

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/CS/HB 489 Subsurface Rights

**SPONSOR(S):** Judiciary Committee; Business & Professional Regulation Subcommittee; Civil Justice Subcommittee and Spano

**TIED BILLS:** None **IDEN./SIM. BILLS:** CS/SB 1556

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	10 Y, 1 N, As CS	Cary	Bond
2) Business & Professional Regulation Subcommittee	11 Y, 0 N, As CS	Butler	Luczynski
3) Judiciary Committee	15 Y, 0 N, As CS	Cary	Havlicak

### SUMMARY ANALYSIS

Most owners of real property simply think of the surface boundaries when defining the extent of the ownership. However, real property theory is that the owner owns a projection from the center of the Earth to the extent of the Earth's atmosphere. Thus, the owner of the surface rights generally owns the oil, gas and minerals underneath the owner's real property. However, a landowner may lease or sell subsurface rights (the right to oil, gas and minerals) separate from the right to own and occupy the surface of the land, thereby creating two separate estates. In general, separation of the estates is uncommon in much of Florida.

Recently, some developers have sold residential homes on property where the subsurface rights were previously severed. Buyers asserted that they had little or no notice that their property did not include subsurface rights.

As a part of a contract for the sale of residential property by a builder or developer, the bill requires a seller who has or will sever or retain any subsurface rights to provide a disclosure summary within the sales contract, or incorporated by references into the sales contract.

The bill does not appear to have a fiscal impact on state and local governments.

The bill provides an effective date of October 1, 2014.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

Most owners of real property simply think of the surface boundaries when defining the extent of the ownership. However, common law real property theory is that the owner owns a projection from the center of the Earth to the extent of the Earth's atmosphere.<sup>1</sup>

The owner of land is entitled to the surface of the land and all that is below it, provided that the deed does not contain a reservation of mineral, or subsurface, rights. However, upon transfer, the deed may convey only the surface rights while the transferor may retain the subsurface rights, creating two separate estates.<sup>2</sup> A deed that is silent on the issue is deemed to convey all property rights.

Generally, a reservation or grant of mineral rights reflects an intent to sever the surface estate from the underlying mineral estate, thus establishing two separate estates.<sup>3</sup> A property owner may sever the estates by either:

- Granting the mineral rights;<sup>4</sup> or
- Conveying the property but retaining the mineral rights.<sup>5</sup>

The owner of each estate has the right to exercise all the rights of ownership, subject to any laws and reservations that the deed may contain.<sup>6</sup> Therefore, the owner of the subsurface rights is entitled to the profits from any minerals that are extracted from beneath the surface of the land.

When the estate is severed into separate surface and subsurface estates, the mineral estate is the dominant estate, and therefore the owner of the mineral estate has the right of ingress and egress to explore for, locate, and remove the minerals. However, in doing so, the owner of the mineral estate may not abuse the surface estate so as to unreasonably injure or destroy its value.<sup>7</sup> A grant or reservation of oil and mineral rights implies an easement for ingress and egress to explore for and remove the oil and minerals found on or underneath the surface estate, even if not specifically granted at the conveyance.<sup>8</sup>

In practice, some developers retain mineral rights without a reference to the mineral rights on the face of the deed. A catch-all provision in the deed, such as, "Subject to Covenants, Conditions, Restrictions, Reservations, Limitations, Easements and Agreements of Records, if any," may be all that appears on the face of the deed to the prospective purchaser. In such cases, a separate grant may have been filed in the public records that list the lots within a development for which mineral rights are being retained by the developer. The developer may also waive its rights of ingress and egress, effectively retaining ownership of any valuable minerals that may reside in the subsurface, but waiving any claim to an easement that would interfere with or even be recognized by the surface owner. While this practice may satisfy constructive notice requirements to make the reservation of mineral rights legally effective, it arguably does not provide adequate notice to the purchaser of the surface property that the purchaser does not own the subsurface rights to the property.<sup>9</sup>

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<sup>1</sup> 42 Fla. Jur 2d Property s. 7.

<sup>2</sup> 36 Fla. Jur 2d Mines and Minerals s. 54.

<sup>3</sup> *Noblin v. Harbor Hills Development, L.P.*, 896 So.2d 781, 783 (Fla. 5th DCA 2005).

<sup>4</sup> *Neel v. Rudman*, 33 So.2d 234, 237 (Fla. 1948).

<sup>5</sup> *P & N Inv. Corp. v. Florida Ranchettes, Inc.*, 220 So.2d 451 (Fla. 1st DCA 1969).

<sup>6</sup> 58 C.J.S. Mines and Minerals s. 197.

<sup>7</sup> *P & N Inv. Corp.*, 220 So.2d at 453.

<sup>8</sup> *Noblin*, 896 So.2d at 784-85.

<sup>9</sup> See, e.g., *Attorney General Pam Bondi Announces that Home Builder is Notifying Florida Homeowners of Option to Request Mineral Rights*, Attorney General Pam Bondi News Release, February 7, 2014, available at

## Effect of the Bill

The bill creates s. 689.29, F.S., to require a seller of residential real property to provide a prospective purchaser with a disclosure summary at or before the execution of the contract if the seller or an affiliated or related entity has or will sever or retain subsurface rights or right of entry.

The bill defines a “seller” as:

[A] seller of real property which, at the time of sale, is zoned for residential use and is property upon which a new dwelling is being constructed or will be constructed pursuant to the contract for sale with the seller, or has been constructed since the last transfer of the property.

The bill defines “subsurface rights” as:

[R]ights to all minerals, mineral fuels, and other resources, including, but not limited to, oil, gas, coal, oil shale, uranium, metals, and phosphate, whether or not they are mixed with any other substance found or located beneath the surface of the earth.

The bill requires the disclosure summary be conspicuous, in boldfaced type, and explain that subsurface rights can be severed from the property, and may have been severed in this case. The disclosure summary must state substantially the following:

SUBSURFACE RIGHTS HAVE BEEN OR WILL BE SEVERED FROM THE TITLE TO REAL PROPERTY BY CONVEYANCE (DEED) OF THE SUBSURFACE RIGHTS FROM THE SELLER OR AN AFFILIATED OR RELATED ENTITY OR BY RESERVATION OF THE SUBSURFACE RIGHTS BY THE SELLER OR AN AFFILIATED OR RELATED ENTITY. WHEN SUBSURFACE RIGHTS ARE SEVERED FROM THE PROPERTY, THE OWNER OF THOSE RIGHTS MAY HAVE THE PERPETUAL RIGHT TO DRILL, MINE, EXPLORE, OR REMOVE ANY OF THE SUBSURFACE RESOURCES ON OR FROM THE PROPERTY EITHER DIRECTLY FROM THE SURFACE OF THE PROPERTY OR FROM A NEARBY LOCATION. SUBSURFACE RIGHTS MAY HAVE A MONETARY VALUE.

If the disclosure summary is not included in the contract for sale, the contract must refer to and incorporate by reference the disclosure summary. The disclosure must include a statement that the potential purchaser should not execute the contract until he or she has read the disclosure summary.

The bill provides an effective date of October 1, 2014.

### B. SECTION DIRECTORY:

Section 1 creates s. 689.29, F.S., relating to disclosure of subsurface rights to prospective purchaser.

Section 2 provides an effective date of October 1, 2014.

## 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 fiscal 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 appears to have a minimal direct economic impact on the private sector related to the cost of providing notice to buyers. Given that sellers of real property in Florida rarely sever subsurface rights, the overall impact on the private sector should be negligible.

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 19, 2014, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment provided technical changes, altered the remedy to include a liquidated damages provision, and removed a criminal penalty.

On March 4, 2014, the Business & Professional Regulation Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment simplified the language of the bill, and made several substantive changes to bring the bill in line with SB 1556. The bill no longer includes several remedies or penalties available in previous versions, and requires a disclosure summary to be included or included by reference with the contract for the first sale of residential property.

On April 4, 2014, the Judiciary Committee adopted one amendment and reported the bill favorably as a committee substitute. The amendment provides a slightly different disclosure summary and removes the boxes to mark as part of the disclosure summary. This analysis is drafted to the committee substitute as passed by the Judiciary Committee.

