorized to appoint code enforcement boards with authority to impose administrative fines and other noncriminal penalties to provide an equitable, expeditious, effective, and inexpensive method for enforcing local codes and ordinances, where a pending or repeated violation continues to exist. The local government may record in the public records a certified copy of an order imposing a code enforcement fine, thereby constituting a lien against the land where the violation exists and upon any other real or personal property owned by the violator. No lien may continue for a period longer than 20 years after the certified copy of an order imposing a fine has been recorded, unless within that time an action is brought to foreclose on the lien or to sue to recover a money judgment for the lien plus interest. The local government also is allowed to collect all costs incurred in recording and satisfying a valid lien.

¹⁶ March 4, 2013, conversation with Russ Hale, attorney for the Florida Banker’s Association.

¹⁷ The Real Property, Probate, and Trust Law Section of the Florida Bar, *White Paper: Fair Notice of Governmental Liens* (on file with the Local and Federal Affairs Committee, Florida House of Representatives).

¹⁸ *Dade County v. Certain Lands*, 247 So.2d 787, 789 (Fla. 3rd DCA 1971).

The bill also amends s. 695.01(3), F.S., to require that governmental and quasi-governmental entities¹⁹ record liens that attach to real property in order for the liens to be effective against creditors or subsequent purchasers, thereby protecting purchasers of real property from hidden liens.

This bill only pertains to governmental or quasi-governmental liens for improvements, services, fines, or penalties, and does not apply to liens for taxes, non-ad valorem or special assessments, or utilities, as these liens are readily identified via public records. A properly recorded lien must include the property owner's name, a property description or address, and the tax or parcel identification number. This requirement serves to prevent instances in which property descriptions have been incomplete or incomprehensible, and consequently incorrectly posted.

The elimination of lien rights will not affect liability for the underlying debt. That is, where a hidden lien is prohibited and the entity elects not to record a lien, the underlying debt is still owed and remains collectible. In practice, however, a debt without a lien is considered difficult to collect.

B. SECTION DIRECTORY:

Section 1: amends s. 689.02(2), F.S., regarding the statutory warranty deed form.

Section 2: amends s. 695.01(3), F.S., regarding lien recording.

Section 3: provides an effective date of October 1, 2013.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill does not appear to have an impact on state revenues.

2. Expenditures:

This bill does not appear to have an impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

Some local governments may experience an increase in revenues as a result of increased collection on recorded liens, which are more easily detected by property owners and title insurance companies. However, the fiscal impact is indeterminate.

2. Expenditures:

This bill may have an unknown impact on local government expenditures. See, FISCAL COMMENTS, below.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill does not appear to have a direct economic impact on the private sector.

D. FISCAL COMMENTS:

¹⁹ While these terms are not defined by ch. 695, F.S., "governmental entity" typically refers to a state agency, a county agency, or any other entity, however styled, that independently exercises any type of state or local governmental function. See, s. 11.45, F.S. A "quasi-governmental" entity may be found by the courts in instances where a private body performs public functions. See, *Turkey Creek, Inc. v. Londono*, 567 So.2d 943, Fla.App. 1 Dist., 1990.

The CS for HB 267 is likely to have a positive but unknown fiscal impact on the private sector. It appears that this bill will lower transaction costs and limit unknown liabilities of transfer agents and purchasers of real property.

It is unknown how many local governments do not record liens. Local governments may be able to elect one of three apparent means by which to respond to this bill, with the following fiscal impacts:

- A local government may elect to record previously unrecorded liens. Most liens only require a single page, which has a recording cost payable to the clerk of court or county recorder of \$10.00.²⁰ The cost to such a local government would be these recording costs, which could ultimately be recoverable.
- A local government may elect to amend any relevant ordinance to add the recording cost to the amount of the outstanding lien.
- A local government may elect to forgo recording liens and attempt to collect such monies without utilizing liens. In this case, the local government would save on “up front” recording costs, but may experience a decline in its collections rate.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

This bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Drafting Issues

None.

Other Comments

In 2002, the Office of Statewide Prosecution issued an interim report from the 16th Statewide Grand Jury on identity theft in Florida. The report implies that social security number requirements facilitate identity theft. Reforms were passed in 2002 in reaction to this report, including an amendment to s. 119.0714, F.S., which prohibits including social security numbers on official records unless expressly required by law.

²⁰ FLORIDA COURT CLERKS & COMPTROLLERS, DISTRIBUTION SCHEDULE 73 (2012), available at http://www.flclerks.com/public_info.html (last viewed Feb. 11, 2013).

The Florida Department of Revenue (DOR) neither receives nor uses the social security numbers on deeds for the purpose of collecting child support or alimony. DOR has indicated that it does not foresee any problem with eliminating the blank space for a social security number on warranty deeds.²¹

This bill is supported by the Real Property, Probate and Trust Law Section of the Florida Bar,²² the Florida Land Title Association, and the Florida Bankers Association. The Florida Association of Counties has no concerns with this bill.²³ The Florida League of Cities does not support the bill.

Any businesses that have been established to research unrecorded liens will undoubtedly oppose the bill.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 7, 2013, the Local & Federal Affairs Committee adopted an amendment that makes technical changes to the bill. This amendment conforms the language of the bill to other provisions in ch. 695, F.S.

This analysis is drafted to the Committee Substitute.

²¹ Legislative and Cabinet Services, Florida Department of Revenue, *Written Communication* (2012) (on file with the Civil Justice Subcommittee, Florida House of Representatives).

²² March 4, 2013, conversation with Gene Adams. Pennington, Moore, Wilkinson, Bell & Dunbar.

²³ February 15, 2013, e-mail from Deena M. Reppen, Legislative Director for the Florida Association of Counties.