

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 927 Adverse Possession

**SPONSOR(S):** Roberson

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 1142

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	15 Y, 0 N	Billmeier	Bond
2) Finance & Tax Committee			
3) Judiciary Committee			

### SUMMARY ANALYSIS

This bill amends the current statutory process for gaining title to real property via an adverse possession claim without color of title. Specifically, this bill:

- Includes occupation and maintenance as one of the forms of proof of possession of property subject to an adverse possession claim;
- Requires the property appraiser to provide notice to the owner of record that an adverse possession claim was made;
- Specifies that the Department of Revenue must develop a uniform adverse possession return;
- Requires the adverse possessor to provide a "full and complete" legal description on the return;
- Requires the adverse possessor to attest to the truthfulness of the information provided in the return under penalty of perjury;
- Requires an adverse possessor to describe, on the return, how he or she is using the property subject to the adverse possession claim;
- Includes emergency rulemaking authority for the Department of Revenue related to the adverse possession return;
- Prescribes procedures governing an adverse possession claim against a portion of an identified parcel of property, or against property that does not currently have a unique parcel identification number;
- Specifies when the property appraiser may add and remove the adverse possessor to and from the parcel information on the tax roll;
- Requires property appraisers to include a notation of an adverse possession claim in any searchable property database maintained by the property appraiser;
- Provides for priority of property tax payments made by owners of record by allowing for refunds of tax payments made by adverse possessors who submit a payment prior to the owner of record; and
- Provides that tax notices must be sent to the owner of property subject to an adverse possession claim even if the county commission has authorized the tax collector to not send out tax notices for bills under a certain amount.

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

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Adverse Possession**

"Adverse possession" is an "actual and visible appropriation of property commenced and continued under a claim of right that is inconsistent with and hostile to the claim of another."<sup>1</sup> It has also been defined as "the open and notorious possession and occupation of real property under an evident claim or color of right, or, in other words, a possession in opposition to the true title and record owner, commenced in wrong and maintained in right."<sup>2</sup>

In Florida, there are two ways to acquire land by adverse possession, which are prescribed by statute.<sup>3</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>4</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>5</sup> Alternatively, in the event a person occupies land continuously 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>6</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>7</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>8</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>9</sup> The adverse possessor must prove each essential element of an adverse possession claim by clear and convincing evidence.<sup>10</sup> Therefore, the adverse possession claim cannot be "established by loose, uncertain testimony which necessitates resort to mere conjecture."<sup>11</sup>

#### **Effect of Proposed Changes**

##### **Possession of the Property**

This bill makes several changes to the current language included in the adverse possession (without color of title) statute for clarity, including a change designed to account for the establishment of "possession" in urban areas, and to make clear that property will be deemed to be possessed by the adverse possessor when:

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<sup>1</sup> 2 Fla. Jur 2d Adverse Possession s. 2

<sup>2</sup> 2 Fla. Jur 2d Adverse Possession s. 2

<sup>3</sup> *Candler Holdings Ltd. I v. Watch Omega Holdings, L.P.*, 947 So.2d 1231, 1234 (Fla. 1st DCA 2007).

<sup>4</sup> Section 95.16, F.S.

<sup>5</sup> Section 95.16, F.S.

<sup>6</sup> Section 95.18(1), F.S.

<sup>7</sup> Section 95.18(2), F.S.

<sup>8</sup> *Candler Holdings Ltd. I*, 947 So.2d at 1234.

<sup>9</sup> *Candler Holdings Ltd. I*, 947 So.2d at 1234.

<sup>10</sup> *Candler Holdings Ltd. I*, 947 So.2d at 1234.

<sup>11</sup> *Id.* (quoting *Grant v. Strickland*, 385 So. 2d 1123, 1125 (Fla. 1st DCA 1980)).

- It is protected by a substantial enclosure;
- It has been usually cultivated or improved; or
- It has been occupied and maintained.

In effect, a person claiming adverse possession may establish possession pursuant to the statute by satisfying any of these three criteria. Because properties subject to adverse possession claims in urban areas may not, in some instances, be amenable to protection by a substantial enclosure, or cultivation or improvement, this bill allows the adverse possessor to establish possession by occupying and maintaining the property.

### **Adverse Possession Return**

This bill makes several changes to the information contained in the adverse possession return submitted by an adverse possessor to initiate the adverse possession claim. This bill requires the Department of Revenue (DOR) to develop a uniform adverse possession return to be used throughout the state. In addition to the information contained on the current form developed by DOR, this bill requires the adverse possessor to provide a “full and complete legal description of the property” on the return.<sup>12</sup> The adverse possessor must also attest to the truthfulness of the information contained on the form under penalty of perjury.<sup>13</sup> Finally, this bill requires the adverse possessor to provide a description of his or her use of the property in the return.

### **Emergency Rulemaking Authority**

This bill grants the DOR the authority to adopt emergency rules related to the changes to the adverse possession return. This bill provides that the executive director of DOR is authorized to adopt emergency rules for the purpose of implementing the additions and changes to the adverse possession return form. These emergency rules may remain in effect for six months after the rules are adopted and may be renewed during the pendency of procedures to adopt final rules addressing the adverse possession return.

### **Notice to Owner of Record**

This bill requires the property appraiser to provide notice to the owner of record that an adverse possession return was submitted. The property appraiser must send to the owner of record a copy of the return, via regular mail. The property appraiser is also required to inform the owner of record that any tax payment made by the owner of record prior to April 1 following the year in which the tax is assessed will have priority over any tax payment made by the adverse possessor.

### **Property Appraiser’s Administration of the Return**

Upon submission of the return, the property appraiser must complete a receipt acknowledging submission of the return. This bill authorizes the property appraiser to refuse to accept a return if it fails to comply with the requirements prescribed in this bill. This bill requires the property appraiser to add a notation at the beginning of the first line of the legal description on the tax roll that an adverse possession claim has been initiated upon receipt of the adverse possession return<sup>14</sup> The property

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<sup>12</sup> DOR created a sample form return for use by property appraisers, which includes the following information: date of filing; date of entering into possession of the property; name and address of the claimant; legal description of the property; notarization clause; and receipt (to be completed by the property appraiser or a designated representative upon submission of the return). See Florida Dep’t of Revenue, Form DR-452, *Form for Return of Real Property in Attempt to Establish Adverse Possession without Color of Title* (rev. Aug. 1993).

<sup>13</sup> A person who knowingly made a false declaration on the return would be guilty of the crime of perjury by false written declaration, which is a third-degree felony, punishable by imprisonment not to exceed five years and a fine not to exceed \$5,000. Section 92.525(3), F.S.

<sup>14</sup> . Until a bulletin by DOR advised otherwise, some property appraisers were adding the adverse possessor as an additional “owner” on the tax roll. Florida Dep’t of Revenue, *Florida Department of Revenue Property Tax Information Bulletin: Return of Real Property in Attempt to Establish Adverse Possession without Color of Title, Form DR-452* (Jan. 25, 2010).

appraiser is also required to maintain the adverse possession return in the property appraiser's records.

### **Claim Against a Portion of a Parcel or Against Property Without a Parcel Number**

This bill prescribes procedures when an adverse possession claim is made against a *portion* of property with a unique parcel identification number. The person claiming adverse possession must provide a legal description of the portion sufficient for the property appraiser to identify the portion. If property appraiser cannot identify the portion of property from the description, the person must obtain a survey of the portion of property. If the whole property already has been assigned a parcel identification number, the property appraiser may not assign a new parcel number to the portion of the property subject to the claim. The property appraiser shall assign a fair and just value to the portion of the property subject to the claim.

This bill also prescribes procedures when an adverse possession claim is made against property that does not yet have a parcel identification number. The person claiming adverse possession shall provide a legal description of the property sufficient for the property appraiser to identify it. If the property appraiser cannot identify the property from the description, the person must obtain a survey of the property. The property appraiser shall assign a parcel identification number to the property and assign a fair and just value to the property.

### **Removal of Notation from Parcel Information**

This bill also delineates when the property appraiser may remove the adverse possessor from the parcel information contained in the tax roll. This bill requires the property appraiser to remove the notation to the legal description on the tax roll that an adverse possession return has been submitted if:

- The adverse possessor notifies the property appraiser in writing that he or she is withdrawing the claim;
- The owner of record provides a certified copy of a court order, entered after the date of the submission of the return, establishing title in the owner of record;
- The property appraiser receives a recorded deed, filed after the date of the submission of the return, transferring title of the same property subject to the claim from the adverse possessor to the owner of record; or
- The tax collector or owner of record submits to the property appraiser a receipt demonstrating that the owner of record has made an annual tax payment for the property subject to the adverse possession claim during the period that the person is claiming adverse possession.

If any one of these events occurs, the property appraiser must also remove the adverse possession return from the property appraiser's records.

### **Adverse Possession Filing Notation**

This bill requires every property appraiser who maintains a public searchable database to provide a clear and obvious notation in the parcel information of the database maintained by the property appraiser that an adverse possession return has been submitted for the particular parcel. Those property appraisers who do not currently offer a searchable database to the public are not subject to this requirement, unless they offer a searchable database to the public in the future.

### **Tax Payments**

This bill provides for priority of property tax payments made by owners of record whose property is subject to an adverse possession claim. Current law provides that if an adverse possessor makes a tax payment prior to the owner of record, the tax collector is not authorized to accept a subsequent payment by the owner of record. This bill provides that if an adverse possessor makes an annual tax payment on property subject to the adverse possession claim, and the owner of record subsequently makes a tax payment prior to April 1, the tax collector is required to accept the owner of record's

payment. Within 60 days, the tax collector must refund the adverse possessor's tax payment. This bill specifies that the refund to the adverse possessor is not subject to approval from the DOR.<sup>15</sup>

This bill also specifies that, upon receipt of a subsequent payment for the same annual tax assessment for a particular parcel, the tax collector must determine if an adverse possession return has been submitted on the particular parcel. If a return has been submitted, the tax collector must refund the payment made by the adverse possessor and afford the owner of record priority of payment as specified in this bill.

In addition, this bill sets forth the tax-payment and refund procedures when only a portion of an identified parcel of property is subject to an adverse possession claim.

This bill excludes properties subject to adverse possession claims from the minimum tax bill provision. Therefore, tax notices must be sent to the owner of property subject to an adverse possession claim even if the county commission has authorized the tax collector to not send out tax notices for bills under a certain amount.

### **Effective Date**

This bill has an effective date of July 1, 2011, and applies to adverse possession claims in which the return was submitted on or after that date, except for the procedural provisions governing the property appraiser's administration of the adverse possession claims included in proposed s. 95.18(4)(c) and (d) (requiring the property appraiser to add a notation of the adverse possession filing and maintain a copy of the return) and s. 95.18(7), F.S. (delineating when the property appraiser may remove the adverse possession notation). These provisions will apply to adverse possession claims in which the return was submitted before, on, or after July 1, 2011.

### **Other Issues**

Establishment of priority of tax payments made by owners of record whose properties are subject to an adverse possession claim would represent policy shift that could effectively preclude an adverse possessor from obtaining title to property because the adverse possessor may be unable to satisfy the tax-payment element of the adverse possession statute. The current statutory framework contemplates that the tax payment is a necessary step for the person claiming adverse possession to gain title to the property. Therefore, current practice by tax collectors is to accept a payment made by an adverse possessor if made prior to a payment by the owner of record.

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

Section 1 amends s. 95.18, F.S., relating to adverse possession without color of title.

Section 2 amends s. 197.212, F.S., relating to minimum tax bill.

Section 3 creates s. 197.3335, F.S., relating to tax payments when property is subject to adverse possession.

Section 4 provides an effective date of July 1, 2011, and providing for retroactive application of procedural provisions.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

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<sup>15</sup> Currently, certain refunds of \$400 or more must be approved by the Department of Revenue prior to the tax collector's remittance of the refund. *See* s. 197.182(1)(i), F.S.

1. Revenues:

None.

2. Expenditures:

The Department of Revenue does not anticipate significant additional costs to implement this bill.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

Property appraisers will incur costs to comply with the notice requirements and to comply with the requirement that searchable databases be updated. The amount is unknown but is not expected to be significant. There are only a small number of adverse possession returns filed each year.

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:

This bill grants the Department of Revenue the authority to adopt emergency rules related to the changes to the adverse possession return. This bill provides that the executive director of the Department of Revenue is authorized to adopt emergency rules for the purpose of implementing the additions and changes to the adverse possession return form created by the Department. These emergency rules may remain in effect for six months after the rules are adopted and may be renewed during the pendency of procedures to adopt final rules addressing the adverse possession return.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.