

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 Community Affairs

BILL: SB 266

INTRODUCER: Senator Passidomo

SUBJECT: Covenants and Restrictions

DATE: December 4, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cochran	Yeatman	CA	Pre-meeting
2.			JU	
3.			RC	

I. Summary:

SB 266 addresses the covenants and restrictions of property owners' associations and makes the following changes:

- Provides updated definitions and replaces the term "homeowners' association" with "property owners' association," which extends statutes authorizing the preservation and revival of covenants and restrictions to a broader range of associations, notably commercial property owners' associations;
- Updates the process for a homeowners' association to timely renew its covenants, and lowers the vote requirement from a two-thirds vote of the members of the board of directors to a majority vote for preservation of existing covenants and restrictions;
- Authorizes parcel owners who were subject to covenants and restrictions, but who do not have a homeowners' association, to use the same mechanisms as a homeowners' association to revitalize extinguished covenants and restrictions;
- Requires a homeowners' association to annually consider preservation of the covenants and restrictions and requires that the association file a summary preservation every 5 years; and
- Conforms statutory and definitional cross-references.

II. Present Situation:

The Marketable Record Title Act

The Marketable Record Title Act (MRTA) was enacted in 1963 to simplify and facilitate land transactions.¹ In general terms, MRTA provides that any person who has been vested with any estate in land of record for 30 years or more has a marketable record title, free and clear of most

¹ *Blanton v. City of Pinellas Park*, 887 So. 2d 1224, 1227 (Fla. 2004).

claims or encumbrances against the land. In essence, MRTA serves as the ultimate land statute of limitations.² The statutes contain nine exceptions in which MRTA does not apply.³

One unintended effect of MRTA, however, is that covenants and restrictions are extinguished 30 years after their creation. Therefore, homeowner associations' covenants and restrictions can expire and become unenforceable. In order to protect the covenants, MRTA has long provided a method for renewing the covenants. Even so, many homeowners' associations still fail to timely file a renewal of their covenants. In 2004, laws were enacted to provide a method for reviving the covenants and restrictions of a mandatory homeowners' association.⁴ In 2007, nonmandatory homeowners' associations became eligible for revitalization.⁵ Revitalization requires the creation of an organizing committee, notice to all affected property owners, approval by a majority of the homeowners, approval by the Department of Economic Opportunity, and the recording of notice in the public records.⁶

Two categories of property owners impacted by MRTA have not been included in the laws permitting renewal or revival of their covenants and restrictions: commercial landowners in office parks, industrial parks, and other commercial districts and neighborhoods with enforceable covenants but no formal homeowners' association. These property owners both enact and enforce covenants and restrictions regarding their property and that of their neighbors.

Due to the disparate issues in the bill, the present situation for each section is discussed in more detail below in conjunction with the Effect of Proposed Changes.

III. Effect of Proposed Changes:

Preservation of Existing Covenants

Present Situation

Sections 712.05 and 712.06, F.S., provide that a homeowners' association may timely renew its covenants by complying with the following conditions:

- The board must give written notice to every parcel owner of the impending preservation of the covenants;⁷
- The board must give written notice to every parcel owner of a meeting of the board of directors where the directors will decide whether to renew the covenants;⁸
- The board of directors of the association must approve the renewal by a two-thirds vote;⁹ and
- Notice of the renewal must be recorded in the official records of the county.¹⁰

² Gregory M. Cook, *The Marketable Record Title Act Made Easy*, The Florida Bar Journal, (Oct. 1992) available at <https://www.floridabar.org/news/tfb-journal/?durl=/DIVCOM/JN/jnjournal01.nsf/Articles/E3897C8163A7258285256BD80071EED5>.

³ Section 712.03, F.S.

⁴ Ch. 2004-345, s. 11, Laws of Fla.

⁵ Ch. 2007-173, s. 1, Laws of Fla.

⁶ Sections 720.403, 720.404, 720.405, 720.406, and 720.407, F.S.

⁷ Section 712.06(1)(b), F.S.

⁸ Section 712.05(1), F.S.

⁹ *Id.*

¹⁰ Section 712.06(2), F.S.

Sections 3 and 4 of the bill change this procedure to:

- Provide that compliance by a homeowners' association with newly created s. 720.3032, F.S. (see discussion below) may substitute for the requirements of ss. 712.05 and 712.06, F.S.;
- Provide that an amendment to a covenant or restriction indexed under the legal name of the property owners' association may also substitute for the requirements of ss. 712.05 and 712.06, F.S.;
- Repeal the requirement that the board achieve a two-thirds vote; and
- Repeal the requirement that affected property owners be furnished notice of the board meeting to vote on preservation.

These sections also contain conforming language.

Preservation and Revitalization of Covenants by a Commercial Property Owners' Association

Present Situation

Current law provides for the preservation and revitalization of covenants by a homeowners association.

Effect of the Bill

Section 2 provides a definition for the term "community covenant or restriction" and substitutes the term "property owners' association" for "homeowners' association." A property owners' association includes a homeowners' association as defined in s. 720.301, F.S., a corporation or entity responsible for the operation of property in which the voting membership is made up of the owners of the property or their agents, or a combination thereof, and in which membership is a mandatory condition of property ownership, as well as an association of parcel owners authorized to enforce a community covenant or restriction. The bill also makes conforming changes for these new terms.

The bill replaces all uses of the term "homeowners' association" found in chapter 712, F.S., with the term "property owners' association." The effect is to expand MRTA laws on preservation and revitalization of covenants or restrictions to cover commercial associations.

Section 12 inserts language to provide that part III of chapter 720, F.S., Covenant Revitalization,¹¹ is intended to provide mechanisms for revitalization of covenants or restrictions by all types of communities and property associations, not just residential communities. This section also includes conforming changes.

Revitalization by an Owner Not Subject to Homeowners' Association

Present Situation

Some residential communities have recorded covenants and restrictions similar to those found in a homeowners' association, but never created an association. Current law permits individual

¹¹ Part III is comprised of sections 720.403 – 720.407, F.S.

owners to file a notice of preservation of covenants before they expire¹² but there are no means of revitalizing those covenants and restrictions.

Effect of the Bill

Section 6 provides for covenant or restriction revitalization by parcel owners who are not subject to a homeowners' association. The bill provides the following definitions:

- “Community” means the real property that is subject to a covenant or restriction that is recorded in the county where the property is located.
- “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, as defined in s. 163.3164, F.S., which is contained in a document recorded in the public records of the county in which a parcel is located and which subjects the parcel to any use restriction that may be enforced by a parcel owner.
- “Parcel” means real property that is used for residential purposes and that is subject to exclusive ownership and any covenant or restriction that may be enforced by a parcel owner.
- “Parcel owner” means the record owner of legal title to a parcel.

Under this section, parcel owners may use the process available to a homeowners' association¹³ to revive covenants or restrictions that have lapsed under MRTA. The parcel owners do not need to provide articles of incorporation or bylaws to revive the covenants or restrictions and only need the approval of a majority of the affected parcel owners in writing. The organizing committee of the community may execute the revived covenants or restrictions in the name of the community and the community name can be indexed as the grantee of the covenants with the parcel owners listed as grantors.

A parcel owner who has ceased to be subject to covenants or restrictions as of October 1, 2018, may commence an action by October 1, 2019, to determine if revitalization would unconstitutionally deprive the parcel owner of right or property. Revived covenants or restrictions do not affect the rights of a parcel owner that are recognized by a court order in an action commenced by October 1, 2019, and may not be subsequently altered without the consent of the affected parcel owner. Although a parcel owner has from October 1, 2018, to October 1, 2019, to file a legal action objecting to the revitalization of a covenant or restriction, the bill does not provide any mechanism to inform parcel owners of this right. Moreover, the bill allows parcel owners seeking to revitalize an extinguished covenant or restriction to proceed after October 1, 2019.

Requirements on the Board of Directors of a Homeowners' Association

Present Situation

While it is probably good practice for a homeowners' association to regularly consider the need for preservation of the covenants and restrictions of their neighborhood, there is no statutory requirement that a board of directors of a homeowners' association do so.

¹² See sections 712.05 and 712.06, F.S.

¹³ See sections 720.403- 720.407, F.S.

Effect of the Bill

Section 7 amends s. 720.303(2), F.S., to require that the board of directors for a homeowners' association must consider whether to file a notice to preserve the covenants and restrictions affecting the community from extinguishment pursuant to MRTA. This must be considered at the first board meeting after the annual meeting of the members.

Section 8 creates s. 720.3032, F.S., to codify that a homeowners' association that wishes to preserve covenants from extinguishment may file in the official records of the county in which it is located a notice detailing:

- The legal name of the association;
- The mailing and physical addresses of the association;
- The names of the affected subdivision plats and condominiums, or the common name of the community;
- The name, address, and telephone number for the current community association management company or manager, if any;
- An indication as to whether the association desires to preserve the covenants or restrictions affecting the community from extinguishment pursuant to MRTA;
- The name and recording information of those covenants or restrictions affecting the community which the association wishes to preserve;
- A legal description of the community affected by the covenants or restrictions; and
- The signature of a duly authorized officer of the association.

The section creates a statutory form for the information. The bill further provides that the filing of the completed form is considered a substitute for the notice required for preservation of the covenants pursuant to ss. 712.05 and 712.06, F.S. As such, every 5-year filing of the form will have the effect of starting the MRTA 30-year period anew.

A copy of this notice must be included as a part of the next notice of meeting or other mailing sent to all members of the association. The original signed notice must be recorded in the official records of the clerk of the circuit court or other recorder for the county.

Other Changes Made by the Bill

Section 1 provides a short title of the "Marketable Record Title Act" for chapter 712, F.S.

Sections 5, 9, 10, 11, 13, 14, and 15 make changes to conform various statutory and definitional cross references.

Section 16 provides an effective date of October 1, 2018.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The State Constitution addresses the property rights of citizens in two pertinent provisions. Article 1, section 2 provides that all natural persons have the right to acquire, possess and protect property. Article 1, section 9 provides that “No person shall be deprived of life, liberty or property without due process of law” Additionally, the State Constitution, in Article 1, section 10, also prohibits any law that impairs the obligation of contracts.

Because of these constitutional property rights protections, two issues arise from the bill. The first is whether the expiration of covenants and restrictions vests additional property rights in the owner of a property. A vested right is defined as “an immediate, fixed right of present or future enjoyment.”¹⁴ For example, the expiration of covenants and restrictions might allow a property owner to build a nonconforming structure on the property or to use the property in a manner not allowed under the covenants and restrictions. The second issue is whether the bill, by allowing the reinstatement of expired covenants and restrictions, allows property rights to be taken in violation of the State Constitution.

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

None.

B. Private Sector Impact:

A person who believes that the revitalization of an expired covenant or restriction is a taking of a vested property right or other constitutional violation may be required to spend substantial funds to vindicate his or her rights in court.

Section 8 of the bill requires associations to prepare and record a notice every 5 years. The recording fee is nominal (\$10 for the first page, \$8.50 for additional pages). Because the form is in statute, associations may be able to complete the task without assistance, or a community association manager can assist an association with preparation and filing without reference to a licensed attorney.

¹⁴ *Coral Lakes Cmty. Ass’n v. Busey Bank, N.A.*, 30 So. 3d 579, 583 (Fla. 2nd DCA 2010) quoting *Pearsall v. Great N. Ry. Co.*, 161 U.S. 646, 673, (1896).

C. Government Sector Impact:

The bill requires the recording of documents in the public records of the county. Recording is subject to a fee of \$10.00 for the first page and \$8.50 for every subsequent page, payable to the recording department (in most counties, the clerk of the court).¹⁵ The net revenues to county recorders, after deductions for incremental costs of recording and indexing documents, are unknown.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 712.01, 712.05, 712.06, 712.11, 720.303, 702.09, 702.10, 712.095, 720.403, 720.404, 720.405, 720.407.

This bill creates the following sections of the Florida Statutes: 712.001, 712.12, and 720.3032.

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.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

¹⁵ Section 28.24(12), F.S.