

## 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	18 Y, 0 N	MacNamara	Poche

### SUMMARY ANALYSIS

HB 617 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 court and an equal indeterminate negative impact on property owners' associations 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 and Effect of Proposed Changes

The Marketable Record Title Act (MRTA) was enacted in 1963 to simplify and facilitate land transactions.<sup>1</sup> 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.<sup>2</sup>

##### MRTA and Property Owners' Associations

Under MRTA, 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.<sup>3</sup> In 2007, nonmandatory homeowners' associations became eligible for revitalization.<sup>4</sup> Revitalization requires the creation of an organizing committee, notice to all affected property owners, recording of notice in the public records, approval by a majority of the homeowners, and approval by the Department of Economic Opportunity.<sup>5</sup>

There are two categories of property owners who enact and enforce covenants and restrictions, but have not been included in the laws regarding renewal or revival of such covenants and restrictions:

- 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*

HB 617 defines "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 conforming changes in s. 712.01, F.S., to reflect 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." This expands the effect of MRTA laws on preservation and revitalization of covenants or restrictions to cover commercial associations.

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

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

<sup>2</sup> S. 712.03, F.S.

<sup>3</sup> Ch. 2004-345, L.O.F.

<sup>4</sup> Ch. 2007-173, L.O.F.

<sup>5</sup> Part III of ch. 720, F.S.

<sup>6</sup> 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 expire<sup>7</sup>, but there are no means of revitalizing such covenants and restrictions as a neighborhood.

HB 617 creates s. 712.12, F.S., allowing individual real property owners to 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*

Under ss. 712.05 and 712.06, F.S, 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;<sup>8</sup>
- 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;<sup>9</sup>
- The board of directors of the association must approve the renewal by a two-thirds vote;<sup>10</sup> and
- Notice of the renewal must be recorded in the Official Records of the county.<sup>11</sup>

In addition to allowing written notice in accordance with s. 712.06, F.S., HB 617 changes this procedure to:

- Allow a homeowners association to comply with newly created s. 720.3032, F.S. (see discussion herein) to 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 receive 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.<sup>12</sup> Currently, if a homeowners' association provides the notice required by s. 712.05(1), F.S., neither the association nor the clerk of the circuit court is required to provide additional notice pursuant to s. 712.06(3), F.S.<sup>13</sup>

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<sup>7</sup> See ss. 712.05 and 712.06, F.S.

<sup>8</sup> S. 712.06(1)(b), F.S.

<sup>9</sup> S. 712.05(1), F.S.

<sup>10</sup> Id.

<sup>11</sup> S. 712.06(2), F.S.

<sup>12</sup> Ch. 2014-133, s. 7, Laws of Fla.

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

The bill clarifies that neither an association nor a clerk of the circuit court must provide additional notice where the association has already provided notice under s. 712.05(1), F.S.

#### 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 to preserve covenants and restrictions. The bill amends s. 720.303(2), F.S., requiring the board of directors of a homeowners' association to consider whether to file a notice to preserve the covenants and restrictions to avoid extinguishment under MRTA. Consideration must occur at the first board meeting after every annual meeting of the members.

HB 617 creates s. 720.3032, F.S., requiring a homeowners' association desiring to preserve covenants to file, in the official records of the county in which the property is located, a notice detailing:

- The association's legal name;
- The mailing and physical addresses;
- 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;
- Whether the association desires to preserve the covenants or restrictions to avoid extinguishment under MRTA;
- The name and recording information of those covenants or restrictions 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 substitutes 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

HB 617 also creates 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.

**Section 3:** Amends s. 712.05, F.S., relating to effect of filing notice.

**Section 4:** Amends s. 712.06, F.S., relating to contents of notice; recording and indexing.

**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 association powers and duties; meetings of board; official records; budgets; financial reporting; association funds; recalls.

**Section 8:** Creates s. 720.3032, F.S., relating to notice of association information; preservation from Marketable Record Title Act.

**Section 9:** Amends s. 702.09, F.S., relating to definitions.

- Section 10:** Amends s. 702.10, F.S., relating to an order to show cause; entry of final judgment of foreclosure; payment during foreclosure.
- Section 11:** Amends s. 712.095, F.S., relating to notice required by July 1, 1983.
- Section 12:** Amends s. 720.403, F.S., relating to preservation of residential communities; revival of declaration.
- Section 13:** Amends s. 720.404, F.S., relating to eligible residential communities; requirements for revival of declaration.
- Section 14:** Amends s. 720.405, F.S., relating to organizing committee; parcel owner approval.
- Section 15:** Amends s. 720.407, F.S., relating to recording; notice of recording; applicability and effective date.
- 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).<sup>14</sup> 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. 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.

## 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.

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<sup>14</sup> S. 28.24(12), F.S.  
**STORAGE NAME:** h0617e.JDC  
**DATE:** 2/1/2018

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.*<sup>15</sup> 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:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

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