

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 903 Adverse Possession

**SPONSOR(S):** Civil Justice Subcommittee; Davis; Waldman and others

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 1166

| REFERENCE                     | ACTION              | ANALYST | STAFF DIRECTOR or<br>BUDGET/POLICY CHIEF |
|-------------------------------|---------------------|---------|--|
| 1) Civil Justice Subcommittee | 13 Y, 0 N, As<br>CS | Ward    | Bond                                     |
| 2) Finance & Tax Subcommittee | 16 Y, 0 N           | Tarich  | Langston                                 |
| 3) Judiciary Committee        | 18 Y, 0 N           | Ward    | Havlicak                                 |

### SUMMARY ANALYSIS

Adverse possession is a method of acquiring title to real property by possession of such property for a statutorily defined period of time. It may be accomplished by possession with color of title (some evidence in a recorded, but faulty, document that the occupant owns the property), or without color of title (without having a deed or other recorded document). To acquire title by adverse possession without color of title, a claimant must openly possess the real property, must protect it by an enclosure or cultivate it, must maintain and occupy the land, and must file a return with the county property appraiser. The claimant must pay all taxes for a period of seven years, and must have filed a return of the land for taxes during the first year of occupation. The property appraiser must also notify the owner of record of the filing of the return for adverse possession.

This bill adds a number of requirements related to adverse possession without color of title. The bill requires that a person who files a return for taxes with the intent of claiming the property by adverse possession must:

- Wait for all taxes and liens on the property to accrue for two years.
- Have actual and continued control of the property.
- Maintain or improve the exterior of any structures on the land.
- Pay all mortgages and liens on the property.
- Not apply for adverse possession for more than one property in the state at the same time.
- Not enter any structure on the land until the end of the adverse possession period.
- Maintain the property without entering any of the structures.

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

The bill is effective July 1, 2013.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

Adverse possession is a method of acquiring title to real property by possession of such land for a statutorily defined period of time. There are several means by which adverse possession of real property can lead to title to real property.

To acquire title by adverse possession without color of title (without having a deed or other recorded document), s. 95.18, F.S., provides that a claimant must:

- Show open, continuous, and hostile possession;
- Pay all taxes due for a period of seven years;
- File a return of the land for taxes with the county property appraiser;
- Protect the property by an enclosure or cultivate it; and
- Maintain and occupy the land.

The property appraiser must also notify the owner of record of the filing of the return for adverse possession.<sup>1</sup>

### Origins of Adverse Possession

The doctrine of adverse possession “dates back at least to sixteenth century England and has been an element of [U.S.] law since the country's founding.”<sup>2</sup> The first adverse possession statute appeared in the United States in North Carolina in 1715.<sup>3</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>4</sup> Generally, an adverse possessor must establish five elements in relationship to possession of the property. The possession must be:

- Open;
- Continuous for the statutory period;
- For the entirety of the area;
- Adverse to the true owner's interests; and
- Notorious.<sup>5</sup>

In most jurisdictions, state statutory law prescribes the limitations period – the period within 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>6</sup> As legal scholars have noted, “[a]dverse possession decisions are inherently fact-specific.”<sup>7</sup> Therefore, an adverse possessor must establish “multiple elements whose tests are elastic and provide the trier of fact with flexibility and discretion.”<sup>8</sup>

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<sup>1</sup> Section 95.18(3), F.S.

<sup>2</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>3</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>4</sup> *Id.* at 122 (quoting BLACK'S LAW DICTIONARY 53 (6th ed. 1990)).

<sup>5</sup> *Id.*

<sup>6</sup> Klass, *supra* note 1, at 287.

<sup>7</sup> Geoffrey P. Anderson and David M. Pittinos, Adverse Possession After House Bill 1148, 37 COLO. LAW 73, 74 (Nov. 2008).

<sup>8</sup> *Id.*

## Adverse Possession in Florida

In Florida, there are two ways to acquire land by adverse possession, both of which are prescribed by statute.<sup>9</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 derived from a recorded written document and that he or she has been in possession of the property for at least seven years.<sup>10</sup> It is irrelevant whether the recorded document is legally valid, 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>11</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, so long as the person adhered to the statutory guidelines for proper adverse possession.<sup>12</sup> Similar to claims made with color of title, the adverse possessor may demonstrate possession of the property by showing that that he or she made a return of intent to claim the property with the property appraiser<sup>13</sup> and either:

- Protected the property by a substantial enclosure (typically a fence);
- Cultivated or improved the property; or
- Occupied and maintained the property.<sup>14</sup>

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>15</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>16</sup> The adverse possessor must prove each essential element of an adverse possession claim by clear and convincing evidence.<sup>17</sup> Therefore, the adverse possession "claim cannot be 'established by loose, uncertain testimony which necessitates resort to mere conjecture.' ”<sup>18</sup>

## Abuse of the Adverse Possession Process

As a result of foreclosures, a glut of vacant homes has increased the propensity of 'squatters' who attempt to gain ownership through adverse possession by illegally occupying homes that have been foreclosed. There have also been instances where these foreclosed home were rented to unsuspecting tenants.

## Changes and Effect of Bill

This bill amends s. 95.18, F.S., to:

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<sup>9</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>10</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 7 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>11</sup> Section 95.16, F.S.

<sup>12</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>13</sup> Section 95.18(3), F.S.

<sup>14</sup> Section 95.18(2), F.S.

<sup>15</sup> *Candler Holdings Ltd. I*, 947 So. 2d at 1234.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* (citing *Bailey v. Hagler*, 575 So. 2d 679, 681 (Fla. 1st DCA 1991)).

<sup>18</sup> *Id.* (quoting *Grant v. Strickland*, 385 So. 2d 1123, 1125 (Fla. 1st DCA 1980)).

- Change the term "occupant" to "adverse possessor."
- Require that the adverse possessor have actual and continued "control" of the property.
  - Under the current law, an adverse possessor only has to 'occupy' the property. This change mandates that an adverse possessor actually control, through maintenance or improvement of the exterior of any structure or the land, the property in order to be eligible to gain title. This change attempts to prevent individuals from adversely possessing property while not actively *controlling* such property; in order to acquire title, the adverse possessor would essentially have to tend to the land. For example, a neighbor that tends to a deceased neighbor's yard, garden, home, etc., when the deceased has no legal heirs, may be deemed to be in control and therefore, eligible to be an adverse possessor. The change would probably prevent a claimant from simply placing personal property on the real property and claiming that he or she 'occupies' the real property.
- Provide that the adverse possessor manifest control by actual maintenance or improvement of the exterior of any structures on the land.
  - This addition helps define, and set the standard for, "control." It appears that it will help ensure that an adverse possessor is actually in control of the property and not just making a claim of the property while not having actual dominion of it.
- Add that the adverse possessor must pay all mortgages and liens on the property.
- Add that taxes must have accrued without payment for at least two years prior to application for the claim.
  - This additional requirement appears to help ensure that the property being adversely possessed is abandoned or not under control or the dominion of the true owner. It also provides protection to true owners who have neglected paying for taxes for only one year.
- Provide that a person may not apply for adverse possession for more than one property in the state at the same time.
  - This restriction, in conjunction with several others, would probably prohibit an 'entrepreneurial' adverse possessor from attempting to adversely possess multiple properties throughout the state that are actually owned (e.g., owned by banks and other lenders) and not abandoned.
- Provide that the adverse possessor may not enter any structure on the land until the end of the adverse possession period and after a deed has been issued to the possessor.
  - This addition appears to help prevent squatters from making adverse possession claims. Squatters will probably not be able to exert continuous possession of the property for seven years if they are prohibited from entering any structure on the property.
- Add to the elements necessary for adverse possession that the property has been "maintained without entering any of the structures."
  - This addition appears to help prevent squatters from making adverse possession claims. Squatters will probably not be able to exert continuous possession of the property for seven years if they are prohibited from entering any structure on the property.

## B. SECTION DIRECTORY:

Section 1 amends s. 95.18, F.S., regarding actions for adverse possession without color of title.

Section 2 provides for an effective date of July 1, 2013.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill calls for changes to form DR 452, "Return of real Property in Attempt to Establish Adverse Possession without Color of Title." It appears that the Department of Revenue has sufficient existing rulemaking authority,

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill limits adverse possession by a person to one property (Line 34) at a time, but does not define that term. It is possible that a legitimate adverse possession claim could affect more than one property at a time (for instance, contiguous lots or adjacent lots that are in two separate plats).

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 13, 2013, the Civil Justice Subcommittee adopted two amendments and reported the bill favorably as a committee substitute. The first amendment removes lines 57 through 62 of the bill, which required written permission from the owner of the property as a condition of adverse possession, and the second amendment removed a portion of line 39 of the bill, which made reference to the issuance of a deed upon completion of the adverse possession requirements. This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.