

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1229 Termination of Easements and Related Rights or Interests for Affordable Housing Development

SPONSOR(S): Civil Justice Subcommittee, Porras and others

TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	16 Y, 1 N, As CS	Mawn	Jones

SUMMARY ANALYSIS

The institution of private property is a fundamental element of the economic and social structure of the United States. Within this institution, different ownership principles define the existence and limits of private property rights. One such set of principles concerns the enforcement of private land use arrangements, known as “servitudes.” A servitude is, essentially, an arrangement that ties rights and obligations to property ownership or possession so that such rights and obligations run with the land to successive owners and occupiers; they include easements (which give a person a nonpossessory right of use or enjoyment in another person’s land for a specific purpose) and real covenants (which limit use of property, typically for the benefit of other property owners in the community).

Where a question arises as to who owns a piece property, or the extent of such person’s ownership interest, an interested party may file a lawsuit asking the court to quiet title to the property – that is, determine who is the property’s true owner. In such a lawsuit, known as a quiet title action, the plaintiff must generally prove his or her title (that is, right of ownership) from the original source for a period of at least seven years before filing the complaint and set forth in the complaint the official records book and page number of the instrument allegedly affecting the plaintiff’s title. If, based on the evidence, it appears that the plaintiff is the property’s rightful owner, or if a default is entered against the defendant (in which case no evidence need be presented), the court must enter judgment removing the alleged cloud from the title and quieting title in the plaintiff. Such final judgment is then recorded in the official records of the county where the property lies.

It is the intent of Florida to articulate a state housing strategy that will carry the state toward the goal of ensuring that each Floridian has safe, decent, and affordable housing. To that end, the State Housing Strategy Act (“SHSA”) requires each local government participating in the State Housing Initiatives Partnership Program to develop and implement a local housing assistance plan (“LHAP”) to make affordable residential units available to very-low-, low-, or moderate-income persons and to persons with special housing needs (such as persons experiencing homelessness, the elderly, migrant farmworkers, and persons with disabilities). Such plans should increase the availability of affordable residential units by combining local resources and cost-saving measures into a local housing partnership and using private and public funds to reduce housing costs.

CS/HB 1229 requires an LHAP to authorize the termination of recorded and unrecorded easements or rights, or servitudes in the nature of easements, for use of or access to a lake with respect to up to no more than one-third of the area of such lake and its upland banks for purposes of redeveloping the land to create affordable housing under the SHSA and s. 196.1978, F.S. (providing an ad valorem tax exemption for affordable housing development). Under the bill:

- The termination of such interests must be achieved through the filing of a quiet title action;
- Notice of such an action must be recorded in the public records where the land lies; and
- Any final order issued in such action must be recorded in the public records where the land lies, along with an instrument describing all extinguished interests and providing a legal description of the newly-established boundaries of the lake.

The bill may have an indeterminate fiscal impact on state and local governments. See Fiscal Comments. The bill provides an effective date of July 1, 2024.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Servitudes

The institution of private property is a fundamental element of the economic and social structure of the United States.¹ Within this institution, different ownership principles define the existence and limits of private property rights.² One such set of principles concerns the enforcement of private land use arrangements, known as “servitudes.”³

A servitude is, essentially, an arrangement that ties rights and obligations to property ownership or possession so that such rights and obligations run with the land to successive owners and occupiers.⁴ Because a servitude can be terminated only by expiration of its terms, by the agreement of all involved parties, by merger of the dominant and servient estates,⁵ by court order, by operation of the Marketable Record Title Act, or by abandonment by the benefiting party, servitudes are significant for their ability to foster stable, long-term property use arrangements for a variety of purposes, including shared land uses; maintaining the character of a residential neighborhood, commercial development, or historic property; and the establishment of infrastructure and common facilities.⁶

Florida law recognizes several types of servitudes, including easements and real covenants. An easement gives a person a nonpossessory right of use or enjoyment in another person’s land for a specific purpose not inconsistent with the property owner’s general rights.⁷ An easement may be “appurtenant,” such that the benefit attaches to land ownership, or an easement may be “in gross,” such that the benefit attaches to a person, not to land ownership.⁸ An easement may also be “affirmative,” in that it gives the easement’s beneficiary the right to use the land in a particular way, or “negative,” in that it prevents the owner of the land burdened by the easement from using the land in a particular way.⁹

Typically, an easement is expressly created in a written agreement, title, deed, deed reservation, or other legal instrument, which writing shows the landowner’s intention to create a permanent right in a

¹ Ronald H. Rosenberg, *Fixing a Broken Common Law— Has the Property Law of Easements and Covenants Been Reformed by a Restatement*, William & Mary Law School Scholarship Repository, Faculty Publications (2016), <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2932&context=facpubs> (last visited Jan. 25, 2024).

² *Id.*

³ *Id.*

⁴ Susan French, *Servitude*, The Encyclopaedia Britannica, Dec. 19, 2003, <https://www.britannica.com/topic/servitude-property-law> (last visited Jan. 25, 2024); Michael J.D. Sweeney, *The Changing Role of Private Land Restrictions: Reforming Servitude Law*, 64 Fordham L. Rev. 661 (1995) <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3208&context=flr> (last visited Jan. 25, 2024).

⁵ The “dominant estate” is the property that benefits from the servitude, while the “servient estate” is the property burdened by the servitude. Legal Information Institute, *Dominant Estate*, https://www.law.cornell.edu/wex/dominant_estate (last visited Jan. 25, 2024); Legal Information Institute, *Servient Estate*, https://www.law.cornell.edu/wex/servient_estate (last visited Jan. 25, 2024).

⁶ *Id.*

⁷ Michael T. Olexa, et al., *Handbook of Florida Fence and Property Law: Easements and Rights of Way*, Oct. 3, 2022, <https://edis.ifas.ufl.edu/publication/FE108> (last visited Jan. 25, 2024).

⁸ Easements appurtenant typically provide the beneficiary with a right of ingress or egress. For example, an easement appurtenant might allow a property owner whose property is cut off from access to the public roadway by an adjacent property to pass through such adjacent property to reach the public roadway. In contrast, easements in gross are typically seen in connection with the offering of utility services. For example, an easement in gross might allow the utility company to place electric power lines across a burdened property. C. Ryan Maloney, *Understanding Easements, Rights-of-Way and Their Effects on Property Value*, July 9, 2020, <https://www.jimersonfirm.com/blog/2020/07/easements-rights-of-way-building-rights-property-value/#:~:text=Easements%20by%20necessity%20are%20created,Stat> (last visited Jan. 25, 2024).

⁹ *Id.*

specific property.¹⁰ However, an easement may also be created by the passage of a state statute or local ordinance, or by implication through the doctrines of either necessity or prescription.¹¹

A real covenant, meanwhile, is a set of rules limiting a property owner's use of his or her property, typically for the benefit of other property owners in the community.¹² A real covenant may be "affirmative," that is, a covenant requiring the property owner to do something, or it may be "restrictive," that is, a covenant prohibiting the property owner from doing something (sometimes called a "restriction").¹³ In either case, to establish a valid and enforceable real covenant, a party must show:

- The covenant touches and concerns the land;
- The original parties to its creation intended for the covenant to run with the land; and
- The party against whom enforcement of the covenant is sought had notice of the restriction.¹⁴

Unlike an easement, a real covenant cannot be created by implication; instead, a real covenant must be expressly set out in a written deed or in another legal instrument referenced or incorporated therein, which deed or instrument should then be recorded in the public records of the state.¹⁵ Such recording puts all subsequent purchasers of the property to which the real covenant applies on constructive notice of the covenant's existence.¹⁶

Quiet Title Action

Where a question arises as to who owns a piece of property, or the extent of such person's ownership interest, an interested party may file a lawsuit asking the court to quiet title to the property – that is, determine who is the property's true owner.¹⁷ In such a lawsuit, known as a quiet title action, the plaintiff must generally prove his or her title (that is, right of ownership) from the original source for a period of at least seven years before filing the complaint and set forth in the complaint the official records book and page number of the instrument allegedly affecting the plaintiff's title.¹⁸ If, based on the evidence, it appears that the plaintiff is the property's rightful owner, or if a default is entered against the defendant (in which case no evidence need be presented), the court must enter judgment removing the alleged cloud from the title and quieting title in the plaintiff.¹⁹ Such final judgment is then recorded in the official records of the county where the property lies.²⁰

Affordable Housing

The Safe Housing Strategies Act ("SHSA"), codified in chapter 420, F.S., declares that it is the intent of Florida to articulate a state housing strategy that will carry the state toward the goal of ensuring that each Floridian has safe, decent, and affordable housing.²¹ Such strategy must involve state and local

¹⁰ Under the common law, now codified in the Florida Statutes, an easement by necessity is created when land is divided in such a way that a parcel is cut off from any reasonable route of ingress or egress; in such an instance, a right-of-way is presumed to have been granted or reserved. An easement by necessity is also created by statute when land used for a dwelling or for agricultural, timber raising, or stockraising purposes is shut off or hemmed in by lands, fencing, or other improvements by other persons so that no practicable route of ingress or egress is available therefrom; unlike with an easement of necessity under the common law, such land does not have to once have been joined with the property to which the easement attaches. Meanwhile, a prescriptive easement is created where a party can show actual, continuous, and uninterrupted use of a limited and defined area of land for 20 years; use, under a claim of right, in conflict with the landowner's use (that is, use without the landowner's consent); and the landowner's knowledge of the use or use so open, notorious, visible, and uninterrupted that knowledge is imputed to the landowner. Olexa, *supra* note 6; s. 704.01, F.S.; *Downing v. Bird*, 100 So. 2d 57 (Fla. 1958); *Crigger v. Fla. Power Corp.*, 436 So. 2d 937 (Fla. 5th DCA 1983).

¹¹ Maloney, *supra* note 8.

¹² Legal Information Institute, *Covenant that Runs with the Land*, https://www.law.cornell.edu/wex/covenant_that_runs_with_the_land (last visited Jan. 25, 2024).

¹³ *Id.*

¹⁴ *Hayslip v. U.S. Home Corp.*, 336 So. 3d 207 (Fla. 2022).

¹⁵ FindLaw, *Creation and Termination of CC&Rs*, <https://www.findlaw.com/realestate/owning-a-home/creation-and-termination-of-cc-rs.html> (last visited Jan. 25, 2024).

¹⁶ *Hayslip*, 336 So. 3d at 210; s. 695.11, F.S.

¹⁷ Ch. 65, F.S.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ S. 420.0003, F.S.

governments working in partnership with communities and the private sector and must involve financial, as well as regulatory, commitment to accomplish this goal.²²

Furthermore, programs to encourage housing production or rehabilitation under the SHSA must be guided by the following general policies:²³

- State and local governments must provide incentives to encourage the private sector to be the primary delivery vehicle for affordable housing development.
- State and local governments should consider and implement innovative solutions to housing issues where appropriate. Innovative solutions include, but are not limited to:
 - Utilizing publicly held land to develop affordable housing through state or local land purchases, long-term land leasing, and school district affordable housing programs. To the maximum extent possible, state-owned lands that are appropriate for affordable housing development must be made available for that purpose.
 - Community-led planning that focuses on urban infill, flexible zoning, redevelopment of commercial property into mixed-use property, resiliency, and furthering development in areas with preexisting public services, such as wastewater, transit, and schools.
 - Project features that maximize efficiency in land and resource use.
 - Mixed-income projects that facilitate more diverse and successful communities.
 - Modern housing concepts such as manufactured homes, tiny homes, 3D-printed homes, and accessory dwelling units.
- State funds should be available only to local governments that provide incentives or financial assistance for housing. State funding for housing should not be made available to local governments whose comprehensive plans²⁴ have been found not in compliance with chapter 163, F.S., and who have not entered into a stipulated settlement agreement with the department to bring the plans into compliance. State funds should be made available only for projects consistent with the local government's comprehensive plan.
- Local governments are encouraged to enter into interlocal agreements, as appropriate, to coordinate strategies and maximize the use of state and local funds.
- State-funded development should emphasize use of developed land, urban infill, and the transformation of existing infrastructure in order to minimize sprawl, separation of housing from employment, and effects of increased housing on ecological preservation areas. Housing available to the state's workforce should prioritize proximity to employment and services.

Local Housing Assistance Plans

The SHSA requires each county or eligible municipality participating in the State Housing Initiatives Partnership Program²⁵ ("SHIP") to establish, by ordinance, a local housing assistance program, and to develop and implement a local housing assistance plan ("LHAP") to make affordable residential units available to very-low-, low-, or moderate-income persons²⁶ and to persons with special housing needs (such as persons experiencing homelessness, the elderly, migrant farmworkers, and persons with disabilities).²⁷ Such plans should increase the availability of affordable residential units by combining local resources and cost-saving measures into a local housing partnership and using private and public funds to reduce housing costs.²⁸

²² *Id.*

²³ *Id.*

²⁴ A local government comprehensive plan provides the principles, guidelines, standards, and strategies for the orderly and balanced future economic, social, physical, environmental, and fiscal development of the area that reflects community commitments to implement the plan and its elements. S. 163.3177(1), F.S.

²⁵ The SHIP provides funds to local governments as an incentive to create partnerships that produce and preserve affordable homeownership and multifamily housing. It also provides very-low-, low-, and moderate-income families with housing-related assistance, including money to buy, repair, or replace a home. Currently, SHIP funds are distributed on an entitlement basis to all 67 counties and 55 Community Development Block Grant entitlement cities in Florida, with a minimum allocation of \$350,000. Florida Housing Coalition, *State Housing Initiatives Partnership Program (SHIP)*, <https://www.floridahousing.org/programs/special-programs/ship---state-housing-initiatives-partnership-program> (last visited Jan. 25, 2024);

²⁶ See s. 420.0004, F.S., for definitions of these and related income classifications.

²⁷ Current LHAPs may be viewed at Florida Housing Finance Corporation, *Local Housing Assistance Plans (LHAP)*, [https://www.floridahousing.org/programs/special-programs/local-housing-assistance-plan-\(lhap\)/current-local-government-lhaps](https://www.floridahousing.org/programs/special-programs/local-housing-assistance-plan-(lhap)/current-local-government-lhaps) (last visited Jan. 25, 2024).

²⁸ S. 420.9075(1)(a), F.S.

In furtherance of the SHSA's housing goals, LHAPs may allocate SHIP funds to do any of the following:²⁹

- Implement local housing assistance strategies for the provision of affordable housing;
- Supplement the funds available to the Florida Housing Finance Corporation ("corporation") to provide enhanced funding of state housing programs within the local government's jurisdiction.
- Provide the local matching share of federal affordable housing grants or programs.
- Fund emergency repairs.
- Further the housing element of the local government comprehensive plan specific to affordable housing.

However, each LHAP is governed by the following criteria and administrative procedures:³⁰

- Each local government must develop a qualification system and selection criteria for funding award applications, adopt criteria for recipient selection, and adopt a maximum award schedule or system of amounts consistent with the intent and budget of its LHAP and with corporation rule.
- The local government must advertise the notice of funding availability in a newspaper of general circulation and periodicals serving ethnic and diverse neighborhoods at least 30 days before the application period begins.
- It is unlawful to discriminate on the basis of race, creed, religion, color, age, sex, marital status, familial status, national origin, or handicap in the award application process for eligible housing.
- As a condition of receipt of an award, the award sponsor or recipient must contractually commit to comply with the affordable housing criteria specified in law applicable to the awards' affordable housing objective.
- The staff or entity with administrative authority for implementing an LHAP assisting rental developments must annually monitor and determine tenant eligibility or, to the extent another governmental entity or corporation program provides periodic monitoring and determination, a local government may rely on such monitoring and determination, with an exception.

Affordable Housing Property Tax Exemption

Section 196.1978, F.S., provides an ad valorem tax³¹ exemption related to affordable housing development. Specifically, this section provides that property used to provide affordable housing to eligible persons³² and natural persons or families meeting the extremely-low-, very-low-, low-, or moderate-income limits, and which is owned entirely by a qualifying nonprofit entity,³³ is considered property owned by an exempt entity and used for a charitable purpose. Under this section, those portions of the affordable housing property that provide housing to extremely-low-, very-low-, low-, or moderate-income persons or families are exempt from ad valorem taxation to the extent authorized under s. 196.196, F.S., which establishes criteria for determining whether property is entitled to an ad valorem tax exemption due to its use for charitable or other purposes.

Further, s. 196.1978, F.S., provides that property in a multifamily project that meets specified criteria is considered property used for a charitable purpose and shall receive a 50 percent discount from the amount of ad valorem tax otherwise owed beginning with the January 1 assessment after the 15th

²⁹ S. 420.9075(1)(b), F.S.

³⁰ S. 420.9075(4), F.S.

³¹ "Ad valorem taxes" are property taxes. Florida real property is assessed annually by the property appraiser for the county in which it lies, and such assessment determines the amount of ad valorem taxes owed each year on the property before any available exemptions are applied. Florida Department of Revenue, *Tax Information for New Residents*, https://floridarevenue.com/Forms_library/current/qt800025.pdf (last visited Jan. 25, 2024).

³² "Eligible persons" means one or more natural persons or a family, irrespective of race, creed, national origin, or sex, determined by the housing finance authority to be of low, moderate, or middle income. Such determination does not preclude any person or family earning up to 150 percent of the state or county median family income from participating in programs. Persons 65 years of age or older shall be defined as eligible persons regardless of their incomes. In determining the income standards of eligible persons for its various programs, the housing finance authority may consider the following factors: requirements mandated by federal law; variations in circumstances in different areas of the state; whether the determination is for rental housing or homeownership purposes; and the need for family-size adjustments to accomplish the purposes set forth in Chapter 159, F.S. S. 159.603, F.S.

³³ A qualifying non-profit entity is an entity that is a corporation not for profit, qualified as charitable under s. 501(c)(3) of the Internal Revenue Code and in compliance with Rev. Proc. 96-32, 1996-1 C.B. 717. S. 196.1978(1), F.S.

completed year of the term of the recorded agreement on those portions of the affordable housing property that provide housing to persons or families meeting the extremely-low-, very-low-, and low-income limits. To qualify for the tax discount, the multifamily project must:

- Have more than 70 units that are used to provide affordable housing to persons or families meeting the extremely-low-, very-low-, or low-income limits; and
- Be subject to an agreement with the Florida Housing Finance Corporation recorded in the official records of the county in which the property lies to provide affordable housing to persons or families meeting the extremely-low-, very-low-, or low-income limits.

However, this discount terminates if the property no longer serves extremely-low, very-low-, or low-income persons pursuant to the recorded agreement.

Effect of Proposed Changes

CS/HB 1229 amends s. 420.0003, F.S., to require LHAPs to authorize the termination of recorded and unrecorded easements or rights, interests, or servitudes in the nature of easements for use of or access to a lake with respect to up to no more than one-third of the area of such lake and its upland banks for purposes of redeveloping the land to create affordable housing under the SHSA and s. 196.1978, F.S., within 90 days from the date of “such authorization request.” Under the bill, the authorization may apply to easements, interests, and servitudes in favor of the public or any other party, other than a public utility or governmental body or agency.

Termination of interests as contemplated by the bill must be achieved through the filing of a quiet title action, for which service of process may be made to a party by certified mail, return receipt requested. At the time of filing such a quiet title action, the bill requires that a notice be recorded in the public records in the county in which the land is located, which notice must identify the action seeking to terminate easements, rights, or servitudes; the interests to be so terminated; and the names of the record owners of such interests. The notice must also identify the owners of the land underlying the affected lake and its banks, and provide a legal description of such lake and its banks. Further, upon issuance of a final order quieting title to any interest as contemplated by the bill, that order, together with an instrument describing all interests that have been extinguished and providing a legal description of the newly established boundaries of the lake, must also be recorded in the public records in the county in which the land is located.

The bill provides an effective date of July 1, 2024.

B. SECTION DIRECTORY:

Section 1: Amends s. 420.0003, F.S., relating to state housing strategy.

Section 2: Provides an effective date of July 1, 2024.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have a positive economic impact on the private sector to the extent that it promotes the affordable housing development but may have a negative economic impact on persons whose property rights are terminated as provided for in the bill.

D. FISCAL COMMENTS:

The bill may have a negative fiscal impact on state and local governments to the extent such entities are directed by a court to pay compensation to a property owner whose property rights are terminated as provided for in the bill.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Private Property Rights

The State Constitution guarantees that “[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner.”³⁴ The Florida Supreme Court has recognized servitudes, including easements, covenants, and other use rights, as private property, for which the owner has a compensation right.³⁵

The bill amends s. 420.0003, F.S., to require LHAPs to authorize the termination of specified servitudes for purposes of redeveloping specified land to create affordable housing. Though the bill does not provide for compensation of the property owners impacted by such terminations, the bill requires that a quiet title action be filed to accomplish such terminations, which action should give the impacted property owners the ability to litigate whether they are entitled to compensation.

³⁴ Fla. Const. art. X, s. 6(a).

³⁵ *Palm Beach Cnty v. Cove Club Investors Ltd.*, 734 So. 2d 379 (Fla. 1999).

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On January 25, 2024, the Civil Justice Subcommittee passed a proposed committee substitute (“PCS”). The PCS differed from the original bill in that it:

- Expanded the bill’s application from home rule charter counties to counties and eligible municipalities participating in the SHIP.
- Required an LHAP to authorize termination of specified easements to foster affordable housing development.
- Moved the bill from s. 712.03, F.S., relating to the Marketable Record Title Act, to s. 420.0003, F.S., relating to the SHSA.

This analysis is drafted to the PCS as passed by the Civil Justice Subcommittee.