

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 617 Covenants and Restrictions

SPONSOR(S): Edwards-Walpole

TIED BILLS: None **IDEN./SIM. BILLS:** SB 266

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Claims Subcommittee	8 Y, 0 N	MacNamara	Bond
2) Local, Federal & Veterans Affairs Subcommittee	13 Y, 0 N	Miller	Miller
3) Judiciary Committee			

SUMMARY ANALYSIS

The bill amends laws related to covenants and restrictions on real property. Specifically, the bill:

- Replaces the term "homeowners' association" with "property owners' association," thus extending statutory provisions regarding preservation and revival of covenants and restrictions affecting real property to a broader range of associations, notably commercial property owners' associations;
- Authorizes real property 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;
- Simplifies the procedures for renewal of the covenants and restrictions of a homeowners association;
- Requires a homeowners association to annually consider preservation of the covenants and restrictions; and
- Creates a statutory form for preservation of the covenants and restrictions.

The bill appears to have an indeterminate minimal positive impact on the clerks of circuit courts and an equal indeterminate negative impact on property owners' association related to recording fees to preserve covenants or restrictions.

The effective date of the bill is October 1, 2018.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background: The Marketable Record Title Act

The Marketable Record Title Act (MRTA) was enacted in 1963 to simplify and facilitate land transactions.¹ In general, MRTA provides that any person vested with any estate in land of record for 30 years or more has a marketable record title free and clear of most claims or encumbrances against the land. Current law includes 9 exceptions to the applicability of MRTA.²

MRTA and Property Owners Associations

One effect of MRTA is that homeowner association covenants and restrictions can lose effect after 30 years. In order to protect such covenants, MRTA has long provided for renewal of such covenants. Renewal restarts the 30 year time period. However, many associations fail to timely file a renewal of their covenants, primarily due to neglect rather than intent. Formerly, MRTA would apply in such cases and accordingly the covenants and restrictions expired and were unenforceable. In 2004, Part III of ch. 720, F.S., was enacted to provide a means by which covenants and restrictions of a mandatory homeowners' association may be revived.³ In 2007, nonmandatory homeowners' associations became eligible for revitalization.⁴ 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.⁵

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

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

The bill 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 real property in which the voting membership is made up of the owners of the real 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 changes in s. 712.01, F.S., to conform to these new terms.

The bill replaces all instances of the term "homeowners' association" found in ch. 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.

The bill provides that Part III of ch. 720, F.S.,⁶ is intended to provide mechanisms for revitalization of covenants or restrictions by all types of communities and property associations, not just residential communities.

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

² s. 712.03, F.S.

³ ch. 2004-345, L.O.F.

⁴ ch. 2007-173, L.O.F.

⁵ part III of ch. 720, F.S.

⁶ ss. 720.403-720.407, F.S.

Revitalization of Residential Covenants Not Related to a Homeowners' Association

There are residential communities with recorded covenants and restrictions similar to those found in a homeowners association, but no association was ever created. Under current law, individual owners can file notice of preservation of covenants before they expire⁷, but there are no means of revitalizing such covenants and restrictions as a neighborhood.

The bill creates s. 712.12, F.S., relating to covenant or restriction revitalization by real property owners not subject to a homeowners' association. The bill provides that the real property owners may use the process available to a homeowners' association in Part III of ch. 720, F.S., to revive covenants or restrictions that have lapsed under MRTA. The real property owners are excepted from needing to provide articles of incorporation or bylaws to revive the covenants or restrictions and only need the required approval in writing. The organizing committee of the community may execute the revived covenants 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 real property 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 real property owner which 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.

Amended Procedures for Preservation of Existing Covenants

A homeowners' association wishing to timely renew its covenants may do so only under the following conditions:

- The board must give written notice to every parcel owner of the impending preservation of the covenants;⁸
- 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;⁹
- The board of directors of the association must approve the renewal by a two-thirds vote;¹⁰ and
- Notice of the renewal must be recorded in the Official Records of the county.¹¹

In addition to allowing written notice in accordance with s. 712.06, F.S., the bill changes this procedure to:

- Provide that compliance by a homeowners association with newly created s. 720.3032, F.S. (see discussion herein) may substitute for the requirements of ss. 712.05 and 712.06, F.S.;
- Provide that an amendment to a covenant or restriction that is indexed under the legal name of the property owners' association and references the recording information of the covenant or restriction to be preserved may 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.

The bill also modifies a provision added to s. 712.05(1), F.S., in 2014 to clarify existing law.¹² Currently, if a homeowners' association provides the notice required by s. 712.05(1), F.S., neither the association

⁷ See ss. 712.05 and 712.06, F.S.

⁸ s. 712.06(1)(b), F.S.

⁹ s. 712.05(1), F.S.

¹⁰ *Id.*

¹¹ s. 712.06(2), F.S.

¹² ch. 2014-133, s. 7, Laws of Fla.

nor the clerk of the circuit court is required to provide additional notice pursuant to s. 712.06(3), F.S.¹³ The bill modifies this section by providing neither a property owners' association nor a clerk of the circuit court must provide additional notice for a notice filed by the association to preserve and protect a community covenant or restriction from extinguishment by operation of MRTA. This revision appears to be consistent with the current requirements of the law and the clarification enacted in 2014.

Additional Requirements of the Board of Directors of a Homeowners' Association

Currently, there is no statutory requirement that a board of directors of a homeowners association regularly consider the need for preservation of the covenants and restrictions of the real property in their neighborhood. The bill amends s. 720.303(2), F.S., requiring the board of directors for a homeowners' association consider whether to file a notice to preserve the covenants and restrictions affecting the community from extinguishment pursuant to MRTA. This consideration must occur at the first board meeting after every annual meeting of the members.

The bill creates s. 720.3032, F.S., to require that a homeowners' association desiring to preserve covenants from termination by operation of MRTA must file in the official records of the county in which the property 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 bill creates a statutory form for such 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.

The failure to file this notice does not affect the validity or enforceability of any covenant or restriction on real property. 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

The bill also provides a short title of the "Marketable Record Title Act" for ch. 712, F.S.; and makes changes to conform various statutory and definitional cross references.

B. SECTION DIRECTORY:

Section 1: Creates s. 712.001, F.S., creating a short title.

Section 2: Amends s. 712.01, F.S., relating to definitions applicable to the Marketable Record Title Act.

Section 3: Amends s. 712.05, F.S., relating to the effect of filing notice to preserve a covenant or restriction.

¹³ See the final two sentences of s. 712.05(1), F.S.

Section 4: Amends s. 712.06, F.S., relating to the contents of a notice to preserve a covenant or restriction and the recording and indexing of the notice.

Section 5: Amends s. 712.11, F.S., relating to covenant revitalization.

Section 6: Creates s. 712.12, F.S., relating to covenant or restriction revitalization by parcel owners not subject to a homeowners' association.

Section 7: Amends s. 720.303, F.S., relating to board meetings of a homeowners' association.

Section 8: Creates s. 720.3032, F.S., relating to notice of association information and preservation of covenants or restrictions from the Marketable Record Title Act.

Section 9: Amends s. 702.09, F.S., relating to definitions applicable to foreclosure of mortgages and statutory liens.

Section 10: Amends s. 702.10, F.S., relating to an order to show cause in a mortgage foreclosure.

Section 11: Amends s. 712.095, F.S., to conform a cross reference.

Section 12: Amends s. 720.403, F.S., relating to preservation of communities and revival of a declaration of covenants.

Section 13: Amends s. 720.404, F.S., relating to eligible communities and requirements for revival of a declaration of covenants.

Section 14: Amends s. 720.405, F.S., relating to the organizing committee and parcel owner approval for revival of a declaration of covenants.

Section 15: Amends s. 720.407, F.S., relating to recording of a declaration of covenants.

Section 16: Provides an effective date of October 1, 2018.

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:

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).¹⁴ The net revenues to county recorders are unknown.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Section 8 of the bill allows associations to prepare and record a notice. 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 utilizing an attorney.

D. FISCAL COMMENTS:

None.

¹⁴ s. 28.24(12), F.S.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

Impairment of Contracts

To the extent that a court may find that a covenant or restriction may be considered a contract between the parties, the changes made by this bill may affect such current contract rights and obligations. Article I, s. 10 of the United States Constitution, and art. I, s. 10 of the Florida Constitution both prohibit the Legislature from enacting any law impairing the obligation of contracts. Although written in terms of an absolute prohibition, the courts have long interpreted the constitutional provisions to prohibit enactment of any unreasonable impairment of contractual rights existing at the time that the law is enacted. The Florida Supreme Court in *Pomponio v. Claridge of Pompano Condominium, Inc.*¹⁵ set forth the following test:

- Was the law enacted to deal with a broad, generalized economic or social problem?
- Does the law operate in an area which was already subject to state regulation at the time the parties' contractual obligations were originally undertaken, or does it invade an area never before subject to regulation by the state?
- Does the law effect a temporary alteration of the contractual relationships of those within its coverage, or does it work a severe, permanent, and immediate change in those relationships irrevocably and retroactively?

B. RULE-MAKING AUTHORITY:

The bill neither requires nor authorizes administrative rulemaking by executive agencies.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

¹⁵ *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So.2d 774, 779 (Fla. 1979).