

**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.)

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Prepared By: The Professional Staff of the Committee on Rules

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BILL: CS/SB 814

INTRODUCER: Rules Committee and Senator Yarborough

SUBJECT: Easements Affecting Real Property Owned by the Same Owner

DATE: February 22, 2024

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Bond</u>	<u>Cibula</u>	<u>JU</u>	<b>Favorable</b>
2.	<u>Bond</u>	<u>Twogood</u>	<u>RC</u>	<b>Fav/CS</b>

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 814 amends laws limiting ownership of real property by certain foreign entities and individuals who are related to a foreign country of concern to: change the prohibitions from "any interest" in real property to a "controlling interest" in real property, create a presumption that a 25% or greater interest is a controlling interest, allow ownership by an otherwise restricted individual if such individual has been granted a non-tourist visa or has been granted asylum, and allow ownership where the intent of such ownership is residential subdivision and development.

The bill also provides that a landowner, whether foreign or domestic, may create a valid easement, servitude, or other interest that affects his or her own land (that is, notwithstanding a "unity of title"). The bill conforms the law on easements and servitudes to modern practices and customs where such easements are commonly created. The bill applies to existing easements or servitudes but does not reinstate an easement or servitude that is invalid for reasons other than unity of title.

The bill is effective upon becoming law.

**II. Present Situation:**

**Foreign Landowners**

Part III of ch. 692, F.S. is entitled "Conveyances to Foreign Entities." In short, the part prohibits the purchase and ownership of certain real property interests by certain entities and noncitizens.

Specifically:

- Section 692.202, F.S., prohibits a foreign principal from owning an interest in agricultural land.
- Section 692.203, F.S., prohibits a foreign principal from owning an interest in any real property that is on or within 10 miles of any military installation or critical infrastructure facility.
- Section 692.204, F.S., prohibits the People’s Republic of China, the Chinese Communist Party, or any official or member of the People’s Republic of China or the Chinese Communist Party, or any related person or entity including Chinese citizens,<sup>1</sup> from owning an interest in any real property.

Section 692.205, F.S., creates an exception to these 3 prohibitions above for properties acquired for a diplomatic purpose authorized by the federal government.

A "de minimus interest" in real property does not violate these prohibitions. A de minimus interest is defined in each of the 3 prohibitions as a less than 5 percent interest in the equities or where ownership is a noncontrolling interest in an entity controlled by a registered investment advisor. What constitutes a controlling interest is not defined.

## Easements

An easement is a nonpossessory interest in land of another. An easement is an interest in land, not merely a contract right. The nonpossessory feature of an easement differentiates it from an estate in land. Thus, the holder of an affirmative easement may only use the land burdened by the easement; the holder may not occupy and possess the realty as does an estate owner. An easement burdens land possessed by someone other than the easement holder. This characteristic is a corollary of the nonpossessory element of an easement. It emphasizes the distinction between possession and use and highlights the fact that a possessor and an easement holder can simultaneously use the same parcel of land.<sup>2</sup> An easement is a right or privilege by which the owner of one parcel of land, by reason of such ownership, has a right to the use of the real property of another for a special purpose.<sup>3</sup>

“Servitude” is the generic term that describes legal devices private parties can use to create rights and obligations that run with land. Rights and obligations that run with land are useful because they create land-use arrangements that remain intact despite changes in ownership of the land. Servitudes permit the creation of neighborhoods restricted to particular uses, providing a private alternative to zoning; they permit property to be used as a basis for financing infrastructure,

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<sup>1</sup> The statute impacts the following: The People’s Republic of China, the Chinese Communist Party, any official or member of the People’s Republic of China or the Chinese Communist Party, any other political party or member of a political party or a subdivision of a political party in the People’s Republic of China; a partnership, an association, a corporation, an organization, or any other combination of persons organized under the laws of or having its principal place of business in the People’s Republic of China, or a subsidiary of such entity; any person who is domiciled in the People’s Republic of China and who is not a citizen or lawful permanent resident of the United States; and any person, entity, or collection of persons or entities described in the forgoing having a controlling interest in a partnership, association, corporation, organization, trust, or any other legal entity or subsidiary formed for the purpose of owning real property in this state.

<sup>2</sup> “Easement” defined, THE LAW OF EASEMENTS & LICENSES IN LAND § 1:1.

<sup>3</sup> FLA.JUR.2D EASEMENTS §1.

providing a private alternative to taxation; and they permit the creation of stable arrangements for shared use of land, providing an alternative to acquisition of fee-simple interests for transportation corridors and natural-resource exploitation. Although these are the most common uses of servitudes, they are not exclusive. Servitudes may be used for any purpose that is not illegal or against public policy. Servitudes are widely used in land development because they can be individually tailored to meet the needs of particular projects. They are widely used for roads, utilities, pipelines, and natural-resource exploitation because they are less expensive than acquisition of a fee simple.<sup>4</sup>

The earliest form of easement or servitude was probably a road or access easement. Such easements, whether formal or informal, have existed by necessity since the time that civilization started recognizing real property rights and ownership.<sup>5</sup> In the past two centuries, progress has led society to create arrangements in the nature of an easement that are for the common good. It is important to note, these easements are necessary for society to function, and affect nearly every parcel of property in Florida. These vital easements include road easements, utility easements (including gas, water, sewer, electrical, and communications easements), stormwater easements, and conservation easements. Such easements often created by a landowner in a form affecting the landowner's own real property. Generally, land owners want these easements so that their property is accessible and can use public utilities and services. Currently, a developer must create various access and utility easements as a condition of state and local laws and regulations regarding plat or condominium approval.<sup>6</sup>

At common law, a landowner may not create an easement or other servitude over his or her own lands.<sup>7</sup> This is commonly referred to as a "unity of title." No apparent public policy argument continues to support this rule. This ancient common law concept has been ignored in the creation of numerous easements, servitudes, and other similar arrangements in Florida that are required by modern society. Recent appellate decisions have, however, used this ancient common law concept to invalidate easements and thus have caused real property lawyers to question whether the limited findings of those decisions could be used to challenge millions of vital consensual access and utility easements. Cases include:

- A developer in Brevard County who owned two adjoining commercial properties. He granted an easement from one parcel to the other parcel regarding use of the parking lot as a condition of a development permit. Many years later the separate parcels had separate owners who litigated the validity of the parking easement. The court found the easement invalid because the same person owned both parcels at the time of creation of the easement.<sup>8</sup>
- Poco Place is a short straight private road in Nokomis. It serves 6 homes, 3 on the North and 3 on South. Bayshore Road, a public road, is at the East end of Poco Place, and a waterfront

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<sup>4</sup> Restatement (Third) of Property (Servitudes) § 1.1 (2000).

<sup>5</sup> For instance, right-of-way easements appear in the Twelve Tables of Rome. Rosenberg, *Fixing a Broken Common Law*, 44 FSU LAW REV. 143, 144 at n. 5.

<sup>6</sup> For instance, a condominium developer must create a nonexclusive easement for ingress and egress over streets, walks, and other rights-of-way serving the units of a condominium, part of the common elements necessary to provide reasonable access to the public ways, easements through the units for utilities, and easements for support of the structure, all of which must be created before the state will approve the developer to sell condominium units to the public. Sections 718.104(4)(n), 718.108(1), and 718.502(1)(b), F.S.

<sup>7</sup> *Winthrop v. Wadsworth*, 42 So. 2d 541, 543-44 (Fla. 1949).

<sup>8</sup> *One Harbor Financial Ltd. Co. v. Hynes Properties, LLC*, 884 So. 2d 1039 (Fla. 3rd DCA 2004).

on the intracoastal is at the West end of Poco Place. Owners of one of the waterfront lots physically blocked the road, blocking access to the waterfront. One of the inland parcel owners responded by suing to enforce the easement rights. The court invalidated a portion of the easements creating Poco Place because that portion was created by a previous landowner in his own land.<sup>9</sup>

### III. Effect of Proposed Changes:

#### Real Property Ownership by Certain Foreign Persons and Entities

The bill amends the statutes creating land ownership restrictions for individuals and entities associated with the foreign countries of concern—China, Russia, Iran, North Korea, Cuba, Syria, and the Venezuelan regime of Nicolas Maduro.

The bill creates the following definitions:

- "Business entity" is defined by cross-reference to s. 606.03, F.S. That statute defines "business entity" to mean "any form of corporation, partnership, association, cooperative, joint venture, business trust, or sole proprietorship that conducts business in this state." This new definition is an addition to the statute.
- "Controlling interest" is defined to mean "the possession of the power to control access to or the use or management of a parcel of real property through ownership interests in or securities of a business entity or entities that own the parcel of real property, or through direct ownership interests in a parcel of real property. A business entity or person who directly or indirectly has an ownership interest of 25 percent or more of a parcel of real property is presumed to have a controlling interest." This new definition is an addition to the statute.
- A "de minimus indirect interest" is defined as either:
  - Owning less than 5 percent of any class of registered equities;
  - Owning less than 5 percent in the aggregate in multiple classes of registered equities; or
  - Owning a noncontrolling interest (less than 25%, see above) in an entity controlled by a company that is both registered with the United States Securities and Exchange Commission as an investment adviser under the Investment Advisers Act of 1940, as amended,<sup>10</sup> and is not a foreign entity.

This definition of "de minimus" is in the current version of each of the 3 prohibitions, and is removed from the 3 statutes and placed in the definitions section.

A "foreign principal" is defined by current law, the term determines the persons who are regulated by the restrictions regarding agricultural lands and lands near critical infrastructure or near a military base. The bill amends the definition "foreign principal" to add that a holder of a current verified visa to enter the United States which does not limit the holder to tourist-based travel, or a holder of official documentation confirming that the person has been granted asylum in the United States, is not a foreign principal. The effect of this change to the definition is that an individual who holds a valid United States visa other than a tourist visa, or who has been granted asylum in the United States, is not prohibited by ss. 693.202 or 693.203, F.S., from

<sup>9</sup> *King v. Roorda*, 355 So. 3d 1001 (Fla. 2d DCA 2023).

<sup>10</sup> 15 U.S.C. § 80b-1 through 15 U.S.C. § 80b-21.

owning an interest in agricultural land, land near critical infrastructure, or land near a military base.

The bill also creates an exception to allow a foreign principal to own agricultural land or land near critical infrastructure or near a military base for the primary purpose of development and sale of residential units. The foreign principal must provide an affidavit to the Department of Commerce certifying the qualifying intent to develop the land.

Parallel to the changes regarding agricultural land and land near critical infrastructure, the bill amends the prohibition against any land ownership by China or Chinese principals at s. 692.204, F.S., to allow an individual citizen of China who holds a valid United States visa other than a tourist visa, or who has been granted asylum in the United States, to have a controlling interest in Florida real property and to allow ownership with the intent of residential subdivision.

As to land ownership by foreign persons, the bill also changes references to the Department of Economic Opportunity to reference the Department of Commerce in recognition of the 2023 change of the department's name.<sup>11</sup> The bill also makes numerous grammar and style improvements to Part III of ch. 692, F.S.

### **Real Property Ownership and Use of Easements and Other Servitudes**

The bill allows the owner of real property to create easements, servitudes, and other interests in real property, notwithstanding the fact that the owner owns all of the affected real property.

The bill validates an easement, servitude, or other interest in real property created prior to the effective date of the bill unless invalidated by a court for a reason other than unity of title. The bill provides that it is the intent of the Legislature to respect the intent of parties to real property transactions that occurred before the effective date of this act and the parties' reliance on easements, servitudes, or other interests created by those transactions.

### **Effective Date**

The bill takes effect upon becoming a law.

## **IV. Constitutional Issues:**

### **A. Municipality/County Mandates Restrictions:**

None.

### **B. Public Records/Open Meetings Issues:**

None.

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<sup>11</sup> Chapter 2023-173, L.O.F.

**C. Trust Funds Restrictions:**

None.

**D. State Tax or Fee Increases:**

None.

**E. Other Constitutional Issues:**

The bill applies to existing easements, servitudes, and other similar agreements. Where a statute may be applied retroactively, a court must first determine if the Legislature intended the statute to be retroactive. If so, the court must determine whether retroactive application would violate any constitutional principles. A court will reject such an application if the statute impairs a vested right, creates a new obligation, or imposes a new penalty. The central focus of a court's inquiry is whether retroactive application of the statute "attaches new legal consequences to events completed before its enactment."<sup>12</sup>

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Passage of the bill has no apparent fiscal impact. The changes regarding ownership by specified persons will likely have a negligible effect on the real estate market. The changes regarding easements confirm current existing legal relationships and thereby help the private sector avoid litigation.

**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: 692.201, 692.202, 692.203, and 692.204.

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<sup>12</sup> *Menendez v. Progressive Exp. Ins. Co.*, 35 So. 3d 873, 877 (Fla. 2010).

This bill creates section 704.09 of the Florida Statutes.

**IX. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Rules on February 21, 2024:**

The CS added the provisions that revise land ownership restrictions for individuals and entities associated with the foreign countries of concern—China, Russia, Iran, North Korea, Cuba, Syria, and the Venezuelan regime of Nicolas Maduro. As revised, individuals from a foreign country of concern who have been granted asylum or have a visa to enter the United States for more than tourism purposes will be fully authorized to purchase and own land. Restrictions will remain in place for governments, government entities, and foreign corporate entities. Additionally, the amendment allows a foreign principal to own land for the purpose of residential development.

The provisions of the amendment relating to easements, servitudes, and other interests affecting real property are substantively the same as those in the underlying bill, but unnecessary verbiage is omitted. The effect of these provisions is to validate easements, servitudes, and other interests, notwithstanding the fact that they were created when the affected property was owned by the same owner. The amendment does not revitalize easements that have been found invalid by a court.

- B. **Amendments:**

None.