

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 887

Adverse Possession

**SPONSOR(S):** Schultz

**TIED BILLS:** None

**IDEN./SIM. BILLS:** SB 292; SB 2234

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Civil Justice & Courts Policy Committee	14 Y, 0 N	Bond	De La Paz
2)	Criminal & Civil Justice Policy Council			
3)				
4)				
5)				

### SUMMARY ANALYSIS

Adverse possession is a method of acquiring title to real property by possession for a period of time. To acquire title by adverse possession without color of title (without having a deed or other recorded document), a claimant must openly possess the real property, must pay all taxes for a period of seven years, and must have filed a return of the land for taxes during the first year of occupation. Current law does not require any notice to the owner who previously paid the taxes.

This bill adds a requirement related to adverse possession without color of title. The bill requires that a person who files a return for taxes with the intent of claiming the property by adverse possession must give notice to the property owner within 15 days of filing the return.

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

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

Adverse possession is a method of acquiring title to real property by possession for a period of time. There are several means by which adverse possession of real property can lead to title to real property. To acquire title by adverse possession without color of title (without having a deed or other recorded document), section 95.18, F.S., provides that a claimant must:

- Show open, continuous, and hostile possession;
- Pay all taxes for a period of seven years; and
- Must file a return of the land for taxes during the first year of occupation.

#### Origins of Adverse Possession

The doctrine of adverse possession “dates back at least to sixteenth century England and has been an element of American law since the country’s founding.”<sup>1</sup> The first adverse possession statute appeared in the United States in North Carolina in 1715.<sup>2</sup>

Adverse possession is defined as “[a] method of acquisition of title to real property by possession for a statutory period under certain conditions.”<sup>3</sup> An adverse possessor must generally establish five elements in relationship to possession. The possession must be:

- Open;
- Continuous for the statutory period;
- For the entirety of the area;
- Adverse to the record owner’s interests; and
- Notorious.<sup>4</sup>

In most jurisdictions, state statutory law prescribes the limitations period – the period in which the record owner must act to preserve his or her interests in the property – while the state’s body of common law governs the nature of use and possession necessary to trigger the running of the statutory

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<sup>1</sup> Alexandra B. Klass, *Adverse Possession and Conservation: Expanding Traditional Notions of Use and Possession*, 77 U. COLO. L. REV. 283, 286 (Spring 2006).

<sup>2</sup> Brian Gardiner, *Squatters’ Rights and Adverse Possession: A Search for Equitable Application of Property Laws*, 8 IND. INT’L & COMP. L. REV. 119, 129 (1997).

<sup>3</sup> *Id.* at 122 (quoting BLACK’S LAW DICTIONARY 53 (6th ed. 1990)).

<sup>4</sup> *Id.*

time period.<sup>5</sup> As legal scholars have noted, “[a]dverse possession decisions are inherently fact-specific.”<sup>6</sup> Therefore, an adverse possessor must establish “multiple elements whose tests are elastic and provide the trier of fact with flexibility and discretion.”<sup>7</sup>

## Adverse Possession in Florida

In Florida, there are two ways to acquire land by adverse possession, which are prescribed by statute.<sup>8</sup> First, an individual adversely occupying property may claim property under color of title if he or she can demonstrate that the claim to title is the derivative of a recorded written document and that he or she has been in possession of the property for at least seven years.<sup>9</sup> It is irrelevant whether the recorded document is legally valid or is fraudulent or faulty. To demonstrate possession, the adverse possessor must prove that he or she cultivated or improved the land, or protected the land by a substantial enclosure.<sup>10</sup> Alternatively, in the event a person occupies land continuously without color of title – i.e., without any legal document to support a claim for title – the person may seek title to the property by filing a return with the county property appraiser’s office within one year of entry onto the property, and paying all property taxes and any assessed liens during the possession of the property for seven consecutive years.<sup>11</sup> Similar to claims made with color of title, the adverse possessor may demonstrate possession of the property by showing that he or she:

- Protected the property by a substantial enclosure (typically a fence); or
- Cultivated or improved the property.<sup>12</sup>

Florida courts have noted that “[p]ublic policy and stability of our society . . . requires strict compliance with the appropriate statutes by those seeking ownership through adverse possession.”<sup>13</sup> Adverse possession is not favored, and all doubts relating to the adverse possession claim must be resolved in favor of the property owner of record.<sup>14</sup> The adverse possessor must prove each essential element of an adverse possession claim by clear and convincing evidence.<sup>15</sup> Therefore, the adverse possession claim cannot be “established by loose, uncertain testimony which necessitates resort to mere conjecture.”<sup>16</sup>

## Abuse of the Adverse Possession Process

Despite certain policy considerations supporting the application of adverse possession in Florida,<sup>17</sup> abuse of the statute may be occurring in certain contexts because the adverse possessor may acquire

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<sup>5</sup> Klass, *supra* note 1, at 287.

<sup>6</sup> Geoffrey P. Anderson and David M. Pittinos, *Adverse Possession After House Bill 1148*, 37 COLO. LAW 73, 74 (Nov. 2008).

<sup>7</sup> *Id.*

<sup>8</sup> *Candler Holdings Ltd. I v. Watch Omega Holdings, L.P.*, 947 So. 2d 1231, 1234 (Fla. 1st DCA 2007). In addition to adverse possession, a party may gain use of adversely possessed property by acquiring a prescriptive easement upon a showing of 20 years of adverse use.

<sup>9</sup> Section 95.16, F.S. See also *Bonifay v. Dickson*, 459 So. 2d 1089 (Fla. 1st DCA 1984). The Florida Legislature, by acts now embodied in statute, reduced the period of limitations as to adverse possession to seven years but left at 20 years the period for acquisition of easements by prescription. *Crigger v. Florida Power Corp.*, 436 So. 2d 937, 945 (Fla. 5th DCA 1983).

<sup>10</sup> Section 95.16, F.S.

<sup>11</sup> Section 95.18(1), F.S. The 1939 Legislature added to what is now s. 95.18(1), F.S., a provision which required that an adverse possessor without color of title must file a tax return and pay the annual taxes on the property during the term of possession. Chapter 19254, s. 1, Laws of Fla. (1939). A 1974 amendment to the statute eliminated the requirement that taxes be paid annually. Chapter 74-382, s. 1, Laws of Fla.

<sup>12</sup> Section 95.18(2), F.S.

<sup>13</sup> *Candler Holdings Ltd. I*, 947 So. 2d at 1234.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* (citing *Bailey v. Hagler*, 575 So. 2d 679, 681 (Fla. 1st DCA 1991)).

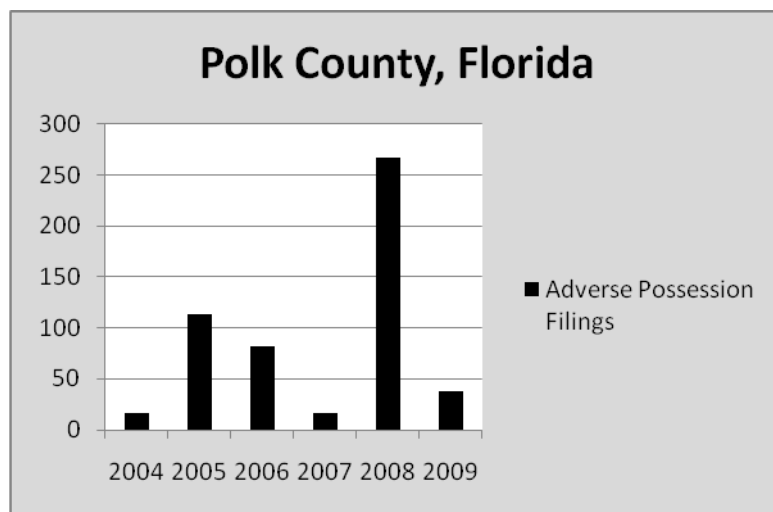
<sup>16</sup> *Id.* (quoting *Grant v. Strickland*, 385 So. 2d 1123, 1125 (Fla. 1st DCA 1980)).

<sup>17</sup> See Comm. on Judiciary, Fla. Senate, *Review of the Requirements for Acquiring Title to Real Property through Adverse Possession* (Interim Report 2010-123) (Oct. 2009), 2, available at [http://www.flsenate.gov/data/Publications/2010/Senate/reports/interim\\_reports/pdf/2010-123ju.pdf](http://www.flsenate.gov/data/Publications/2010/Senate/reports/interim_reports/pdf/2010-123ju.pdf).

title to property in instances where the record owner attempts to pay taxes and monitors the property. Some landowners in Florida<sup>18</sup> have expressed concern that individuals are capitalizing on the current adverse possession laws to gain title to adjoining properties, and that the burden to overcome these claims unfairly rests with the property owner of record. For example, in some counties, adjoining landowners have filed numerous adverse possession returns on several properties and have paid property taxes on those parcels in an attempt to claim title to the property by adverse possession despite any good faith claim to title. In order to protect the owner's property interests, he or she may be required to initiate litigation to eject the adverse possessor or to receive a judgment declaring his or her rights to the property. Significant legal fees and other costs may be associated with countering adverse possession claims.

### **Adverse Possession Trends in Florida**

Some counties in Florida have experienced an influx of adverse possession claims, while other counties have received very few filings, or none at all, in recent years. For example, the following figure illustrates the number of adverse possession returns submitted to the Polk County Property Appraiser's Office in recent years:<sup>19</sup>



Currently, Polk County has more than 500 adverse possession returns on record. In Orange County, there are 51 adverse possession returns on record out of 434,940 total parcels. The Brevard County Property Appraiser's Office has between 100 and 150 adverse possession returns on record. Although the incidence of adverse possession claims appears to be more prevalent in rural areas in Florida, urban areas also experience adverse possession claims.

### **Effect of Bill**

This bill amends s. 95.18, F.S., to require that a person who files a return for taxes with the intent of claiming the property by adverse possession must give notice to the property owner. The claimant must send, by certified mail, a copy of the return for taxes. If the claimant does not file proof of mailing within 15 business days, the property appraiser must cancel the return. This requirement does not apply where the owner of record cannot be determined by reviewing the records of the property appraiser.

#### **B. SECTION DIRECTORY:**

Section 1 amends s. 95.18, F.S., regarding adverse possession.

<sup>18</sup> Senate professional staff interviewed landowners subject to adverse possession claims, as well as real property practitioners, to gauge their experiences with the process. In some instances the record landowner may reside in another state. This absence from Florida may further impair the landowner's ability to oppose an adverse possession claim.

<sup>19</sup> Data provided by the Polk County Property Appraiser's Office.

Section 2 provides an effective date of July 1, 2010.

## **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:**

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

#### **2. Other:**

None.

### **B. RULE-MAKING AUTHORITY:**

None.

### **C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

## **IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**

n/a