HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 733 Marketable Record Title Act
SPONSOR(S): Judiciary Committee, Civil Justice Subcommittee, Smith, D. and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 802

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	14 Y, 0 N, As CS	Mawn	Luczynski
2) Judiciary Committee	15 Y, 0 N As CS	Mawn	Luczynski

SUMMARY ANALYSIS

The Marketable Record Title Act ("MRTA") automatically extinguishes all estates, interests, claims, or charges, existing due to any act, title transaction, event, or omission occurring before the effective date of the root of title and not statutorily excepted or otherwise preserved from extinguishment. In other words, MRTA simplifies the title examination process by confirming real property's marketability based on a 30-year marketable record period and a consideration of the statutory exceptions.

Restrictive covenants govern the use of real property. Some restrictive covenants restrict a person's ownership, occupancy, or use of real property based on such person's membership in a class protected under the Fourteenth Amendment of the United States Constitution and section 2, article I of the Florida Constitution, including race, religion, color, national origin, familial status, and physical disability ("discriminatory restriction"). Such discriminatory restrictions violate the federal and state Fair Housing Acts and are thus unenforceable. However, restrictive covenants can be difficult to remove from the official records as they run with the land. A prospective homebuyer discovering a discriminatory restriction in the home's deed may be discouraged from buying the home, believing that he or she may be unwelcome in the neighborhood.

CS/CS/HB 733:

- Clarifies that a property conveyance subject to existing encumbrances identified in a muniments of title does not restart MRTA's 30-year marketability period on such encumbrances without an affirmative statement of the parties' intent to do so or a specific reference to the identified encumbrance's official records book and page number.
- Adds covenants, restrictions, zoning requirements, and building or developmental permits to the list of encumbrances extinguished by MRTA.
- Excepts from extinguishment by MRTA zoning ordinances, land development regulations, building codes, and other laws, regulations, and regulatory approvals operating independently of matters recorded in the official record as well as any recorded covenant or restriction that on the face of the first page states that it was accepted by a governmental entity as part of any such law, regulation, or regulatory approval.
- Provides that a discriminatory restriction is unenforceable and extinguished under MRTA.
- Creates a simplified process for a property owners' or voluntary neighborhood association to remove a discriminatory restriction through a majority vote of the association's board.

The bill is intended to be remedial in nature and to apply retroactively.

The bill does not appear to have a fiscal impact on state or local governments.

The bill takes effect upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:
Background

Marketable Record Title Act

Background

Prior to passage of the Marketable Record Title Act ("MRTA") in 1963, a title examination involved reviewing all documents relating to the real property recorded in the public records of the county in which the property lies from the oldest public records[1] to the most recent.[2] This usually required the purchase of a title abstract and a review and analysis of every document and title transaction[3] listed in the abstract.[4] However, MRTA created a new title concept, i.e., the marketable record title, by eliminating ancient defects or stale claims to real property.[5] In other words, MRTA simplifies the title examination process by confirming a piece of real property's marketability based on a 30-year marketable record period and a consideration of certain statutory exceptions rather than on a perfect record from the oldest public records to the most recent. Specifically, MRTA provides that any person with the legal capacity to own land who, alone or with a predecessor in title, has been vested with any estate in land of record for 30 years or more, has marketable record title to such land free and clear of all claims other than those excepted in statute.[6]

After 30 years, MRTA automatically extinguishes all estates, interests, claims, or charges, existing due to any act, title transaction, event, or omission occurring before the effective date of the root of title and not statutorily excepted from extinguishment.[7] All extinguished estates, interest, claims, or charges become null and void.[8] However, MRTA also sets out rights and interests not extinguished by its terms, including:

- Estates or interests, easements and use restrictions disclosed by and defects inherent in the muniments of title[9] on which the estate is based beginning with the root of title.[10]
- Estates, interests, claims, or charges, or any covenant or restriction[11] preserved by the filing of a proper notice in accordance with MRTA.[12]
- Rights of any person possessing the land so long as the person is in such possession.[13]
- Estates, interests, claims, or charges arising out of a title transaction recorded after the root of title effective date.[14]
- Recorded or unrecorded easements in the nature of easements, rights-of-way, and terminal facilities.[15]

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[1] These records could date as far back as a land grant from the King of Spain when Florida was a Spanish colony. *See* The Florida Bar, *Florida Real Property Title Examination and Insurance* chapter 2, (8th ed. 2016).
[2] Gregory M. Cook, *The Marketable Record Title Act Made Easy*, 66 Fl. Bar J. 55 (Oct. 1992), https://www.floridabar.org/the-florida-bar-journal/the-marketable-record-title-act-made-easy/ (last visited Feb. 6, 2020).
[3] "Title transaction" means any recorded instrument or court proceeding affecting title to any estate or interest in land and describing the land sufficiently to identify its location and boundaries. S. 712.01(7), F.S.
[4] *Id.*
[5] *Id.*
[6] S. 712.02(1), F.S.
[7] "Root of title" means any title transaction purporting to create or transfer the estate claimed by any person which is the last title transaction to have been recorded at least 30 years before the time when marketability is being determined. The effective date of the root of title is the date it was recorded. Ss. 712.01(6) and 712.04, F.S.
[8] S. 712.04, F.S.
[9] "Muniments of title" are written instruments or evidence which the owner of lands, possessions, or inheritances has entitling said owner to defend the title. Muniments of title need not be recorded to be valid, except that recording statutes do give good-faith purchasers certain rights over other persons. 42 Fla. Jur. 2d § 16.
[10] S. 712.03(1), F.S.
[11] "Covenant or restriction" means any agreement or limitation contained in a document recorded in the public records of the county in which the parcel is located which subjects the parcel to any use or other restriction or obligation. S. 712.01(2), F.S.
[12] S. 712.03(2), F.S.
[13] S. 712.03(3), F.S.
[14] S. 712.03(4), F.S.

- Rights of a person in whose name the land is assessed on the county tax rolls under specified circumstances.[16]
- State title to lands beneath navigable waters acquired by virtue of sovereignty.[17]
- Any right, title, or interest held by the Board of Trustees of the Internal Improvement Trust Fund,[18] specified water management districts, or the United States.[19]

MRTA also provides a mechanism for an interested party to preserve from extinguishment a right or interest the party holds. Specifically, a person with an interest in land or some other right subject to extinguishment by MRTA may preserve such interest or right by filing a written notice at any time during marketability period immediately after the effective date of the root of title.[20] Additionally, a property owners' association ("POA")[21] may preserve and protect a community covenant or restriction[22] by filing either a:

- Written notice in the form required by MRTA;[23]
- Summary notice complying with the specifications of s. 720.3032(2);[24] or
- Community covenant or restriction amendment indexed under the association's legal name and referencing the information to be preserved.[25]

Such an action creates a new marketable record period, preventing extinguishment of the interests and rights contained in the notice or community covenant or restriction amendment for 30 years from the date of filing.[26]

Recent Complications

Real estate practitioners in Florida commonly except from a seller's warranty of title in a deed matters identified as outstanding encumbrances or restrictions by making the deed subject to all matters of record and instruments identified by official book and page numbers.[27] Though the parties rarely intend to restart MRTA's 30-year marketability period on a prior existing encumbrance or restriction by such an action, it could be argued that identifying the official book and page number of such encumbrance or restriction in a muniments of title could do just that.[28]

Additionally, in 2016, a court, in *Save Calusa Trust v. St. Andrews Holdings, Ltd.* ("*Calusa*"), found that a restrictive covenant recorded in compliance with a government-imposed land-use restriction is not a title interest extinguished under MRTA, acknowledging established Florida law recognizing that government-imposed property restrictions do not affect marketability of title.[29] The court also acknowledged that no language in MRTA reaches zoning regulations, finding that a restrictive zoning ordinance is not a hidden property interest of the kind MRTA seeks to extinguish.[30] However, in some cases, there is no way to facially determine whether a restrictive covenant recorded in the official

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[15] S. 712.03(5), F.S.
[16] S. 712.03(6), F.S.
[17] S. 712.03(7), F.S.
[18] The Board of Trustees of the Internal Improvement Trust Fund is comprised of the Governor and the Cabinet. *See* Florida Department of Environmental Protection, *Division of State Lands*, https://floridadep.gov/lands (last visited Feb. 6, 2020).
[19] S. 712.03(8), F.S.
[20] S. 712.05, F.S.
[21] A POA is a homeowners' association, a corporation or other entity responsible for the operation of property in which voting membership is made up of the property owners and their agents, or a combination thereof, and in which membership is a mandatory condition of property ownership, or an association of parcel owners authorized to enforce a community covenant or restriction imposed on the parcels. S. 712.01(5), F.S.
[22] "Community covenant or restriction" means any agreement or limitation contained in a document recorded in the public records of the county where the property lies which subjects the parcel to any use restriction enforceable by a property owners' association or authorizes a property owners' association to impose a charge or assessment against the parcel or parcel owner. S. 712.01, F.S.
[23] S. 712.05(2)(a), F.S.
[24] S. 712.05(2)(b), F.S.
[25] *Id.*
[26] S. 712.05(3), F.S.
[27] *See* Real Property, Probate & Trust Law Section of the Florida Bar ("RPPTL"), *White Paper: Revisions to Chapter 712*, (July 28, 2018).
[28] *Id.*
[29] *See Save Calusa Trust v. St. Andrews Holdings, Ltd*., 193 So. 3d 910 (Fla. 3d DCA 2016), citing *Wheeler v. Sullivan*, 106 So. 876 (Fla. 1925).
[30] *See Calusa*, 193 So. 3d 910, citing *Blanton v. City of Pinellas Park*, 887 So. 2d 1224 (Fla. 2004).

records was recorded in compliance with a government-imposed land-use,[31] and thus whether the restrictive covenant is extinguished by MRTA or preserved under the judicially-created exception.

Discriminatory Restrictive Covenants

Taken together, the Fourteenth Amendment of the United States Constitution and section 2, article I of the Florida Constitution protect persons from discrimination on the basis of certain characteristics, including race, color, national origin, religion, gender, pregnancy, familial status, and physical disability ("protected class"). However, some title transactions recorded in the state restrict a person's ownership, occupancy, or use of real property based on such person's membership in a protected class ("discriminatory restriction"), vestiges of a time when property value was determined in part by the people living in the neighborhood.[32]

In the early 20th century, cities used zoning ordinances to segregate people into neighborhoods by race and ethnicity, but in 1917, the U.S. Supreme Court declared the practice unconstitutional.[33] After this ruling, restrictive covenants became the preferred method of segregation based on membership in a protected class. As private contracts, restrictive covenants did not fall under existing laws prohibiting discrimination by the federal government or the state, and in 1926, the U.S. Supreme Court declared discriminatory restrictions enforceable.[34] Discriminatory restrictions were so successful in segregating neighborhoods that in 1934, the Federal Housing Administration ("FHA") recommended that all FHA-insured homes include such restrictions in their deeds, finding that, "if a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes."[35]

However, in 1948, the U.S. Supreme Court found racially restrictive covenants unenforceable under the Fourteenth Amendment of the United States Constitution.[36] In 1949, the FHA stopped rejecting new mortgage insurance applications simply because the home's purchase or occupancy might violate a discriminatory restrictive covenant,[37] and in 1968, Congress passed the Fair Housing Act, explicitly prohibiting racial discrimination in housing sale, rental, or financing.[38] Florida's Fair Housing Act also generally prohibits discrimination in the sale or rental of real property based on membership in a protected class,[39] and prohibits the making, printing, or publishing of "any notice, statement, or advertisement with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on [such membership]."[40]

Though unenforceable, discriminatory restrictions can be difficult to remove from the public record as they run with the land, passing from owner to owner. Where a restrictive covenant governs the use of property in a homeowners' association[41] ("HOA"), the Declaration of Covenants may be amended to remove the restriction by an affirmative vote of the HOA's members, which vote must be two-thirds of all voting interests unless the HOA's governing documents[42] specify otherwise.[43] However, voter apathy

[31] *See* RPPTL, *supra* note 27.
[32] In 1931, a common appraisal text included the language: "we must recognize the customs, habits, and characteristics of various strata of society and races of people." National Association of Realtors ("NAR"), You Can't Live Here: The Enduring Impacts of Restrictive Covenants (Feb. 2018), https://www.nar.realtor/sites/default/files/documents/2018-February-Fair-Housing-Story.pdf (last visited Feb. 6, 2020).
[33] *Buchanan v. Warley*, 245 U.S. 60 (1917).
[34] *Corrigan v. Buckley*, 271 U.S. 323 (1926).
[35] NAR, *supra* note 32.
[36] *Shelley v. Kraemer*, 334 U.S. 1 (1948).
[37] NAR, *supra* note 32.
[38] Title VIII of the Civil Rights Act of 1968.
[39] The prohibition does not apply to the sale or rental of a single-family home by a private individual owner, housing for older persons if the discrimination is against familial status, or to a religious organization giving preference to members of such religion for any dwelling operated or owned for something other than a commercial purpose under specified circumstances. S. 760.29(1), (2), and (4), F.S.
[40] S. 760.23(1)-(3), F.S.
[41] HOA means a Florida corporation responsible for a community's operation in which the voting membership is made up of parcel owners or their agents, or a combination thereof, and in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel. S. 720.301(9), F.S.
[42] An HOA's governing documents include the Declaration of Covenants, Articles of Incorporation, Bylaws, and Rules and Regulations.
[43] S. 720.306(1)(b), F.S.

is a common problem in HOAs, making restrictive covenant amendments challenging,[44] and no similar process exists for homeowners living in a neighborhood with a voluntary neighborhood association.[45]

However, a homeowner with a discriminatory restriction in his or her deed may seek a declaratory judgment[46] from the circuit court for the judicial circuit in which the property is located to determine his or her rights under the deed.[47] This process can be costly and time-consuming, as well as intimidating for homeowners unfamiliar with the court system. Additionally, a declaratory judgment would only state that a discriminatory restriction is void and unenforceable against the homeowner; it would not remove the offending language from the official record.

Many who encounter a discriminatory restriction suffer pain, reminded of segregation and other forms of discrimination from the not-so-distant past. Additionally, a prospective homebuyer may be discouraged from buying a home with a discriminatory restriction in the deed, believing that he or she may not be welcome in the neighborhood.[48] Understanding this, California and Washington State have in recent years created a simplified process for HOAs to remove discriminatory restrictive covenants from their respective Declarations of Covenant.[49] California also allows a homeowner with a discriminatory restriction in his or her deed to file in the official records of the county in which his or her property lies a modification document along with a copy of the deed with the offending restriction stricken through.[50] If the county attorney agrees that the stricken restriction is illegal and unenforceable, the modification document is recorded in the county's official records.[51]

Effect of Proposed Changes

CS/CS/HB 733 clarifies that real property conveyances subject to a prior existing encumbrance or restriction identified in a muniments of title does not restart MRTA's 30-year marketability period on such encumbrance or restriction unless the parties to the instrument include an affirmative statement of their intent to do so or there is specific reference made to the official records book and page number of the identified encumbrance or restriction.

The bill also provides that covenants, restrictions, zoning requirements, and building or developmental permits are extinguished by MRTA but conforms MRTA to the *Calusa* court's holding by excepting from extinguishment any:

- Comprehensive plan or plan amendment, zoning ordinance, land development regulation, building code, development order or permit, and other law, regulation, or regulatory approval operating independently of matters recorded in the official record; and
- Recorded covenant or restriction that on the face of the first page of the document states that it was accepted by a governmental entity as part of any such law, regulation, or regulatory approval.

Additionally, the bill defines "discriminatory restriction," providing that such a restriction is unlawful and unenforceable. Under the bill, a discriminatory restriction is extinguished from any recorded title

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[44] *See* Joseph Adams, *Voter Apathy Plagues Florida Community Associations*, Florida Condo & HOA Law Blog (Feb. 16, 2017), https://www.floridacondohoalawblog.com/2017/02/16/voter-apathy-plagues-florida-community-associations/ (last visited Feb. 6, 2020).
[45] A voluntary association is, as the name suggests, voluntary. Members must pay dues and follow the association's rules, but the association has no lien rights or other authority over the homeowner except to exclude the homeowner from membership.
[46] An interested person in doubt about his or her rights under a deed, will, contract, or other article or instrument may have determined by a court any question of construction or validity arising under such article or instrument. When such relief if sought, all interested persons whose interest may be affected by the declaration may be made parties. The court's declaration may be either affirmative or negative in form and has the force and effect of a final judgment. Ss. 86.011, 86.021, and 86.091, F.S.
[47] S. 86.021, F.S.
[48] For example, in 2019, an attorney buying a home in the Betton Hills neighborhood of Tallahassee, Florida discovered a racially discriminative restrictive covenant in the home's deed prohibiting a person "of other than the Caucasian race" to own, use, or occupy property in the neighborhood except as "domestic servants." The attorney, upset by language that would have excluded her minor son if enforceable, decided not to buy the home. *See* TaMaryn Waters, *Attorney Wants Outdated, Racist Covenant Language in Betton Hills Stripped*, Tallahassee Democrat, Oct. 13, 2019, https://www.tallahassee.com/story/news/money/2019/07/01/attorney-wants-outdated-racist-covenant-language-betton-hills-stripped-tallahassee/1546406001/ (last visited Feb. 6, 2020).
[49] *See* Wash. Rev. Code § 49.60.227; *see also* Cal. Civ. Code § 6606.
[50] See Cal. Gov't Code § 12956.1.
[51] See Cal. Gov't Code § 12956.2.

transaction under MRTA, and filing a notice to preserve such a restriction has no effect. The bill also simplifies the process to remove a discriminatory restriction in a covenant affecting parcels in a POA or a voluntary neighborhood association by allowing such removal through a majority vote of the association's board of directors, instead of a vote by two-thirds of the association's members or some other number of members specified in the association's governing documents.

Finally, the bill provides that the MRTA changes are intended to be remedial in nature and to apply retroactively. However, the bill creates a one-year grace period for a person whose interest might be extinguished by such changes to file a notice to preserve the interest.

The bill provides an effective date of upon becoming law.

B. SECTION DIRECTORY:

Section 1: Amends s. 712.03, F.S., relating to exceptions to marketability.
Section 2: Amends s. 712.04, F.S., relating to interests extinguished by marketable record title.
Section 3: Creates s. 712.065, F.S., relating to extinguishment of discriminatory restrictions.
Section 4: Amends s. 712.12, F.S., relating to covenant or restriction realization by parcel owners not subject a homeowners' association.
Section 5: Provides that the amendments to ss. 712.03, 712.04, and 712.12, F.S., are intended to be remedial in nature and to apply retroactively.
Section 6: Provides a one-year grace period for a person whose interest may be extinguished by the act to file a notice to preserve the interest.
Section 7: Directs the Division of Law Review to replace the phrase "the effective date of this act" wherever it occurs in the act with the date the act becomes a law.
Section 8: Provides an effective date of upon becoming law.

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:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does appear to effect counties or municipalities.

2. Other:

The bill includes three sections expressly intended to be remedial in nature and to apply retroactively. The Florida Supreme Court has developed a two-prong test for determining whether a statute may be applied retroactively.[52] First, there must be "clear evidence of legislative intent to apply the statute retroactively."[53] Second, the court must determine "whether retroactive application is constitutionally permissible."[54] Retroactive application of a statute is unconstitutional if it deprives a person of due process by impairing vested rights or imposing new obligations to previous conduct,[55] and the Legislature's labeling of a statue as remedial does not necessarily make it so.[56] However, a truly remedial statute may be applied retroactively, as it does not create or destroy rights or obligations.[57] Instead, such a statute "operates to further a remedy or confirm rights that already exist."[58]

The bill deals expressly with rights and interests in real property. However, the bill attempts to avoid impairing vested rights by providing a one-year grace period for a person whose right or interest may be affected by the bill to file a notice preserving such right or interest.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

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[52] *See Metropolitan Dade County v. Chase Federal Housing Corp.,* 737 So. 3d 494 (Fla. 1999), citing *McCord v. Smith*, 43 So. 2d 704 (Fla. 1949).
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *See State Farm Mut. Auto Ins. Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995).
[57] *Id.*
[58] *See Maronda Homes, Inc. of Fla. V. Lakeview Reserve Homeowners' Ass'n, Inc.*, 127 So. 3d 1258 (Fla. 2013).

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 22, 2020, the Civil Justice Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Created a simplified process for voluntary neighborhood associations to remove discriminatory restrictions from neighborhood parcels.
- Deleted a provision allowing a homeowner to seek a determination from the Department of Economic Opportunity that his or her deed contains a discriminatory restriction extinguished by MRTA.

On February 6, 2020, the Judiciary Committee adopted an amendment and reported the bill favorably as a committee substitute. The amendment clarified that MRTA does not apply to any recorded covenant or restriction that on the first page states that it was accepted by a governmental entity as part of any law, regulation, or regulatory approval operating independently of matters recorded in the official records.

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.