

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 1167 Attorney Fees and Costs in Property Rights Disputes

**SPONSOR(S):** Local Administration, Federal Affairs & Special Districts Subcommittee, Yarkosky

**TIED BILLS:** IDEN./SIM. **BILLS:** SB 702

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	16 Y, 1 N	Mawn	Jones
2) Local Administration, Federal Affairs & Special Districts Subcommittee	16 Y, 0 N, As CS	Mwakyanjala	Darden
3) Judiciary Committee	18 Y, 0 N	Mawn	Kramer

### SUMMARY ANALYSIS

The institution of private property is a fundamental element of the economic and social structure of the United States. Within this institution, different ownership principles define the existence and limits of private property rights. One such set of principles concerns the enforcement of private land use arrangements, known as “servitudes.” A servitude is, essentially, an arrangement that ties rights and obligations to property ownership or possession so that such rights and obligations run with the land to successive owners and occupiers. Because a servitude can be terminated only by expiration of its terms, by the agreement of all involved parties, by merger of the dominant and servient estates, by court order, or by abandonment by the benefiting party, servitudes are significant for their ability to foster stable, long-term property use arrangements for a variety of purposes, including shared land uses; maintenance of the character of a residential neighborhood, commercial development, or historic property; and the establishment of infrastructure and common facilities. Some of the more commonly-created servitudes convey “use rights” (that is, the rights to use a property one does not own, typically in a specified manner, for one’s own benefit) and rights of ingress and egress (that is, the legal rights to enter upon or exit from a piece of real property).

Riparian rights are rights incident to land bordering navigable waters such as rivers, channels, and streams (“riparian land”) and include rights of ingress, egress, boating, bathing, and fishing, and to an unobstructed view. Riparian rights also include the right to erect upon the bed and shores adjacent to the riparian land docks and other structures for the riparian land owner’s private use, subject to the right of the public to use the navigable waters and applicable regulatory and environmental approval schemes. Riparian rights, which inure to the riparian land owner, are appurtenant to and inseparable from the riparian land. Conveyance of title to or lease of the riparian land entitles the grantee to the riparian rights running with the land, whether or not such rights are mentioned in the deed or lease.

The traditional “English rule” entitled a prevailing party in civil litigation to attorney fees as a matter of right. However, Florida and a majority of other United States jurisdictions have adopted the “American rule,” where each party bears its own attorney fees unless a “fee-shifting statute” provides an entitlement to fees. In Florida, several such fee-shifting statutes entitle the prevailing party to have his or her fees paid by the other party.

CS/HB 1167 provides that, in a civil action brought against the owner of a parcel of real property to resolve a property rights dispute, the court may award reasonable attorney fees and costs to the prevailing defendant if the improvements made to the property by the defendant property owner were made in substantial compliance with, or in reliance on, environmental or regulatory approvals or permits issued by a political subdivision of the state or a state agency. However, the bill provides that attorney fees and costs may not be so awarded where the environmental or regulatory approval or permit was issued due to a material mistake of fact or law or was not issued in compliance with law.

The bill may have a fiscal impact on state or local governments. See Fiscal Comments. The bill provides an effective date of upon becoming a law.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### Servitudes

The institution of private property is a fundamental element of the economic and social structure of the United States.<sup>1</sup> Within this institution, different ownership principles define the existence and limits of private property rights.<sup>2</sup> One such set of principles concerns the enforcement of private land use arrangements, known as “servitudes.”<sup>3</sup>

A servitude is, essentially, an arrangement that ties rights and obligations to property ownership or possession so that such rights and obligations run with the land to successive owners and occupiers.<sup>4</sup> Because a servitude can be terminated only by expiration of its terms, by the agreement of all involved parties, by merger of the dominant and servient estates,<sup>5</sup> by court order, or by abandonment by the benefiting party, servitudes are significant for their ability to foster stable, long-term property use arrangements for a variety of purposes, including shared land uses; the maintenance of the character of a residential neighborhood, commercial development, or historic property; and the establishment of infrastructure and common facilities.<sup>6</sup>

Some of the more commonly-created servitudes convey “use rights” (that is, the rights to use a property one does not own, typically in a specified manner, for one’s own benefit) and rights of ingress and egress (that is, the legal rights to enter upon or exit a piece of real property). Servitudes typically come in the form of:

- Easements, which give a person a nonpossessory right of use or enjoyment in another person’s property for a specific purpose not inconsistent with the property owner’s general rights;<sup>7</sup>
- Real covenants, which limit a property owner’s use of his or her own property, typically for the benefit of other property owners in the community; or
- Profits à prendre, which give a person a non-possessory right to enter upon and remove natural resources (such as minerals, timber, produce, wildlife, or grass) from the property of another.

##### Riparian Rights

Upon attaining statehood in 1845, Florida “assumed title to and sovereignty over the navigable waters in the state and the lands thereunder” from the submerged bed up to the “ordinary high water mark.”<sup>8</sup> Under the common law Public Trust Doctrine, which recognizes the public’s right to natural resources, navigable rivers, lakes, and tidelands are held in the public trust, and the state has a legal duty to preserve and control such waters for public navigation and other lawful uses.<sup>9</sup>

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<sup>1</sup> Ronald H. Rosenberg, *Fixing a Broken Common Law— Has the Property Law of Easements and Covenants Been Reformed by a Restatement*, William & Mary Law School Scholarship Repository, Faculty Publications (2016), <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2932&context=facpubs> (last visited Feb. 21, 2024).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Susan French, *Servitude*, The Encyclopaedia Britannica, Dec. 19, 2003, <https://www.britannica.com/topic/servitude-property-law> (last visited Feb. 21, 2024); Michael J.D. Sweeney, *The Changing Role of Private Land Restrictions: Reforming Servitude Law*, 64 Fordham L. Rev. 661 (1995) <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3208&context=flr> (last visited Feb. 21, 2024).

<sup>5</sup> The “dominant estate” is the property that benefits from the servitude, while the “servient estate” is the property burdened by the servitude. Legal Information Institute, *Dominant Estate*, [https://www.law.cornell.edu/wex/dominant\\_estate](https://www.law.cornell.edu/wex/dominant_estate) (last visited Feb. 21, 2024); Legal Information Institute, *Servient Estate*, [https://www.law.cornell.edu/wex/servient\\_estate](https://www.law.cornell.edu/wex/servient_estate) (last visited Feb. 21, 2024).

<sup>6</sup> *Id.*

<sup>7</sup> Michael T. Olexa, et al., *Handbook of Florida Fence and Property Law: Easements and Rights of Way*, Oct. 3, 2022, <https://edis.ifas.ufl.edu/publication/FE108> (last visited Feb. 21, 2024).

<sup>8</sup> Art. X, s. 11, Fla. Const.; *Merrill-Stevens Co. v. Durkee*, 57 So. 428 (Fla. 1912).

<sup>9</sup> Art. X, s. 11, Fla. Const.; *Coastal Petroleum Co. v. Am. Cyanamid Co.*, 492 So. 2d 339, 342 (Fla. 1986); *State ex rel. Ellis v. Gerbing*, 56 Fla. 603 (1908).

Riparian rights are rights incident to land bordering navigable waters<sup>10</sup> such as rivers, channels, and streams<sup>11</sup> (“riparian land”) and include rights of ingress, egress, boating, bathing, and fishing, and to an unobstructed view.<sup>12</sup> Riparian rights also include the right to erect upon the bed and shores adjacent to the riparian land docks and other structures for the riparian land owner’s private use, subject to the right of the public to use the navigable waters and applicable regulatory and environmental approval schemes.<sup>13</sup> Riparian rights, which inure to the riparian land owner, are appurtenant to and inseparable from the riparian land.<sup>14</sup> Conveyance of title to or lease of the riparian land entitles the grantee to the riparian rights running with the land, whether or not such rights are mentioned in the deed or lease.<sup>15</sup>

In order for riparian rights to attach, the riparian land must extend to the ordinary high water mark of the navigable water.<sup>16</sup> However, courts have acknowledged that there is no one proper method for establishing riparian rights boundaries, and such rights do not necessarily extend into the waters according to riparian land boundaries.<sup>17</sup> Instead, such boundaries must be apportioned and riparian rights determined in accordance with equitable principles, with consideration given to the lay of the shore line, the direction of the water body, and the co-relative rights of adjoining riparian land owners.<sup>18</sup>

## Land Use Regulation

### *Local Government Regulation*

Florida law requires each county and municipality to plan for future development and growth by adopting, implementing, and amending as necessary a comprehensive plan.<sup>19</sup> All elements of a plan or plan amendment must be based on relevant, appropriate data,<sup>20</sup> and an analysis by the local government may include surveys, studies, aspirational goals, and other data available at the time of adopting the plan or amendment.<sup>21</sup> The data supporting a plan or amendment must be taken from professionally accepted sources and must be based on permanent and seasonal population estimates and projections published by the Office of Economic and Demographic Research or generated by the local government based upon a professionally acceptable methodology.<sup>22</sup>

Comprehensive plans adopted by local governments provide the principles, guidelines, standards, and strategies for the orderly and balanced future economic, social, physical, environmental, and fiscal development of the area.<sup>23</sup> A key purpose of such plans is to establish meaningful and predictable standards for land use and development.<sup>24</sup> Accordingly, each county and municipality must adopt and enforce land use regulations (such as zoning ordinances) that are consistent with and implement their adopted comprehensive plan.<sup>25</sup> Furthermore, all public and private development must be consistent

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<sup>10</sup> The test to determine whether water is “navigable water” is whether, at the time Florida joined the United States in 1845, the waterbody was, in its ordinary and natural state, used or capable of being used by any watercraft for a sufficient part of the year as a public highway for commerce. “Navigable waters” in the state do not extend to any permanent or transient waters in the form of so-called lakes, ponds, swamps, or overflowed lands lying over and upon areas which have heretofore been conveyed to private individuals by the United States or by the state without reservation of public rights in and to said waters. *Odum v. Deltona Corp.*, 341 So. 2d 977 (Fla. 1976); s. 253.141(2), F.S.

<sup>11</sup> Riparian rights should not be confused with littoral rights, which are rights incident to land bordering non-flowing waterbodies, such as lakes, ponds, seas, oceans, and gulfs.

<sup>12</sup> S. 253.141, F.S.; *Hayes v. Bowman*, 91 So. 2d 795 (Fla. 1957).

<sup>13</sup> The right to build such a structure does not include the right to use the structure for commercial purposes. Further, the Florida Department of Environmental Protection has established a regulatory approval scheme and setback requirements for structures built over submerged sovereign lands, including docks. *Ferry Pass Inspectors’ & Shippers’ Ass’n v. White’s River Inspectors’ & Shippers’ Ass’n*, 48 So. 643 (Fla. 1909); *Belvedere Dev. Corp. v. Dept of Transp.*, 476 So. 2d 649 (Fla. 1985); Fla. Admin. Code R. 18-21.

<sup>14</sup> S. 253.141, F.S.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*; *Thiesen v. Gulf, Fla. & Alabama Railway Co.*, 78 So. 491 (Fla. 1917).

<sup>17</sup> *Hayes*, 91 So. 2d at 801, 802 (Fla. 1957); *Lake Conway Shores HOA, Inc. v. Driscoll*, 476 So. 2d 1306 (Fla. 5th DCA 1985).

<sup>18</sup> *Id.*

<sup>19</sup> Ss. 163.3167(2), 163.3177(2), F.S.

<sup>20</sup> “To be based on data means to react to it in an appropriate way and to the extent necessary indicated by the data available on that particular subject at the time of adoption of the plan or plan amendment at issue.” S. 163.3177(1)(f), F.S.

<sup>21</sup> S. 163.3177(1)(f), F.S.

<sup>22</sup> *Id.*

<sup>23</sup> S. 163.3177(1), F.S.

<sup>24</sup> S. 163.3167(1)(a-c) and (2), F.S.

<sup>25</sup> S. 163.3202, F.S.

with the local comprehensive plan and all applicable land use regulations; to accomplish this, local governments implement an approval and permitting scheme for property owners wishing to make specified improvements to their properties.<sup>26</sup>

### *State Regulation*

Like local governments, the State establishes standards for land use and development through the enactment of laws and the implementation of land use regulations promulgated by state agencies; many such laws and regulations focus on state-level environmental protection and natural resource conservation.<sup>27</sup> In many instances, a state-level approval and permitting scheme governs property owners wishing to make specified improvements to their properties, thereby ensuring compliance with applicable state land use laws and regulations.<sup>28</sup>

### Attorney Fees

The traditional “English rule” entitled a prevailing party in civil litigation to attorney fees as a matter of right. However, Florida and a majority of other United States jurisdictions have adopted the “American rule,” where each party bears its own attorney fees unless a “fee-shifting statute” provides an entitlement to fees. In Florida, several such fee-shifting statutes entitle the prevailing party to have his or her fees paid by the other party.<sup>29</sup>

### **Effect of Proposed Changes**

CS/HB 1167 creates s. 57.106, F.S., to provide that, in a civil action brought against the owner of a parcel of real property to resolve a property rights dispute, the court may award reasonable attorney fees and costs to the prevailing defendant if the improvements made to the property by the defendant property owner were made in substantial compliance with, or in reliance on, environmental or regulatory approvals or permits issued by a political subdivision of the state or a state agency. Under the bill:

- “Improvement” means an act done to increase the value or benefit of real property.
- “Property rights” means zoning, future land use designations, easement rights, ingress and egress rights, environmental resource and impact permits, and those rights incident to land bordering on navigable waters.

However, the bill provides that attorney fees and costs may not be so awarded where the environmental or regulatory approval or permit was issued due to a material mistake of fact or law or was not issued in compliance with law.

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

#### **B. SECTION DIRECTORY:**

**Section 1:** Creates s. 57.106, F.S., relating to recovery of attorney fees and costs in certain disputes regarding property rights.

**Section 2:** Provides an effective date of upon becoming a law.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

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<sup>26</sup> See ss. 163.3161(6) and 163.3194(1)(a), F.S.

<sup>27</sup> See, e.g., Florida Department of Environmental Protection, *About DEP*, <https://floridadep.gov/about-dep> (last visited Feb. 21, 2024).

<sup>28</sup> *Id.*

<sup>29</sup> See, e.g., s. 400.023, F.S. (nursing home resident); s. 440.34, F.S. (claimant in a workers’ compensation case in certain situations); s. 501.2105, F.S. (plaintiff in specified FDUTPA actions); ss. 626.9373 and 627.428, F.S. (prevailing insured party in a case brought against an insurer); s. 790.33, F.S. (plaintiff in a suit to enforce his or her firearm rights); see also 42 U.S.C. s. 1988(b) (federal fee-shifting statute for prevailing parties in actions to enforce certain civil rights statutes).

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See Fiscal Comments.

D. FISCAL COMMENTS:

The bill may have a positive fiscal impact on prevailing defendants in the types of property rights disputes contemplated by the bill to the extent that such defendants recover their attorney fees and costs where they would not otherwise have been able to do so. However, the bill may have a negative fiscal impact on non-prevailing plaintiffs in such disputes, which may be state or local government entities, to the extent that such plaintiffs have to pay a prevailing defendant's attorney fees and costs where they would not have otherwise had to do so.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This 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 January 31, 2024, the Local Administration, Federal Affairs & Special Districts Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Revised definitions of “improvement” and “property rights”;
- Made it permissive for a court to award attorney fees under the bill, rather than mandatory; and
- Provided an exception to the award of attorney fees where the environmental or regulatory approval or permit was issued due to a material mistake of fact or law or not issued in compliance with law.

This analysis is drafted to the committee substitute as passed by the Local Administration, Federal Affairs & Special Districts Subcommittee.