

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1139 Ancillary Property Rights
SPONSOR(S): Civil Justice & Property Rights Subcommittee, Smith, D.
TIED BILLS: **IDEN./SIM. BILLS:** SB 1520

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Property Rights Subcommittee	15 Y, 0 N, As CS	Mawn	Jones
2) Tourism, Infrastructure & Energy Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

The Marketable Record Title Act (“MRTA”) automatically extinguishes all estates, interests, claims, or charges, existing due to any act, title transaction, event, or omission occurring before the effective date of the root of title and not statutorily excepted or otherwise preserved from extinguishment. In other words, MRTA simplifies the title examination process by confirming real property’s marketability based on a 30-year marketable record period and a consideration of the statutory exceptions.

Real property ownership comes with many rights, including the owner’s right to exclude others from entering upon his or her property. However, such right may be transferred through an easement, which is a benefit giving a person a limited right of use or enjoyment of another’s land (the “servient estate”) for a special purpose not inconsistent with the grantor’s general property rights. Easements, which may be implied or may be created by law, by an agreement between the parties, or by a grant from the original property owner, are commonly granted to utility companies for the provision of utility services.

CS/HB 1139:

- Clarifies that a property conveyance subject to existing encumbrances identified in a muniments of title does not restart MRTA’s 30-year marketability period on such encumbrances without an affirmative statement of the parties’ intent to do so or a specific reference to the identified encumbrance’s official records book and page number.
- Adds covenants, restrictions, zoning requirements, and building or developmental permits to the list of encumbrances extinguished by MRTA.
- Excepts from extinguishment by MRTA zoning ordinances, land development regulations, building codes, and other laws, regulations, and regulatory approvals operating independently of matters recorded in the official record as well as any recorded covenant or restriction that states it was accepted by a governmental entity as part of such law, regulation, or regulatory approval.
- Specifies that a utility easement is an interest in real property.
- Allows a utility easement to be alienated, assigned, divided, transferred, or apportioned by its grantee and any successors or assigns, unless such action is expressly forbidden in the easement instrument.
- Specifies that, as long as a utility easement assignment is consistent with the terms in the easement instrument, the action is not an undue burden on the servient estate.

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

The bill provides an effective date of upon becoming a law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Marketable Record Title Act

Background

Before the Marketable Record Title Act's ("MRTA") 1963 passage, a title examination involved reviewing all documents relating to the real property recorded in the public records of the county from the oldest public records – which could in some cases date back to a land grant from the king of Spain¹ – to the most recent.² This usually required the purchase of a title abstract and a review and analysis of every document and title transaction³ listed in the abstract.⁴

However, MRTA created a new title concept, the marketable record title, by eliminating ancient defects or stale claims to real property.⁵ In other words, MRTA simplifies the title examination process by confirming a piece of real property's marketability based on a 30-year marketable record period and a consideration of certain statutory exceptions rather than on a perfect record from the oldest public records to the most recent. Specifically, MRTA provides that any person with legal capacity to own land who, alone or with a predecessor in title, has been vested with any estate in land of record for 30 years or more, has marketable record title to such land free and clear of all claims other than those excepted in statute.⁶

After 30 years, MRTA automatically extinguishes all estates, interests, claims, or charges, existing due to any act, title transaction, event, or omission occurring before the effective date of the root of title⁷ and not statutorily excepted from extinguishment.⁸ All extinguished estates, interest, claims, or charges become null and void.⁹ However, MRTA also sets out rights and interests not extinguished by its terms, including:

- Estates or interests, easements and use restrictions disclosed by and defects inherent in the muniments of title¹⁰ on which the estate is based beginning with the root of title.¹¹
- Estates, interests, claims, or charges, or any covenant or restriction¹² preserved by the filing of a proper notice in accordance with MRTA.¹³
- Rights of any person possessing the land as long as the person is in such possession.¹⁴
- Estates, interests, claims, or charges arising out of a title transaction recorded after the root of title effective date.¹⁵

¹ See The Florida Bar, *Florida Real Property Title Examination and Insurance* chapter 2, (8th ed. 2016).

² Gregory M. Cook, *The Marketable Record Title Act Made Easy*, 66 Fl. Bar J. 55 (Oct. 1992), <https://www.floridabar.org/the-florida-bar-journal/the-marketable-record-title-act-made-easy/> (last visited Mar. 8, 2021).

³ "Title transaction" means any recorded instrument or court proceeding affecting title to any estate or interest in land and describing the land sufficiently to identify its location and boundaries. S. 712.01(7), F.S.

⁴ *Id.*

⁵ *Id.*

⁶ S. 712.02(1), F.S.

⁷ "Root of title" means 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 it was recorded. S. 712.01(6), F.S.

⁸ S. 712.04, F.S.

⁹ *Id.*

¹⁰ "Muniments of title" are written instruments or evidence which the owner of lands, possessions, or inheritances has entitling said owner to defend the title. Muniments of title need not be recorded to be valid, except that recording statutes do give good-faith purchasers certain rights over other persons. 42 Fla. Jur. 2d § 16.

¹¹ S. 712.03(1), F.S.

¹² "Covenant or restriction" means any agreement or limitation contained in a document recorded in the public records of the county in which the parcel is located which subjects the parcel to any use or other restriction or obligation. S. 712.01(2), F.S.

¹³ S. 712.03(2), F.S.

¹⁴ S. 712.03(3), F.S.

- Recorded or unrecorded easements in the nature of easements, rights-of-way, and terminal facilities.¹⁶
- Rights of a person in whose name the land is assessed on the county tax rolls under specified circumstances.¹⁷
- State title to lands beneath navigable waters acquired by virtue of sovereignty.¹⁸
- Any right, title, or interest held by the Board of Trustees of the Internal Improvement Trust Fund,¹⁹ specified water management districts, or the United States.²⁰

MRTA also provides a mechanism for an interested party to preserve from extinguishment a right or interest the party holds. Specifically, a person with an interest in land or some other right subject to extinguishment by MRTA may preserve such interest or right by filing a written notice at any time during the marketability period immediately after the effective date of the root of title.²¹ Additionally, a property owners' association ("POA")²² may preserve and protect a community covenant or restriction²³ by filing either a:

- Written notice in the form required by MRTA;²⁴
- Summary notice complying with the specifications of s. 720.3032(2), F.S.;²⁵ or
- Community covenant or restriction amendment indexed under the association's legal name and referencing the information to be preserved.²⁶

Such an action creates a new marketable record period, preventing extinguishment of the interests and rights contained in the notice or community covenant or restriction amendment for 30 years from the date of filing.²⁷

Recent Issues

Real estate practitioners in Florida commonly except from a seller's warranty of title in a deed matters identified as outstanding encumbrances or restrictions by making the deed subject to all matters of record and instruments identified by official book and page numbers.²⁸ Though the parties rarely intend to restart MRTA's 30-year marketability period on a prior existing encumbrance or restriction by such an action, it can be argued that identifying the official book and page number of such encumbrance or restriction in a muniments of title could do so.²⁹

Additionally, in 2016, the Third District Court of Appeal held that a restrictive covenant recorded in compliance with a government-imposed land-use restriction is not a title interest extinguished under MRTA, acknowledging established Florida law recognizing that government-imposed property

¹⁵ S. 712.03(4), F.S.

¹⁶ S. 712.03(5), F.S.

¹⁷ S. 712.03(6), F.S.

¹⁸ S. 712.03(7), F.S.

¹⁹ The Board of Trustees of the Internal Improvement Trust Fund is comprised of the Governor and the Cabinet. See Florida Department of Environmental Protection, *Division of State Lands*, <https://floridadep.gov/lands> (last visited Mar. 8, 2021).

²⁰ S. 712.03(8), F.S.

²¹ S. 712.05, F.S.

²² A POA is a homeowners' association, a corporation or other entity responsible for the operation of property in which voting membership is made up of the property owners and their agents, or a combination thereof, and in which membership is a mandatory condition of property ownership, or an association of parcel owners authorized to enforce a community covenant or restriction imposed on the parcels. S. 712.01(5), F.S.

²³ "Community covenant or restriction" means any agreement or limitation contained in a document recorded in the public records of the county where the property lies which subjects the parcel to any use restriction enforceable by a property owners' association or authorizes a property owners' association to impose a charge or assessment against the parcel or parcel owner. S. 712.01, F.S.

²⁴ S. 712.05(2)(a), F.S.

²⁵ S. 712.05(2)(b), F.S.

²⁶ *Id.*

²⁷ S. 712.05(3), F.S.

²⁸ See Real Property, Probate & Trust Law Section of the Florida Bar ("RPPTL"), *White Paper: Revisions to Chapter 712*, (July 28, 2018).

²⁹ *Id.*

restrictions do not affect marketability of title.³⁰ The court also acknowledged that no language in MRTA reaches zoning regulations, finding that a restrictive zoning ordinance is not a hidden property interest of the kind MRTA seeks to extinguish.³¹ However, in some cases, there is no way to facially determine whether a restrictive covenant recorded in the official records was recorded in compliance with a government-imposed land-use,³² and thus whether the restrictive covenant is extinguished by MRTA or preserved under the judicially-created exception.

Utilities: Easements and Storm Hardening

Easements

Real property ownership comes with many rights, including the owner's right to exclude others from entering upon his or her property. However, such right may be transferred through an easement, which is a benefit based on land ownership giving someone a limited right of use or enjoyment of another's land (the "servient estate") for a special purpose not inconsistent with the grantor's general property rights.³³ Easements, which may be implied or created by law, by an agreement between the parties, or by a grant from the original property owner, are commonly granted to utility companies for the provision of utility services.³⁴

An easement holder may do what is reasonably necessary for the easement's full enjoyment, but the right may not be increased to a greater extent than reasonably necessary and contemplated at the time of the easement's creation.³⁵ An easement's scope is defined by what is granted, and all rights not granted are retained by the grantor.³⁶ An easement's scope cannot be expanded to include a use merely because such use does not impose an added burden on the servient estate.³⁷ However, an electric transmission line easement holder may avail itself of modern inventions and improvements if such action is within the easement's scope.³⁸

Storm Hardening of Utilities

Investor-owned electric utilities ("IOUs") install overhead or underground distribution facilities based on the principle of least-cost electric distribution service.³⁹ Generally, underground distribution facility construction is more expensive than overhead construction.

After the intense 2004 and 2005 hurricane seasons, Florida's Public Service Commission ("PSC") imposed several new requirements on IOUs to strengthen (or "harden") electric transmission and distribution infrastructure⁴⁰ to withstand severe weather events. Under these rules, IOUs must establish the cost differential between overhead and underground facility construction. Upon request, the IOU will complete a new underground installation or convert an existing overhead distribution line to

³⁰ See *Save Calusa Trust v. St. Andrews Holdings, Ltd.*, 193 So. 3d 910 (Fla. 3d DCA 2016), citing *Wheeler v. Sullivan*, 106 So. 876 (Fla. 1925).

³¹ See *Calusa*, 193 So. 3d 910, citing *Blanton v. City of Pinellas Park*, 887 So. 2d 1224 (Fla. 2004).

³² See RPPTL, *supra* note 27.

³³ Michael D. Stewart, *Easements in Florida Real Estate*, <https://www.michaelstewartlaw.com/2013/02/05/florida-real-estate-law-easements/#:~:text=An%20easement%20is%20a%20limited,property%20rights%20of%20the%20owner> (last visited Mar. 8, 2021).

³⁴ *Id.*

³⁵ *Crutchfield v. F.A. Sebring Realty Co.*, 69 So. 2d 328 (Fla. 1954).

³⁶ *City of Orlando v. MSD-Mattiek, L.L.C.*, 895 So. 2d 1127 (Fla. 5th DCA 1999) (finding that it was an undue burden on the servient estate to allow fiber optic cable installation along an existing electric easement).

³⁷ *Id.*

³⁸ *Florida Power Corp. v. Silver Lake Homeowners' Ass'n*, 727 So. 2d 1149 (Fla. 5th DCA 1999) (allowing an electric utility to upgrade from wooden to steel transmission line poles).

³⁹ See Stewart, *supra* note 32.

⁴⁰ Transmission facilities are those parts of the electric power grid, including transmission lines, that move electricity at high voltages (69 kilovolts and above) from generating sources to "load centers" or other points on the grid where the voltage is reduced for delivery to an electric utility's distribution system. Distribution facilities are those parts of the electric power grid, including primary and secondary distribution lines and transformers, that deliver electricity at a reduced voltage usable by most end-users. Sometimes, customers with extremely high demands may take service at transmission voltage.

underground installation, provided that the requesting party pays the appropriate cost differential established in the IOU's tariffs.⁴¹

After the 2004 and 2005 hurricane seasons, the PSC amended its undergrounding rules by adopting new provisions to lessen the cost impact on parties requesting conversion of overhead facilities to underground installation. These changes required IOUs to account for average storm restoration costs when calculating the cost differential to be paid for undergrounding projects; assuming higher storm restoration costs for overhead facilities, the cost differential would be reduced.⁴² These changes also allowed an IOU to request that a portion of the cost of an undergrounding project be borne by all of its ratepayers if a benefit to all ratepayers could be demonstrated.⁴³

For Florida's three largest IOUs, approximately 40 percent of all distribution lines are underground, and the majority of recent undergrounding projects were for new construction, rather than the conversion of overhead lines to underground installation.⁴⁴

In 2018, two Florida IOU's – Florida Power & Light Company (FPL) and Duke Energy Florida, LLC., (DEF) – began targeted undergrounding programs. DEF plans to convert approximately 1,200 miles of overhead lines in a ten-year term. FPL's program has a three-year term and is estimated to cost \$100 million to convert 158 miles of overhead lines. The costs of these programs are supported through the revenues from current base rates for each utility.⁴⁵ Each program focuses on historically poor performing lateral circuits, with the goal of testing different construction techniques and identifying impediments to converting these targeted overhead facilities to underground facilities.⁴⁶

2018 Review of Florida's Electric Utility Hurricane Preparedness and Restoration Actions

After the 2016 and 2017 hurricane season, the PSC began reviewing electric utility storm preparedness and restoration actions to identify potential areas where infrastructure damage, outages, and recovery time for customers could be minimized in the future. The PSC collected data from all utilities and sought input from non-utility stakeholders and customers.

In July 2018, the PSC released the results of its review. With respect to the initiatives taken after the 2004 and 2005 hurricane seasons, the PSC concluded that Florida's storm hardening programs were effective in reducing the length of outages as compared to the 2004 and 2005 hurricane seasons. The PSC determined that hardened overhead distribution facilities performed better than non-hardened overhead facilities; very few transmission structures failed; underground facilities performed much better than overhead facilities; and the primary cause of outages came from outside the utilities' right-of-way, such as damage from falling trees and displaced vegetation where the utility lacked legal access to control the vegetation.⁴⁷

⁴¹ Most new subdivision construction is underground. Developers of new subdivisions that request underground construction may recover the cost differential through the sales prices of lots or new homes.

⁴² Rule 25-6.078(4), F.A.C., *Schedule of Charges*.

⁴³ See, e.g., Rule 25-6.064(7), F.A.C., *Contribution-in-Aid of Construction for Installation of New or Upgraded Facilities*; Rule 25-6.078(10), F.A.C., *Schedule of Charges*; Rule 25-6.115(12), F.A.C., *Facility Charges for Conversion of Existing Overhead Investor-Owned Distribution Facilities*.

⁴⁴ Florida Public Service Commission ("FPSC"), *Review of Florida's Electric Utility Hurricane Preparedness and Restoration Actions* (July 2018)

<http://www.floridapsc.com/Files/PDF/Publications/Reports/Electricgas/UtilityHurricanePreparednessRestorationActions2018.pdf> (last visited Mar. 8, 2021).

⁴⁵ FPSC, Agency Analysis of 2019 House Bill 797, at 2-3.

⁴⁶ FPSC, *supra* note 43.

⁴⁷ *Id.*

Effect of Proposed Changes

Marketable Record Title Act

CS/HB 1139 clarifies that real property conveyances subject to a prior existing encumbrance or restriction identified in a muniments of title does not restart MRTA's 30-year marketability period on such encumbrance or restriction unless:

- The parties to the instrument include an affirmative statement of their intent to do so; or
- There is specific reference made to the official records book and page number of the identified encumbrance or restriction.

The bill also provides that covenants, restrictions, zoning requirements, and building or developmental permits are extinguished by MRTA but conforms MRTA to the *Calusa* court's holding by excepting from extinguishment any:

- Comprehensive plan or plan amendment, zoning ordinance, land development regulation, building code, development order or permit, and other law, regulation, or regulatory approval operating independently of matters recorded in the official record; and
- Recorded covenant or restriction that on the face of the first page of the document states that it was accepted by a governmental entity as part of any such law, regulation, or regulatory approval.

Further, the bill provides that the MRTA changes are intended to be remedial in nature and to apply retroactively. However, the bill creates a one-year grace period for a person whose property interest might be extinguished by such changes to file a notice to preserve the interest.

Utilities: Easements and Storm Hardening

The bill specifies that a utility easement⁴⁸ is an interest in real property. The bill also:

- Authorizes a utility easement's alienation, assignment, division, transfer, or apportionment unless such action is otherwise expressly prohibited in the easement instrument.
- Specifies that a utility easement's assignment is not an undue burden on the servient estate if the assignment is consistent with the terms set forth in the easement instrument.

This will likely allow a utility company to maintain or assign an easement, which in turn may further efforts to harden the state's utility grid.

The bill provides an effective date of upon becoming a law.

B. SECTION DIRECTORY:

Section 1: Creates s. 704.09, F.S., relating to utility easements.

Section 2: Amends s. 712.03, F.S., relating to exceptions to marketability.

Section 3: Amends s. 712.04, F.S., relating to interests extinguished by marketable record title.

Section 4: Amends s. 712.12, F.S., relating to covenant or restriction revitalization by parcel owners not subject to a homeowners' association.

Section 5: Provides that the amendments to ss. 712.03, 712.04, and 712.12, F.S., are intended to clarify existing law and are remedial in nature.

Section 6: Providing that a person with an interest in land which may be potentially extinguished by the bill and whose interest has not been extinguished by July 1, 2021, must file a notice to preserve such interest.

Section 7: Directing the Division of Law Review to replace the phrase "effective date of this act" wherever it appears in the bill with the date the act becomes law.

Section 8: Providing an effective date of upon becoming a law.

⁴⁸ "Utility easement" means an easement, created by a written grant of easement, for the purpose of providing utility services such as water, wastewater, reclaimed water, natural gas, electricity, drainage, and other utility services.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill makes it easier for utility easements to be maintained or assigned, which may help harden the state's electrical grid from hurricanes and other windstorm events, leading to fewer surcharges assessed to Florida consumers related to hurricane or wind damage repair to existing electrical facilities.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 12, 2021, the Civil Justice and Property Rights Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment deleted telephone service from the list of utility service examples for which a utility easement may be granted.

This analysis is drafted to the committee substitute as passed by the Civil Justice and Property Rights Subcommittee.