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 Committee on Community Affairs

BILL:	SB 1046
INTRODUCER:	Senator Passidomo
SUBJECT:	Covenants and Restrictions
DATE:	March 31, 2017
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cochran	Yeatman	CA	**Pre-meeting**
2.			JU	
3.			RC	

I. Summary:

SB 1046 relates to covenants and restrictions and does the following:

- Authorizes counties and municipalities to amend, release, or terminate a restriction or covenant that they imposed or accepted during the approval of a development permit. This provision is retroactive and applies to existing restrictions and covenants;
- Provides updated definitions and replaces the term "homeowners' association" with "property owners' association," thus extending statutory provisions regarding preservation and revival to a broader range of associations, notably commercial property owners' associations;
- Adds that a marketable record title is also free and clear of all zoning requirements or building or development permits that occurred before the effective date of the root of title;
- Updates the process for a homeowners' association to timely renew its covenants, including repealing the requirement that a homeowners' association board achieve a two-thirds vote for preservation of existing covenants and restrictions;
- Authorizes parcel owners who were subject to covenants and restrictions but who do not have a homeowners' association to use the same mechanisms as a homeowners' association to revitalize extinguished covenants and restrictions;
- Requires a homeowners' association to annually consider preservation of the covenants and restrictions and requires an association to file a summary preservation every five years; and
- Conforms statutory and definitional cross references.

II. Present Situation:

The Marketable Record Title Act

The Marketable Record Title Act (MRTA) was enacted in 1963 to simplify and facilitate land transactions.[1] In general, MRTA provides that any person vested with any estate in land of

[1] *Blanton v. City of Pinellas Park*, 887 So.2d 1224, 1227 (Fla. 2004).

record for 30 years or more has a marketable record title free and clear of most claims or encumbrances against the land. Current law includes nine exceptions to the applicability MRTA.[2]

One effect of MRTA is that homeowner association covenants can lose effect after 30 years. In order to protect such covenants, MRTA has long provided for renewal of such covenants. However, many homeowners' associations fail to timely file a renewal of their covenants. Formerly, MRTA would apply in such cases and accordingly the covenants and restrictions expired and were unenforceable. In 2004, part III of ch. 720, F.S., was enacted to provide a means by which covenants and restrictions of a mandatory homeowners' association may be revived.[3] In 2007, nonmandatory homeowners' associations became eligible for revitalization.[4] Revitalization requires the creation of an organizing committee, notice to all affected property owners, approval by a majority of the homeowners, approval by the Department of Economic Opportunity, and the recording of notice in the public records.[5]

There are two categories of property owners who enact and enforce covenants and restrictions regarding their property and that of their neighbors who are impacted by MRTA, but have not been included in the laws regarding renewal or revival of their covenants and restrictions. These property owners are commercial landowners in office parks, industrial parks, and other commercial districts; and neighborhoods with enforceable covenants but no formal homeowners' association.

Due to the disparate issues in the bill, the present situation for each section is discussed below in conjunction with the Effect of Proposed Changes.

III. Effect of Proposed Changes:

Extinguishable Interests in Real Property

Present Situation

In *Save Calusa Trust v. St. Andrews Holding, Ltd.*,[6] a recent decision by the Third District Court of Appeal, the court held that government imposed encumbrances are not subject to extinguishment under MRTA.[7] In the case, the current owner of land sought to redevelop the land. A former owner had agreed with the county to a restrictive covenant as a condition of the building permit. In relevant part, the covenant provided that the restrictions

> continue for a period of 99 years unless released or revised by the Board of County Commissioners of the County of Dade, State of Florida, or its successors with the consent of 75 percent of the members of the corporation owning the

[2] Section 712.03, F.S.
[3] Chapter 2004-345, Laws of Fla.
[4] Chapter 2007-173, Laws of Fla.
[5] Part III of ch. 720, F.S.
[6] 193 So. 3d 910 (Fla. 3d DCA 2016).
[7] *Id*. at 916.

> aforedescribed property and those owners within 150 feet of the exterior boundaries of the aforedecribed property.[8]

More than 140 homes were developed around the exterior boundary of the property.[9] None of these homes had any reference to the restrictive covenant in their deeds and the homeowners had no role in maintaining the property or any other reciprocal responsibilities.[10]

The court of appeal held that a restrictive zoning covenant evidences the County's intent to regulate the property.[11] The Third District had previously determined that a Zoning Appeals Board resolution, with a restrictive covenant, constitutes a governmental regulation with the force of law.[12] The court concluded that as a governmental regulation, and not an estate, interest, claim, or charge affecting the property, the restrictive covenant was not subject to extinguishment pursuant to MRTA.[13]

Effect of the Bill

Sections 1 and 2 amend ss. 125.022 and 166.033, F.S., respectively, to provide that a county or municipality, in its sole discretion, may amend, release, or terminate a restriction or covenant that it imposed or accepted at the approval or issuance of the development permit. The county or municipality may accomplish this through its police powers. The county or municipality may not delegate its police power to a third party and declares any purported delegation to be void. These sections also repeal an apparently unnecessary statement in ss. 125.022 and 166.033, F.S., that allows a county or city to provide information to an applicant on what other state or federal permits may apply to the development.

Section 3 provides that these changes relating to development permits are remedial in nature and apply retroactively.

Section 6 amends s. 712.04, F.S., to add that a marketable record title is also free and clear of all zoning requirements or building or development permits that occurred before the effective date of the root of title. This freedom from encumbrances does not alter or invalidate a zoning ordinance, land development regulation, building code, or other ordinance, rule, regulation or law if such operates independently of matters recorded in the official records. The bill provides that this provision is also intended to clarify existing law and is remedial in nature, applying to all covenants or restrictions imposed or accepted before, on, or after the effective date of the bill.

Preservation of Existing Covenants

Present Situation

Sections 712.05 and 712.06, F.S., provide that a homeowners' association wishing to timely renew its covenants may only do so under the following conditions:

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[8] *Id* at 912.
[9] *Id* at 912-13.
[10] *Id*. at 913.
[11] *Id*. at 915.
[12] *Id*. referencing *Metro Dade Cty. v. Fontainebleau Gas & Wash, Inc.*, 570 So. 2d 1006 (Fla. 3d DCA 1990).
[13] *Id*. at 916.

- The board must give written notice to every parcel owner of the impending preservation of the covenants;[14]
- The board must give written notice to every parcel owner of a meeting of the board of directors where the directors will decide whether to renew the covenants;[15]
- The board of directors of the association must approve the renewal by a two-thirds vote;[16] and
- Notice of the renewal must be recorded in the Official Records of the county.[17]

Sections 7 and 8 of the bill change this procedure to:
- Provide that compliance by a homeowners' association with newly created s. 720.3032, F.S. (see discussion below) may substitute for the requirements of ss. 712.05 and 712.06, F.S.;
- Repeal the requirement that the board achieve a two-thirds vote; and
- Repeal the requirement that affected property owners be furnished notice of the board meeting to vote on preservation.

These sections also contain conforming language.

Preservation and Revitalization of Covenants by a Commercial Property Owners' Association

Present Situation
Current law provides for the preservation and for the revitalization of covenants by a homeowners association.

Effect of the Bill
Section 5 provides a definition for the term community covenant or restriction and substitutes the term property owners' association for homeowners' association. A property owners' association includes a homeowners' association as defined in s. 720.301, F.S., a corporation or entity responsible for the operation of property in which the voting membership is made up of the owners of the property or their agents, or a combination thereof, and in which membership is a mandatory condition of property ownership, as well as an association of parcel owners authorized to enforce a community covenant or restriction. The bill also makes changes in s. 712.01, F.S., to conform to these new terms.

The bill replaces all instances of the term "homeowners' association" found in ch. 712, F.S., with the term "property owners' association." The effect is to expand MRTA laws on preservation and revitalization of covenants or restrictions to these associations, that is, to expand the law to cover commercial associations.

Section 16 provides that part III of ch. 720, F.S., comprised of ss. 720.403 – 720.407, F.S., is intended to provide mechanisms for revitalization of covenants or restrictions by all types of

[14] Section 712.06(1)(b), F.S.
[15] Section 712.05(1), F.S.
[16] *Id.*
[17] Section 712.06(2), F.S.

communities and property associations, not just residential communities. This section also includes conforming changes.

Revitalization by an Owner Not Subject to Homeowners' Association

Present Situation
There are residential communities in which there were recorded covenants and restrictions similar to those found in a homeowners' association, but no association was ever created. Under current law, individual owners can file notice of preservation of covenants before they expire (see ss. 712.05 and 712.06, F.S.), but there are no means of revitalizing such covenants and restrictions.

Effect of the Bill
Section 10 creates s. 712.12, F.S., relating to covenant or restriction revitalization by parcel owners not subject to a homeowners' association. The bill provides the following definitions:

- "Community" means the real property that is subject to a covenant or restriction that is recorded in the county where the property is located.
- "Covenant or restriction" means any agreement or limitation imposed by a private party and not required by a governmental agency as a condition of a development permit, as defined in s. 163.3164, F.S., which is contained in a document recorded in the public records of the county in which a parcel is located and which subjects the parcel to any use restriction that may be enforced by a parcel owner.
- "Parcel" means real property that is used for residential purposes and that is subject to exclusive ownership and any covenant or restriction that may be enforced by a parcel owner.
- "Parcel owner" means the record owner of legal title to a parcel.

The section provides that the parcel owners may use the process available to a homeowners' association in ss. 720.403 – 720.407, F.S., to revive covenants or restrictions that have lapsed under MRTA. The parcel owners are excepted from needing to provide articles of incorporation or bylaws to revive the covenants or restrictions and only need the required approval in writing. The organizing committee of the community may execute the revived covenants in the name of the community and the community name can be indexed as the grantee of the covenants with the parcel owners listed as grantors. A parcel owner who has ceased to be subject to covenants or restrictions as of October 1, 2017, may commence an action by October 1, 2018, to determine if revitalization would unconstitutionally deprive the parcel owner of right or property. Revived covenants or restrictions do not affect the rights of a parcel owner which are recognized by a court order in an action commenced by October 1, 2018, and may not be subsequently altered without the consent of the affected parcel owner.

Requirements on the Board of Directors of a Homeowners' Association

Present Situation
While it is probably good practice for a homeowners' association to regularly consider the need for preservation of the covenants and restrictions of their neighborhood, there is no statutory requirement that a board of directors of a homeowners' association do so.

Effect of the Bill

Section 11 amends s. 720.303(2), F.S., to require that the board of directors for a homeowners' association must consider whether to file a notice to preserve the covenants and restrictions affecting the community from extinguishment pursuant to MRTA. This must be considered at the first board meeting after the annual meeting of the members.

Section 12 creates s. 720.3032, F.S., to require that, at least once every 5 years, a homeowners' association must file in the official records of the county in which it is located a notice detailing:

- The legal name of the association;
- The mailing and physical addresses of the association;
- The names of the affected subdivision plats and condominiums, or the common name of the community;
- The name, address, and telephone number for the current community association management company or manager, if any;
- An indication as to whether the association desires to preserve the covenants or restrictions affecting the community from extinguishment pursuant to MRTA;
- The name and recording information of those covenants or restrictions affecting the community which the association wishes to preserve;
- A legal description of the community affected by the covenants or restrictions; and
- The signature of a duly authorized officer of the association.

The section creates a statutory form for such information. The bill further provides that the filing of the completed form is considered a substitute for the notice required for preservation of the covenants pursuant to ss. 712.05 and 712.06, F.S. As such, every 5-year filing of the form will have the effect of starting the MRTA 30-year period anew.

The failure to file this notice does not affect the validity or enforceability of any covenant or restriction. A copy of this notice must be included as a part of the next notice of meeting or other mailing sent to all members of the association. The original signed notice must be recorded in the official records of the clerk of the circuit court or other recorder for the county.

Other Changes Made by the Bill

Section 4 provides a short title of the "Marketable Record Title Act" for ch. 712, F.S.

Sections 9, 13, 14, 15, 17, 18, and 19 make changes to conform various statutory and definitional cross references.

Section 20 provides for an effective date of October 1, 2017.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Impairment of Contracts

To the extent that a court may find that a covenant or restriction may be considered a contract between the parties, the changes made by this bill may affect such current contract rights and obligations. Article I, Section 10 of the United States Constitution, and Article I, Section 10 of the Florida Constitution both prohibit the Legislature from enacting any law impairing the obligation of contracts. Although written in terms of an absolute prohibition, the courts have long interpreted the provisions to prohibit enactment of any unreasonable impairment of contractual rights existing at the time that the law is enacted. The Florida Supreme Court in *Pomponio v. Claridge of Pompano Condominium, Inc.*[18] set forth the following test:

- Was the law enacted to deal with a broad, generalized economic or social problem?
- Does the law operate in an area which was already subject to state regulation at the time the parties' contractual obligations were originally undertaken, or does it invade an area never before subject to regulation by the state?
- Does the law effect a temporary alteration of the contractual relationships of those within its coverage, or does it work a severe, permanent, and immediate change in those relationships irrevocably and retroactively?

Retroactive Application of Laws

Sections 1, 2, 3 and 6 of the bill appear to operate retroactively. The following analysis applies to those sections to the extent that they may have retroactive application:

Article I, Section 2 of the Florida Constitution guarantees to all persons the right to acquire, possess, and protect property. Article I, Section 9 of the Florida Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law." These constitutionally-protected due process rights protect individuals from the retroactive application of a substantive law that adversely affects or destroys a vested right; imposes or creates a new obligation or duty in connection with a previous transaction or consideration; or imposes new penalties. For the retroactive application of a law to be constitutionally permissible, the Legislature must express a clear intent that the law apply retroactively, and the law must be procedural or remedial in nature.[19]

[18] 378 So.2d 774, 779 (Fla. 1979).
[19] *Maronda Homes, Inc. v. Lakeview Reserve Homeowners Ass'n*, 127 So. 3d 1258, 1272 (Fla. 2013).

Remedial statutes operate to further a remedy or confirm rights that already exist, and a procedural law provides the means and methods for the application and enforcement of existing duties and rights. In contrast, a substantive law prescribes legal duties and rights and, once those rights and duties are vested, due process prevents the Legislature from retroactively abolishing or curtailing them.[20]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Section 12 of the bill requires associations to prepare and record a notice every 5 years. The recording fee is nominal ($10 for the first page, $8.50 for additional pages). Because the form is in statute, associations may be able to complete the task without assistance, or a community association manager can assist an association with preparation and filing without reference to a licensed attorney.

C. Government Sector Impact:

The bill requires the recording of documents in the public records of the county. Recording is subject to a fee of $10.00 for the first page and $8.50 for every subsequent page, payable to the recording department (in most counties, the clerk of the court).[21] The net revenues to county recorders, after deductions for incremental costs of recording and indexing documents, are unknown.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Sections 1 and 2 of the bill refer to the "imposition or acceptance of a recorded or unrecorded restriction" in the context of a local government's approval of a development order. The phrase "imposition or acceptance" is unclear and could pertain to conditions imposed by the local government or accepted by the local government. If the latter, the bill raises an uncertainty as to whether the local government is given the ability to amend, release, or terminate restrictions imposed by another authority. The sections could be clarified by referring to restrictions imposed by the county or municipality or, if accepted, specify by whom such restrictions are accepted.

Sections 1 and 2 also discuss the exercise of police power by a county or municipality "in its sole discretion." Charter counties have all power of local government not inconsistent with general law or special law approved by a vote of the electors.[22] Non-charter counties have all power

[20] *Id*.
[21] Section 28.24(12), F.S.
[22] Art. VIII, s. 1(g), Fla. Const.

provided by general or special law.[23] Municipalities have all power of self-government except as otherwise provided by law.[24] Accordingly, the exercise of police power by county or municipal governments is constrained by appropriate law enacted by the Legislature. Authorizing use of the police power "in the sole discretion" of the county or municipality thus could be interpreted as vague or requiring clarification. As sufficient legal guidance already exists for local governments to exercise their police powers, inclusion of the phrase in the bill appears unnecessary.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 125.022, 166.033, 712.01, 712.04, 712.05, 712.06, 712.11, 720.303, 702.09, 702.10, 712.095, 720.403, 720.404, 720.405, and 720.407.

This bill creates the following sections of the Florida Statutes 712.001, 712.12, and 720.3032.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

[23] Art. VIII, s. 1(f), Fla. Const.
[24] Art. VIII, s. 2(b), Fla. Const.