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 Judiciary

BILL:	SB 802
INTRODUCER:	Senator Perry
SUBJECT:	Marketable Record Title Act
DATE:	December 9, 2019
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stallard	Cibula	JU	**Pre-meeting**
2.			IT	
3.			RC	

I. Summary:

SB 802 expands the reach of the Marketable Record Title Act's main provision, seeks to clarify an exception to the main provision, and bolsters current law's prohibition on discriminatory deed provisions.

The main provision of the Marketable Record Title Act (MRTA) extinguishes most interests, claims, and other real property "rights" that were not created in or after a given property's "root of title"—the most recent title transaction (such as a deed) that is more than 30 years old. The bill, in contrast to a recent court opinion, provides that the rights extinguished by MRTA include restrictive covenants that were recorded in connection with a zoning regulation.

MRTA also includes a list of exceptions—rights that it does not eliminate even though they were created before the root of title. One category of exceptions includes rights that are "disclosed" in the root of title. The bill seeks to increase how specifically a right must be disclosed in the root of title if the right is to qualify as an exception.

The bill, consistent with prohibitions currently set forth in the Fair Housing Act, extinguishes "discriminatory restrictions" from title transactions, such as deeds, and expressly states that the restrictions are unlawful, unenforceable, and null and void. The bill provides for summary removal of discriminatory restrictions from the governing documents of a property owners' association. With regard to an owner of non-association property, the bill authorizes the owner to obtain a determination from the Department of Economic Opportunity that a provision of a title transaction is a discriminatory restriction. The owner may then record the determination.

Finally, the bill provides a grace period of one year for persons whose interests would otherwise be extinguished by the bill to file a notice and save their interests from extinguishment.

II. Present Situation:

The Marketable Record Title Act

The Marketable Record Title Act (MRTA) was enacted in 1963 "to simplify conveyances of real property, stabilize titles, and give certainty to land ownership."[1, 2] To accomplish these goals, MRTA extinguishes most "rights" in real property that were not created in or after the "root of title." The root of title is essentially the most recent title transaction (such as a deed) that is more than 30 years old.[3]

Rights Extinguished Under the MRTA

MRTA extinguishes the following "rights," subject to exceptions:

> [A]ll estates, interests, claims, or charges, the existence of which depends upon any act, title transaction, event, or omission that occurred before the effective date of the root of title.[4]

Moreover, MRTA notes that it extinguishes these rights regardless of how they are "denominated" in a deed or other instrument creating the right. Accordingly, the issue of whether MRTA applies to extinguish a given right has often come before the courts, as it did in 2016 when the Third District Court of Appeal considered whether a certain restrictive covenant was an "interest" subject to extinguishment under MRTA.[5]

A Recent District Court of Appeal Opinion Regarding the Applicability of the MRTA

In *Save Calusa Trust v. St. Andrews Holdings, Ltd.,* 193 So. 3d 910 (Fla. 3d DCA 2016), the court addressed the issue of "whether a restrictive covenant, recorded in compliance with a government-imposed condition of a land use approval, is a title interest subject to extinguishment by MRTA."[6] The court held that the restrictive covenant was not a title "interest" under MRTA, and thus was not subject to extinguishment by MRTA.

The court reasoned that the restrictive covenant was an inseparable part of a governmental action to rezone the property at issue. The issue thus became whether MRTA extinguishes zoning regulations.[7] The court concluded that, based on MRTA's language and case law, MRTA did not extinguish zoning regulations, including the one at issue in the case.[8]

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[1] *Save Calusa Trust v. St. Andrews Holdings, Ltd.,* 193 So. 3d 910, 914 (Fla. 3d DCA 2016).
[2] The Marketable Record Title Act is set forth in ch. 712, F.S.
[3] Section 712.06, F.S., defines root of title as any title transaction purporting to create or transfer the estate claimed by any person which is the last title transaction to have been recorded at least 30 years before the time when marketability is being determined. The effective date of the root of title is the date on which it was recorded.
[4] Section 712.04, F.S. The exceptions are set forth at s. 712.03, F.S.
[5] *Save Calusa Trust v. St. Andrews Holdings, Ltd.,* 193 So. 3d 910 (Fla. 3d DCA 2016).
[6] *Id*. at 914. The restrictive covenant at issue required the owner of a golf course, as a prerequisite to redeveloping the property, to have the consent of 75 percent of the homeowners whose homes were in a ring around the course.
[7] *Id* at 915.
[8] *Id*. at 915-16.

Exceptions to Extinguishment under the MRTA

MRTA includes a long list of exceptions—real property rights that MRTA expressly does not extinguish even if the rights were created in a pre-root instrument.

One exception is any right "disclosed" in a deed or other "muniment of title" recorded in the chain of title from the root forward (including a right that arose pre-root). This exception is described more precisely in MRTA:

> Estates or interests, easements and use restrictions disclosed by and defects inherent in the muniments of title [such as a deed] on which said estate is based beginning with the root of title; provided, however, that a general reference in any of such muniments to easements, use restrictions or other interests created prior to the root of title shall not be sufficient to preserve them unless specific identification by reference to book and page of record or by name of recorded plat be made therein to a recorded title transaction which imposed, transferred or continued such easement, use restrictions or other interests . . . .[9]

The Real Property, Probate and Trust Law Section of The Florida Bar believes that this provision should be clearer, particularly as to how specific a disclosure of a pre-root right needs to be for it to fall within the exception.[10] This concern was sparked, at least in part, by a 2015 opinion of the Third District Court of Appeal.[11] The court held that a reference to a pre-root restrictive covenant in several deeds was more than a "general reference" and was otherwise specific enough to meet the statutory definition; thus, the restrictive covenant was not extinguished by MRTA.[12] The references at issue did not include a book and page number.

The court's stated reasoning as to why the references were nonetheless specific enough was brief. The court stated that it agreed with the trial court and a certain expert witness's assessment. Beyond that, the court noted that the references were specific enough so that the covenants were not "hidden" such that the transferees/owners would have been surprised by them. Thus, the court noted, its decision was consistent with "the core concern" of MRTA that "no hidden interest in real property [would be able to be] asserted without limitation against a record property owner."[13]

Discriminatory Real Estate Restrictions

Overview

Federal and state law prohibit discrimination on the basis of race and several other characteristics in the sale, lease, or use of real property. Nonetheless, discriminatory restrictive covenants and other instruments—relics of an era when real estate discrimination was legal—remain in the

[9] Section 712.03(1), F.S.
[10] Real Property, Probate and Trust Law Section of The Florida Bar, *White Paper: Revisions to Chapter 712 (Commonly known as Florida's Marketable Record Title Act)* (2019) (on file with the Senate Committee on Judiciary).
[11] Conversation with French Brown, IV., Esq., lobbyist for the Real Property, Probate and Trust Law Section of The Florida Bar (Dec. 5, 2019). *See generally*, *Barney v. Silver Lakes Acres Property*, 159 So. 3d 181 (Fla. 3d DCA 2015).
[12] *Id*. at 183.
[13] *Id* at 183 (*quoting H & F Land, Inc. v. Panama City–Bay Cnty. Airport and Indus. Dist*., 736 So.2d 1167, 1171 (Fla.1999)).

records of many, perhaps all, counties, and can still be found in a title search. Though these documents are not legally enforceable, their existence has troubled many people who have discovered that a property that they own or rent, or would like to own or rent, was once encumbered by a (enforceable) discriminatory restriction.[14] But current law does not appear to provide a way to strike or otherwise disavow these provisions in the public records.

Fair Housing Act

This state's Fair Housing Act, which was closely modeled from the federal Act,[15] broadly prohibits discrimination in the sale or rental of real property, including by way of racist restrictive covenants.

The Fair Housing Act's main operative provisions relating to the sale, rental, and use of real estate are set forth in s. 760.23(1), (2), F.S.:

> (1) It is unlawful to refuse to sell or rent after the making of a bona fide offer, to refuse to negotiate for the sale or rental of, or otherwise to make unavailable or deny a dwelling to any person because of race, color, national origin, sex, handicap, familial status, or religion.
>
> (2) It is unlawful to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, national origin, sex, handicap, familial status, or religion.

Moreover, s. 760.23(3), F.S., specifically prohibits discriminatory "notices" and "statements":

> (3) It is unlawful to make, print, or publish, or cause to be made, printed, or published, any notice, statement, or advertisement with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, national origin, sex, handicap, familial status, or religion or an intention to make any such preference, limitation, or discrimination.

However, these provisions are subject to exceptions and exemptions, as set forth in s. 760.29, F.S. For instance, the prohibitions do not apply to the sale or rental of a single-family house by its owner, or to the rental of a small multi-unit building, such as a duplex, if the owner lives in one of the units. The Fair Housing Act also does not apply to prevent a religious organization from restricting the occupancy, sale, or rental of its facilities to members of its religion. Moreover, the Act's prohibitions on discrimination on the basis of familial status "do not apply with respect to housing for older persons."

As for enforcement, the Act authorizes a person who alleges that he or she has been injured by a discriminatory housing provision to pursue administrative and civil remedies. However, the Act

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[14] *See, e.g.*, *Attorney wants outdated, racist covenant language in Betton Hills stripped*, TALLAHASSEE DEMOCRAT (July 1, 2019), https://www.tallahassee.com/story/news/money/2019/07/01/attorney-wants-outdated-racist-covenant-language-betton -hills-stripped-tallahassee/1546406001/.

[15] *See* 42 U.S.C. §§ 3601-19.

does not mention the opportunity for a homeowner to obtain a written determination that a discriminatory restriction on his or her own property is extinguished by the Act or any other law. Similarly, the Act does not allow a homeowners association, or a condominium or cooperative association, to forego its normal procedures for removing these provisions from a document affecting a parcel within the association.

Other States' Efforts to Erase or Otherwise Address Unenforceable Discriminatory Provisions in Public Records

At least a few states—California, Washington, and Ohio—have enacted statutes to address discriminatory real estate restrictions that, though they have long been unenforceable, nonetheless linger in the public records as hurtful and shameful reminders of the past.

California's statutes address these discriminatory provisions in several ways. For instance, California requires a real estate agent, title insurance company, or country recorder, among others, to place a notice on each deed, declaration, or governing document provided to a person. The notice advises the recipient that any discriminatory provision in the document "violates state and federal housing laws and is void," and that the recipient make may file a "modification document" with the "county recorder," along with a copy of the document containing the restriction, with the restriction stricken.[16] If the county counsel agrees that the stricken provision is illegal and void, the modification document must be filed in the county records, and shall include a book and page reference to the original document.[17]

Washington's statutes contain a similar procedure, but also give a property owner, as well as an occupant or tenant, the option to file a declaratory action to have the provision "stricken."[18] Additionally, Washington's statutes contain a provision declaring a long list of discriminatory real estate provisions to be "void."[19]

California also authorizes the expedited removal of any unlawful and void discriminatory provision from the governing documents of a condominium association or other "common interest development."[20] Under this statute, the association must amend out the provision notwithstanding "any other provision of law or provision of the governing documents."[21]

Ohio's approach appears to be more limited. There, when a county recorder processes a transfer of "registered land," he or she is required to "delete" from the sectional indexes "all references" to any discriminatory restrictive covenant affecting the land.[22]

[16] CAL. GOV'T CODE § 12956.1.
[17] CAL. GOV'T CODE § 12956.2.
[18] WASH. REV. CODE § 49.60.227.
[19] WASH. REV. CODE § 49.60.224.
[20] CAL. CIVIL CODE § 6606.
[21] *Id*.
[22] OHIO REV. CODE § 317.20(E)(2).

III. Effect of Proposed Changes:

The bill expands the reach of the Marketable Record Title Act's main provision, seeks to clarify an exception to the main provision, and bolsters current law's prohibition on discriminatory deed provisions.

The main provision of the Marketable Record Title Act extinguishes most interests, claims, and other real property "rights" that were not created in or after a given property's "root of title"—the most recent title transaction (such as a deed) that is more than 30 years old. The bill, in contrast to a recent court opinion, provides that the rights extinguished by MRTA include restrictive covenants that were recorded in connection with a zoning regulation.

MRTA also includes a list of exceptions—rights that it does not eliminate even though they were created before the root of title. One category of exceptions includes rights that are "disclosed" in a deed or other muniment, beginning at the root of title. The bill seeks to increase how specifically a right must be disclosed if the right is to qualify as an exception. Whether the bill accomplishes this is unclear, due to the length and complexity of the 135-word sentence comprising the revised provision, and to the nuanced differences in the existing and revised requirements.

Under current law, disclosure by "general reference" is sufficient if it makes "specific identification" to the book and page or recorded plat of the document creating the right. It is unclear how this "general reference" that includes a "specific identification" is operatively different than what is sufficient under the bill. Under the bill, a "specific reference" is sufficient, as is "an affirmative statement in a muniment of title to preserve" the rights created pre-root "as identified by the official book and page or instrument number."

Assuming the language of the bill has its intended effect, older restrictions on the use of property that are contained in deeds will no longer be in force. This change appears likely to facilitate the redevelopment of some properties, including properties having recorded use restrictions that require the consent of surrounding property owners for a change in use.

The bill extinguishes "discriminatory restrictions" from title transactions, such as deeds, and expressly states that the restrictions are unlawful, unenforceable, and null and void. The bill, unlike the Fair Housing Act, provides no exceptions or exemptions from this provision.

The bill provides for summary removal of discriminatory restrictions from the governing documents of a property owners' association. With regard to an owner of non-association property, the bill authorizes the owner to obtain a determination from the Department of Economic Opportunity that a provision of a title transaction is a discriminatory restriction. The owner may then record the determination.

Finally, the bill provides a grace period of 1 year for persons whose interests would otherwise be extinguished by the bill to file a notice and save their interests from extinguishment.

The bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in Article VII, s. 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

The bill includes three sections that are expressly intended to apply retroactively. The bill states that these sections are "remedial in nature" and are "intended to clarify existing law." The Florida Supreme Court has developed a two-prong analysis for determining whether a statute may be applied retroactively.[23] First, there must be "clear evidence of legislative intent to apply the statute retrospectively."[24] If so, then the court moves to the second prong, "which is whether retroactive application is constitutionally permissible."[25] Retroactive application is unconstitutional if it deprives a person of due process by impairing vested rights or imposing new obligations to previous conduct:

> A retrospective provision of a legislative act is not necessarily invalid. It is so only in those cases wherein vested rights are adversely affected or destroyed or when a new obligation or duty is created or imposed, or an additional disability is established, on connection with transactions or considerations previously had or expiated.[26]

Accordingly, a "remedial" or "procedural" statute may be applied retroactively, because these statutes do not create or destroy rights or obligations.[27] Instead, a remedial statute "operates to further a remedy or confirm rights that already exist" and a procedural statute provides the "means and methods for the application and enforcement of existing

[23] *See, e.g., Florida Ins. Guar. Ass'n., Inc. v. Devon Neighborhood Ass'n, Inc*., 67 So. 3d 187, 194 (Fla. 2011).
[24] *Metropolitan Dade County v. Chase Federal Housing Corp.,* 737 So. 3d 494 (Fla. 1999) (quoting *McCord v. Smith*, 43 So.2d 704, 708–09 (Fla.1949); cf. *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55, 61 (Fla. 1995).
[25] *Id.*
[26] *Id.* at 503 (*citing McCord v. Smith*, 43 So. 2d 704, 708-09 (Fla. 1949).
[27] *See State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995).

duties and rights."[28] Finally, the Legislature's labeling of a law as remedial or procedural does not make it so.[29]

Courts might determine that the bill's retroactive provisions impair vested rights. By their nature and their terms, the provisions in question pertain to rights in real property. In fact, the bill acknowledges this in Section 6. However, Section 6 also provides a grace period for people whose rights would be affected by the bill to take steps to protect rights that would otherwise be extinguished by the bill.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

The operative difference between s. 712.03(1), F.S., in current law and s. 712.03(1), F.S., in the bill is unclear. Moreover, the bill language is itself unclear. Accordingly, the Legislature may wish to amend the bill to clarify this provision.

Also, unlike the Fair Housing Act, the bill does not contain any exemptions from its main provision. If this was unintentional, the Legislature might wish to amend the bill accordingly. The Fair Housing Act prohibits discrimination on a number of bases, including religion. However, as an example of one of its exemptions, the FHA expressly states that it does not prohibit a religious organization from restricting the sale of its property to members of that religion.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 712.03, 712.04, and 712.12.

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[28] *Maronda Homes, Inc. of Fla. v. Lakeview Reserve Homeowners Ass'n., Inc*., 127 So. 3d 1258, 1272 (Fla. 2013) (*citing Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994); *City of Lakeland v. Catinella*, 129 So. 2d 133, 136 (Fla. 1961)).

[29] *See State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995).

This bill creates section 712.065 of the Florida Statutes.

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.