

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 219 Real Property Rights

SPONSOR(S): Civil Justice & Property Rights Subcommittee, Tuck and others

TIED BILLS: **IDEN./SIM. BILLS:** SB 1380

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|---|------------------|---------|--|
| 1) Civil Justice & Property Rights Subcommittee | 16 Y, 0 N, As CS | Mawn | Jones |
| 2) Local Administration & Veterans Affairs Subcommittee | 18 Y, 0 N | Leshko | Miller |
| 3) Judiciary Committee | 18 Y, 0 N | Mawn | Kramer |

SUMMARY ANALYSIS

The Marketable Record Title Act (“MRTA”) simplifies the title examination process by clearing ancient clouds on a property’s title. More specifically, MRTA automatically extinguishes all estates, interests, claims, or charges, existing due to any act, title transaction, event, or omission occurring more than 30 years ago, unless a statutory exception applies. In 2016, a court decision held that where a restrictive covenant is recorded “in compliance with a government-imposed condition of a land use approval,” such covenant is not extinguished by MRTA.

Under Florida law, a private property owner generally has the right to use his or her private property as a parking facility. A private property owner who chooses to use his or her property in this way may:

- Tow an unauthorized vehicle from his or her parking facility under specified conditions.
- Unless prohibited by local ordinance or regulation, establish rules and rates and issue fines for rule violations to persons parking in the parking facility.

CS/HB 219 establishes a bright-line rule to clarify MRTA’s operation in light of the 2016 court decision. Specifically, the bill:

- Clarifies that a property conveyance subject to existing encumbrances identified in a muniments of title does not automatically restart MRTA’s 30-year marketability period on such encumbrances.
- Modifies the definition of “covenant or restriction” to include agreements or limitations imposed by a governmental entity or required by such an entity as a condition of a development permit.
- Adds covenants, restrictions, zoning requirements, and building or development permits to the list of encumbrances extinguished by MRTA but excepts from extinguishment:
 - Comprehensive plans or plan amendments; zoning ordinances; land development regulations; building codes; development permits and orders; and other laws, regulations, or regulatory approvals operating independently of matters recorded in the official record; and
 - Any recorded covenant or restriction that states on the face of the first page of the document that it was accepted by a governmental entity as part of, or as a condition of, any such comprehensive plan or plan amendment; zoning ordinance; land development regulation; building code; development permit or order; or other law, regulation, or regulatory approval.
- Allows a person with an interest in land which may be extinguished by the bill and whose interest has not been extinguished before July 1, 2022, to file a notice with the clerk of the court by July 1, 2023, to preserve such interest.

The bill also prohibits a county or municipality from enacting any ordinance or regulation restricting or prohibiting the owner or operator of a private parking facility from establishing rates and fees and issuing fines.

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

Before the Marketable Record Title Act's ("MRTA") 1963 passage, a title examination involved laboriously 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 automatically eliminating ancient defects or stale claims to real property.⁵ In other words, MRTA simplified 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. Specifically, MRTA provides that any person with legal capacity to own land who 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 specified in statute or otherwise preserved.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 The rights and interests not extinguished by MRTA include:

- 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* ch. 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 Feb. 21, 2022).

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 Cook, *supra* note 2.

⁵ *Id.*

⁶ *Id.*; See also S. 712.03, 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 s. 16.

¹¹ S. 712.03(1), F.S.

¹² "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 which is contained in a document recorded in the public records of the county in which the parcel is located and which subjects the parcel to any use restriction that may be enforced by a parcel owner. "Development permit" means any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official local government action having the effect of permitting land development. Ss. 712.01(2) and 163.3164(16), F.S.

¹³ S. 712.03(2), F.S.

¹⁴ S. 712.03(3), F.S.

¹⁵ S. 712.03(4), 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 restriction or covenant recorded pursuant to the Pollutant Discharge Prevention and Control Act¹⁹ or the Environmental Control Acts.²⁰
- Any right, title, or interest held by the Board of Trustees of the Internal Improvement Trust Fund,²¹ specified water management districts, or the United States.²²

Preserving Interests Under MRTA

MRTA 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.²³ Additionally, a property owners' association²⁴ may preserve and protect a community covenant or restriction²⁵ by filing a:

- Written notice in the form required by MRTA;²⁶
- Summary notice complying with the specifications of s. 720.3032(2), F.S., relating to notice of association information;²⁷ or
- Community covenant or restriction amendment indexed under the association's legal name and referencing the information to be preserved.²⁸

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.²⁹

Recent Issues

Florida real estate practitioners commonly except outstanding encumbrances or restrictions from a seller's warranty of title in a deed by making the deed subject to all matters of record and instruments identified by their official records book and page numbers assigned by the clerk of the court.³⁰ Though the parties may not 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 records book and page number of an encumbrance or restriction in a muniments of title could do just that.³¹

¹⁶ S. 712.03(5), F.S.

¹⁷ S. 712.03(6), F.S.

¹⁸ S. 712.03(7), F.S.

¹⁹ Ch. 376, F.S.

²⁰ Ch. 403, F.S.; S. 712.03(8), F.S.

²¹ The Board of Trustees of the Internal Improvement Trust Fund is composed of the Governor and the Cabinet. See Florida Department of Environmental Protection, *Division of State Lands*, <https://floridadep.gov/lands> (last visited Feb. 21, 2022).

²² S. 712.03(9), F.S.

²³ S. 712.05, F.S.

²⁴ A property owners' association 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.

²⁵ "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.

²⁶ S. 712.05(2)(a), F.S.

²⁷ S. 712.05(2)(b), F.S.

²⁸ *Id.*

²⁹ S. 712.05(3), F.S.

³⁰ See Real Property, Probate & Trust Law Section of the Florida Bar ("RPPTL"), *White Paper: Revisions to Chapter 712*, (July 28, 2018).

³¹ *Id.*

Additionally, in 2016, the Third District Court of Appeal (“Third DCA”) 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 restrictions do not affect marketability of title.³² 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.³³ However, in some cases, there is no way to determine on the face of the documents whether a restrictive covenant recorded in the official records was recorded in compliance with a government-imposed land-use,³⁴ and thus whether the restrictive covenant is extinguished by MRTA or preserved under the judicially-created exception.

Regulation of Vehicles Parked on Private Property

Under Florida law, a private property owner generally has the right to use his or her private property as a parking facility.³⁵ A private property owner who chooses to use his or her property in this way may:

- Tow an unauthorized vehicle from the parking facility under specified conditions.³⁶
- Unless prohibited by local ordinance or regulation, establish rules and rates and issue fines for rule violation to persons parking in the parking facility.³⁷

In 2019, the City of Miami passed an emergency ordinance banning the operators of privately-owned parking facilities in the city from issuing citations for violations of facility rules, claiming that such citations caused confusion for the recipients who sometimes thought the citations were city-issued and could lead to civil or criminal penalties.³⁸ In 2021, the City of Miami amended the ordinance to authorize the issuance of private parking citations if they are not called a “violation, citation, or ticket” and include a notice informing the recipient that “[t]his invoice is privately issued, is not issued by a governmental authority, and is not subject to civil or criminal penalties.”³⁹ That same year, Broward County enacted an ordinance making it “unlawful for any person, including a parking facility operator or agent, to issue a private ticket to a motor vehicle or to the owner of any such vehicle.”⁴⁰

Effect of Proposed Changes

Marketable Record Title Act

CS/HB 219 establishes a bright-line rule to clarify MRTA’s operation in light of the Third DCA opinion. Specifically, the bill clarifies that a real property conveyance 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 in the property’s legal description to the identified encumbrance’s official records book and page number, instrument number, or plat name.

The bill also:

- Redefines “covenant or restriction” to include, in line with the Third DCA’s holding, agreements or limitations imposed by a governmental entity or required by such an entity as a condition of a development permit.

³² 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)).

³³ *Id.* at 916 (citing *Blanton v. City of Pinellas Park*, 887 So. 2d 1224 (Fla. 2004)).

³⁴ See RPPTL, *supra* note 30.

³⁵ Local ordinances and community associations (through deed restrictions or declarations of covenants) may restrict or limit the parking of motor vehicles and the establishment of parking facilities on private property. See, e.g., s. 33-124.1, Miami-Dade County, Fla. Code of Ordinances.

³⁶ S. 715.07, F.S.

³⁷ Florida law does not expressly authorize the establishment of such rates and fees or the issuance of such fines, but neither does it expressly prohibit doing so.

³⁸ City of Miami, Fla. Ord. No. 13840 (enacted May 23, 2019); S. 25-292, City of Miami, Fla. Code of Ordinances.

³⁹ City of Miami, Fla. Ord. No. 13990 (enacted April 22, 2021); S. 25-292, City of Miami, Fla. Code of Ordinances.

⁴⁰ Broward County, Fla. Ord. No. 2021-43 (enacted Sept. 21, 2021); S. 20-164.2, Broward County, Fla. Code of Ordinances.

- Provides that MRTA extinguishes covenants and restrictions based on zoning requirements, and building or development permits but conforms MRTA to the Third DCA's holding by excepting from extinguishment:
 - Comprehensive plans or plan amendments; zoning ordinances; land development regulations; building codes; development orders or permits; and any other laws, regulations, or regulatory approvals operating independently of matters recorded in the official record; and
 - Any recorded covenant or restriction that states on the face of the document's first page that it was accepted by a governmental entity as part of, or as a condition of, any such comprehensive plan or plan amendment; zoning ordinance; land development regulation; building code; development permit or order; or other law, regulation, or regulatory approval.
- Provides that it is intended to clarify existing law, remedial in nature, and applicable to all estates, interests, claims, covenants, restrictions, and charges, whether imposed or accepted before, on, or after the bill's effective date.
- Allows a person whose interest in land may be extinguished by the bill and whose interest has not been extinguished before July 1, 2022, to file a notice with the clerk of the court by July 1, 2023, to preserve the interest.

Regulation of Vehicles Parked on Private Property

The bill expressly authorizes the owner or operator of private property used as a motor vehicle parking facility to establish rules, rates, and fines that govern private persons parking at the facility, which rules and rates may include parking charges and fines for violating the parking facility's rules. Further, the bill prohibits a county or municipality from enacting an ordinance or regulation restricting or prohibiting the right of a private property owner or operator to establish such rules, rates, and fines and declares that any such ordinance or regulation is null and void.

Effective Date

The bill provides an effective date of upon becoming a law and directs the Division of Law Revision to replace the phrase "the effective date of this act" wherever it appears in the bill with the date the bill becomes law.

B. SECTION DIRECTORY:

Section 1: Amends s. 712.03, F.S., relating to exceptions to marketability.

Section 2: Amends s. 712.04, F.S., relating to interests extinguished by marketable record title.

Section 3: Amends s. 712.12, F.S., relating to covenant or restriction revitalization by parcel owners not subject to a homeowners; association.

Section 4: Creates s. 715.075, F.S., relating to vehicles parked on private property; rules and rates authorized.

Section 5: Provides that the bill is intended to clarify existing law, remedial in nature, and applicable to all estates, interests, claims, covenants, restrictions, and charges, whether imposed or accepted before, on, or after the bill's effective date.

Section 6: Provides a grace period for a person whose interest in land may be extinguished by the bill to preserve such interest.

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

Section 8: Provides an effective date.

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 may have a positive indeterminate fiscal impact on the private sector, as it guarantees to the owner or operator of a private parking facility the right to charge fees for the privilege of parking on the property and issue fines for parking facility rule violations.

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:

Retroactive Application of Laws

In Florida, absent an express statement of legislative intent, a law is presumed to operate prospectively, not retroactively.⁴¹ Both the Florida and the United States Constitutions explicitly forbid passage of a law criminalizing past conduct, but the legislature may provide that a non-criminal law applies retroactively in certain situations.⁴² In determining whether a law may be applied retroactively, courts first determine whether the law is procedural, remedial, or substantive in nature.⁴³ A purely procedural or remedial law may apply retroactively without offending the Constitution, but a substantive law generally may not apply retroactively absent clear legislative intent to the contrary.⁴⁴ However, even where the legislature has expressly stated that a law will have retroactive application, a court may reject that application if the law impairs a vested right, creates a new obligation, or imposes a new penalty.⁴⁵ Further, where a law is designed to serve a remedial purpose, a court may decide not to apply the law retroactively where doing so “would attach new legal consequences to events completed before its enactment.”⁴⁶

⁴¹ *Fla. Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.*, 67 So. 3d 187 (Fla. 2011).

⁴² U.S. Const. art. I, ss. 9 and 10; Art. 1, s. 10, Fla. Const.

⁴³ A procedural law merely establishes the means and methods for applying or enforcing existing duties or rights. A remedial law confers or changes a remedy, i.e., the means employed in enforcing an existing right or in redressing an injury. A substantive law creates, alters, or impairs existing substantive rights. *Windom v. State*, 656 So. 2d 432 (Fla. 1995); *St. John's Village I, Ltd. v. Dept. of State*, 497 So. 2d 990 (Fla. 5th DCA 1986); *McMillen v. State Dept. of Revenue*, 74 So. 2d 1234 (Fla. 1st DCA 1999).

⁴⁴ *State Farm Mutual Automobile Ins. Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995).

⁴⁵ *Menendez v. Progressive Exp. Ins. Co., Inc.*, 35 So. 3d 873 (Fla. 2010).

⁴⁶ *L. Ross, Inc. v. R.W. Roberts Const. Co.*, 481 So. 2d 484 (Fla. 1986).

The bill provides that its MRTA provisions are intended to clarify existing law, are remedial in nature, and are applicable to all estates, interests, claims, covenants, restrictions, and charges, whether imposed or accepted before, on, or after the bill's effective date. Therefore, the bill may have retroactive application in some situations. Whether a court would determine that retroactive application is permissible will likely depend on the facts of the particular case.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On January 13, 2022, the Civil Justice and Property Rights Subcommittee adopted a proposed committee substitute ("PCS") and reported the bill favorably as a committee substitute. The PCS differed from the original bill as it prohibited a county or municipality from enacting an ordinance or regulation restricting or prohibiting the owner or operator of a private parking facility from establishing rates and fees and issuing fines.

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