

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 Rules

BILL: CS/SB 804

INTRODUCER: Rules Committee and Senator Passidomo

SUBJECT: Possession of Real Property

DATE: March 2, 2018

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	Favorable
2.	<u>Present</u>	<u>Yeatman</u>	<u>CA</u>	Favorable
3.	<u>Davis</u>	<u>Phelps</u>	<u>RC</u>	Fav/CS

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 804 amends and modernizes real property provisions controlling ejectment, unlawful and forcible entry, and unlawful detainer actions. The bill also creates a section of statute governing the “customary use” of private property for public use.

Ejectment, unlawful and forcible entry, and unlawful detainer actions all involve a person entitled to possession of real property who is wrongfully removed but seeks to recover possession of the property. The current statutes are amended in this bill to:

- Create new definitions,
- Clarify which courts have jurisdiction,
- Modernize statutory pleading requirements, and
- Provide remedies.

A final section of the bill addresses the common law doctrine of customary use or the general right of the public to use and access the dry sand area of a beach on private property. The bill details the process by which a governmental entity may seek the judicial determination of a recreational customary use of private beach property.

II. Present Situation:

Ejectment Actions

An ejectment action is a legal proceeding in which a person who is wrongfully ejected from real property seeks to recover possession of that property as well as damages and costs. In these actions, the plaintiff must allege that he or she has:

- Title to the land,
- Been wrongfully deprived or dispossessed, and
- Suffered damages.¹

Chapter 66, Ejectment, provides little statutory framework for ejectment actions. The little statutory framework that exists provides that the common law practice of naming fictitious parties is abolished and establishes some minor procedural, verdict, and judgment requirements. The chapter, however, does not provide for basic elements of ejectment actions such as a definition of “ejectment” or establish which trial court maintains jurisdiction or address whether presuit notice² is necessary in beginning an action. While some of these provisions are established in case law, it would be helpful to practitioners if these items were set forth in the ejectment chapter.

Forcible Entry and Unlawful Detainer Actions

Chapter 82, which addresses Forcible Entry and Unlawful Detainer, is intended to provide a peaceful and efficient process for someone to recover possession of real property that is unlawfully taken from them.

Unlawful Entry and Forcible Entry

The “unlawful entry and forcible entry” statute prohibits a person from entering any lands or tenements, except when that entry is permitted by law, and prohibits a person when entry is permitted from entering with “strong hand or with multitude of people.” The statute permits entry only in “a peaceable, easy and open manner.”³

Unlawful Entry and Unlawful Detention

The “unlawful entry and unlawful detention” statute states that no person who enters without consent into any lands or tenements “in a peaceable, easy and open manner” may “hold them afterwards against the consent of” someone who is entitled to possess them. This action does not apply to residential tenancies, which are governed by the Landlord and Tenant Act.⁴

Remedies, Summary Procedure, and Time Limit for an Action

The next section of the statutes relating to unlawful detention provides a remedy for the party who is turned out or deprived of possession by “unlawful entry or forcible entry” and states that

¹ BLACK’S LAW DICTIONARY (10th ed. 2014).

² Several provisions in statute require a plaintiff to notify prospective defendants before filing a lawsuit. See, for example, ss. 70.001, 400.0233, 429.293, and 766.106, F.S.

³ Section 82.01, F.S.

⁴ Section 82.02, F.S.

he or she is entitled to the summary procedure⁵ for the expeditious resolution of the action within 3 years afterwards.⁶

Title Questions

An action for forcible entry and unlawful detainer may only address the right of possession and damages. No question of title is involved in the action.

Presuit Notice

This chapter does not require presuit notice by a plaintiff. However, because the chapter is silent, it may lead to confusion as to whether presuit notice is required.

Customary Use

Florida Constitution

In Florida, the public has the right to access shorelines and beaches that are located below what is referred to as the “mean high tide line.” The State Constitution, in Article X, section 11, provides that “title to the lands under navigable waters, within the boundaries of the state . . . including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people.”⁷ This is known as the common law public trust doctrine.

State Statute

The beaches of the state include additional land beyond what is described in the public trust doctrine. The dry sands above the mean high water line may be owned privately, as recognized by statute.⁸ Additionally, the Legislature has noted in its State Comprehensive Plan, Coastal and Marine Resources, that it is a policy to “Ensure the public’s right to reasonable access to beaches.”⁹

Florida Supreme Court

The courts have recognized the public’s ability to acquire rights to the dry sand areas of privately owned sections of a beach but have not rendered many decisions in the area. In 1974, the Florida Supreme Court generally established the customary use doctrine in Florida when it held:

If the recreational use of the sandy area adjacent to the mean high tide has been ancient, reasonable, without interruption and free from dispute, such use as a matter of custom, should not be interfered with by the owner. However, the owner may make any use of his property which is consistent with such public use and

⁵ Summary procedure is set forth in s. 51.01, F.S. A summary procedure is a non-jury proceeding designed to settle a matter in a relatively prompt and simple manner. BLACK’S LAW DICTIONARY (10th ed. 2014).

⁶ Section 82.03, F.S.

⁷ Sea Grant Florida, the University of Florida, *Common Law Tools to Promote Beach Access*, <https://www.flseagrant.org/wateraccess/common-law-statutes/> (last visited Jan. 17, 2018).

⁸ Section 177.28, F.S.

⁹ Section 187.201(8)(b)2., F.S.

not calculated to interfere with the exercise of the right of the public to enjoy the dry sand area as a recreational adjunct of the wet sand or foreshore area.¹⁰

Attorney General Opinion

The Florida Attorney General issued an opinion in 2002¹¹ addressing the regulation of the dry sand portion of beaches. The City of Destin adopted a beach management ordinance to provide for the regulation of public use and conduct on the beach. The Sheriff of Okaloosa County and the mayor of Destin inquired about the regulation. The Attorney General issued three findings in its opinion:

- The City may regulate in a reasonable manner the beach within its corporate limits to protect the public health, safety, and welfare. This regulation must have a rational relation to and be reasonably designed to accomplish a purpose necessary for the protection of the public. The city may not exercise its police power in an arbitrary, capricious, or unreasonable manner. Such regulation may be accomplished regardless of the ownership of this area, with the exception of state ownership, and without regard to whether the public has been expressly or impliedly allowed to use that area of the beach by a private property owner who may hold title to the property.
- The right of a municipality to regulate and control dry sand beach property within its municipal boundaries is not dependent on the finding of the Florida Supreme Court in *City of Daytona Beach v. Tona-Rama, Inc.*
- Private property owners who hold title to dry sand areas of the beach falling within the jurisdictional limits of the City of Destin may utilize local law enforcement for purposes of reporting incidents of trespass as they occur.¹²

District Court of Appeal

The customary use doctrine articulated by the Florida Supreme Court was limited in 2007 with a 5th District Court of Appeal decision, *Trepanier v. County of Volusia*.¹³ The court noted

While some may find it preferable that proof of these elements of custom be established for the entire state by judicial fiat in order to protect the right of public access to Florida's beaches, it appears to us that the acquisition of a right to use private property by custom is intensely local and anything but theoretical. "Custom" is inherently a source of law that emanates from long-term, open, obvious, and widely-accepted and widely-exercised practice. It is accordingly impossible precisely to define the geographic area of the beach for which evidence of a specific customary use must be shown, because it will depend on the particular geography and the particular custom at issue.¹⁴

¹⁰ *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 78 (1974).

¹¹ Op. Att'y Gen. Fla. 2002-38 (2002).

¹² *Id.*

¹³ *Trepanier v. County of Volusia*, 965 So. 2d 276 (Fla. 5th DCA 2007).

¹⁴ *Id.* at 289.

It should be noted that the court also held that a determination of customary use “requires the courts to ascertain in each case the degree of customary and ancient use the beach has been subject to”¹⁵

Federal Court Decision

The most recent decision published on the customary use doctrine was issued by the U.S. District Court for the Northern District of Florida, in Pensacola, in November, 2017.¹⁶ The Court was asked to decide whether a Walton County customary use ordinance was enacted *ultra vires* or beyond the scope of the county’s authority. In its ordinance, Walton County declared that the county’s dry sand areas were subject to the customary use doctrine. Accordingly, the ordinance prohibited certain signs, ropes, fences, or chains in the dry sand portion of a beach which were designed to exclude the public from the dry sand area. Violators were subject to a \$500 fine.

In its lengthy decision, the Court held that Walton County did not act outside its authority in adopting the ordinance that recognized and regulated customary use.¹⁷ The Court did note, however, that “property owners have a right under Florida law to *de novo* as-applied judicial review and a determination of the existence of customary use rights.”¹⁸ The decision was recently appealed to the United States Court of Appeals for the Eleventh Circuit in Atlanta.¹⁹

It is apparent from these opinions that private individuals and governmental entities are challenged when trying to understand the scope of the customary use doctrine when it affects private property rights.

III. Effect of Proposed Changes:

Ejectment (Section 1)

Three subsections are added to the beginning of chapter 66, F.S., to define ejectment, clarify which court has jurisdiction, and address presuit notification.

Definition

The bill adds a “right of action” provision which states that a person with a superior title to possess real property may maintain an ejectment action to recover possession of the property. This addition clarifies what an ejectment action is and reduces confusion to both lay people and practitioners as to when an ejectment action is the appropriate remedy when seeking to recover real property. The absence of a current definition may create confusion as to whether an ejectment action in chapter 82, F.S., or a landlord and tenant action in chapter 83, F.S., is proper.

¹⁵ *Id.* at 288 quoting *Reynolds v. County of Volusia*, 659 So. 2d 1186 (Fla. 5th DCA 1995).

¹⁶ *Alford, et al., v. Walton County*, 3:16-cv-00362-MCR-CJK, Order filed Nov. 22, 2017.

¹⁷ *Id.* at 45.

¹⁸ *Id.*

¹⁹ The case was docketed for appeal on December 27, 2017, and is case 17-15741.

Jurisdiction

Circuit courts possess exclusive original jurisdiction “in actions of ejectment”²⁰ as provided in chapter 26, F.S. The addition of this language in the ejectment chapter eliminates any confusion as to where these actions are maintained.

Presuit Notice

Language is added which states that a plaintiff is not required to provide any presuit notice or demand to a defendant before an action may begin. While some civil actions do require presuit notice and demands, this clarifies that ejectment actions do not. The additional language is essentially the codification of case law.

Statutory Pleading Requirements

The bill modernizes and simplifies the statutory language of existing pleading requirements for ejectment actions. However, the pleading requirements are not substantially changed by the bill.

Operation

A new “operation” subsection is added to provide that the ejectment section is “cumulative to other existing remedies and may not be construed to limit other remedies” This language or similar language is found in other statutes. According to Black’s Law Dictionary, a cumulative remedy is a remedy that is “available to a party in addition to another remedy that still remains in force.”²¹ This additional language is also consistent with case law on ejectment actions.

Forcible Entry and Unlawful Detainer (Bill Sections 2-9)

Definitions (Bill Section 2)

The bill deletes the current definitions of “unlawful entry and forcible entry” and “unlawful entry and unlawful detention” and replaces them with modernized definitions of forcible entry, unlawful detention, and unlawful entry.

A definition of real property is added and means land or any existing permanent or temporary building or structure on the land and any attachments generally held out for the use of persons in possession of the real property. The term “real property” is then used for consistency throughout the section and replaces the term “dwelling” in the remedy for unlawful detention by a transient occupant of residential property. This change in terminology appears to allow for the use of unlawful detainer actions to regain possession of a broader array of properties.

A definition of record titleholder is supplied and means someone who holds title to real property as evidenced by an instrument recorded in the public records of the county where the real property is located.

²⁰ Section 26.012(2)(f), F.S.

²¹ BLACK’S LAW DICTIONARY (10th ed. 2014).

Applicability (Bill Section 3)

A new section is added to explain when these provisions apply. They do not apply to residential tenancies in the Landlord and Tenant chapter nor do they apply to the possession of real property in the Mobile Home and Recreational Vehicle Parks chapter or the Mobile Park Lot Tenancies chapter.

Remedies, Summary Procedure, and Time Limit for an Action (Bill Section 4)

The bill, consistent with existing statutes and case law, establishes that a person entitled to possession of the real property has a cause of action against someone who obtained possession by forcible entry, unlawful entry, or unlawful detention and may recover possession and damages. However, the bill reorganizes and rewords many of the related statutory requirements and makes few substantive changes. If a court determines that the defendant entered or detained the property in a willful and knowingly wrongful manner, the bill provides that a plaintiff may receive damages that are double the reasonable rental value of the property from the beginning of the wrongful entry or detention until the plaintiff receives possession of the property. This measure of damages is a restatement of existing law. In addition, the bill allows a plaintiff to recover other damages which may include, but are not limited to, damages for waste. Finally, the bill provides that actions for possession and damages may be bifurcated by the court.

The reorganized and reworded statutory provisions continue to provide for the use of the summary judicial procedures to expeditiously resolve forcible entry, unlawful entry, and unlawful detainer actions.

The bill deletes language requiring that summary procedure actions for forcible entry, unlawful entry, and unlawful detainer actions be brought within 3 years after possession has been withheld from the plaintiff.

Advancing the Cause on the Calendar (Bill Section 4)

Language is added in the bill to require a court to “advance the cause of action [for forcible entry, unlawful entry, or unlawful detention] on the calendar.” This is a new provision not found in the existing statutes, however, identical language is found in the Landlord and Tenant Act in s. 83.59, F.S., regarding an action for possession after a rental agreement is terminated and a tenant does not vacate the premises. The effect of the language may be to emphasize that courts must ensure that actions using the summary procedure are resolved expeditiously.

Service of Process (Bill Section 7)

The current statute regulating service of process provides that when a defendant cannot be found at his or her usual place of residence, a summons may be served by posting a copy of the summons in a conspicuous place on the property described in the complaint and summons. The bill provides a simplified process to provide notice by posting if personal service on the defendant cannot be obtained. The bill provides that if, after at least two attempts to obtain personal service, a defendant cannot be found in the county where the action is pending and the defendant does not have a usual place of abode in the county or there is no one 15 years old or older residing at that usual place in the county, then the sheriff must serve the summons and

complaint by attaching it to a conspicuous part of the real property involved in the proceeding. At least 6 hours must elapse between the two attempts to obtain personal service.

If the plaintiff anticipates providing notice using the attachment method described above, the plaintiff must provide the clerk of the court with two additional copies of the summons and complaint and two prestamped envelopes addressed to the defendant. One of the envelopes must be addressed to the defendant's residence, if it is known. The other envelope must be addressed to the defendant's last known business address, if it is known. The clerk must then immediately mail the copies of the summons and complaint by first-class mail, note in the docket that the mailing has occurred, and file a certificate in the court file noting the fact of the mailing and date. Service is effective on the date of posting or mailing, whichever is later, and at least 5 days must have elapsed after the date of service before a final judgment for removal of the defendant may be entered.²²

Effect of Judgment (Bill Section 9)

While chapter 82, F.S., currently provides that no judgment for a plaintiff or defendant bars an action of trespass for injury to property or ejectment between the parties regarding the same real property, the bill adds more language. The bill provides that a judgment is not conclusive as to the facts in any future action for ejectment or quiet title. It also states that a judgment rendered pursuant to chapter 82, F.S., may be superseded, in whole or in part, by a subsequent judgment in an action for trespass for injury to the real property, ejectment, or quiet title involving the same parties with respect to the same real property.

Sections Repealed (Bill Sections 11-14)

The bill repeals s. 82.061, F.S., relating to service of process, s. 82.071, F.S., relating to trials and evidence as to damages, and s. 82.081, F.S., relating to trial and verdict forms. The first two sections are contained in other provisions of the bill and the third section is removed because the forms are outdated.

Establishment of Recreational Customary Use (Bill Section 10)

The bill establishes a process by which a governmental entity may seek the judicial determination of a recreational customary use of private beach property. The process appears designed to reduce ongoing and protracted litigation among property owners and governments. After defining what a governmental entity is, the bill provides that a governmental entity may not adopt or keep in effect an ordinance or rule that is based upon customary use of any portion of a beach above the mean high-water line, unless the ordinance or rule is based upon a judicial declaration affirming recreational customary use of the beach.

Notice

The new procedure created in the bill requires that the governmental entity, at a public hearing, adopt a formal notice of intent to affirm the existence of a recreational customary use on private property.

²² This language is very similar to that found in s. 48.031, F.S., Service of process generally; service of witness subpoenas and s. 48.183, F.S., Service of process in action for possession of premises.

The notice must specifically identify:

- The parcels of property or the specific portions of the property, for which the customary use affirmation is sought;
- The detailed, specific, and individual use or uses of the parcels to which the customary use affirmation is sought; and
- Each source of evidence the governmental entity will rely upon to prove that the recreational customary use has been ancient, reasonable, without interruption, and free from dispute.

The governmental entity must provide notice of the public hearing to the owner of each parcel of property at the address recorded in the county property appraiser's records. The notice must:

- Be provided at least 30 days before the public meeting by certified mail with return receipt requested;
- Be published in a newspaper of general circulation in the area where the parcels of property are located; and
- Be posted on the governmental entity's website.

Judicial Determination

Within 60 days after adopting the notice of intent, the governmental entity must file a Complaint for Declaration of Recreational Customary Use with the circuit court in the county where the subject property is located. This is a newly created cause of action and is similar to a declaratory judgment.²³ The governmental entity must provide notice of filing the complaint to the owner of each parcel as required above for the notice of intent. The notice must allow the owner to intervene in the proceeding within 45 days after receiving the notice. The governmental entity must also provide verification that the notice has been served to the property owners so that the court may establish a schedule for the proceedings.

The proceedings will be conducted de novo, or anew. The court must determine whether the evidence presented by the governmental entity demonstrates that the recreational customary use or uses identified in the notice of intent have been ancient, reasonable, without interruption, and free from dispute. No presumption exists regarding the existence of a recreational customary use of the property in question. The governmental entity bears the burden of proof to demonstrate that the recreational customary use exists. A parcel owner who is subject to the complaint may intervene in the proceeding as a party defendant in the proceeding.

Application

These customary use provisions do not apply to a governmental entity having an ordinance or rule that was adopted and in effect on or before January 1, 2016. Additionally, the provisions do not deprive a governmental entity from raising customary use as an affirmative defense in any proceeding that challenges an ordinance or rule that was adopted before July 1, 2018.

The bill takes effect July 1, 2018.

²³ A declaratory judgment is a binding adjudication in which a court establishes the rights of the parties without requiring enforcement of its decision. It is generally used to resolve legal uncertainties for the parties. BLACK'S LAW DICTIONARY (10th ed. 2014).

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 66.021, 82.01, 82.02, 82.03, 82.04, 82.05, 82.091, and 82.101.

The bill redesignates section 82.045 as section 82.035 of the Florida Statutes.

This bill creates section 163.035 of the Florida Statutes.

This bill repeals the following sections of the Florida Statutes: 82.061, 82.071, and 82.081.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Rules on March 1, 2018:

The committee substitute differs from the underlying bill only in section 10 which pertains to the establishment of recreational customary use. The original bill provided that a common law claim of customary use must apply to a particular parcel and must be determined by a court. The committee substitute deletes that provision and provides an efficient process by which a governmental entity may affirm customary use rights by first adopting an ordinance and then seeking a judicial determination of the recreational customary use.

B. Amendments:

None.