

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Community Affairs

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BILL: CS/SB 1520

INTRODUCER: Judiciary Committee and Senator Boyd

SUBJECT: Ancillary Property Rights

DATE: March 25, 2021

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Bond</u>	<u>Cibula</u>	<u>JU</u>	<u>Fav/CS</u>
2.	<u>Paglialonga</u>	<u>Ryon</u>	<u>CA</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>RC</u>	_____

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 1520 amends real property law to specify that a utility easement is an interest in real property that must be recorded and may be transferred or assigned, and amends the Marketable Recordable Title Act (MRTA) to provide that it may extinguish certain covenants or restrictions related to zoning requirements or a building or development permit.

In general, an easement allows the holder of the easement the right to enter into a servient estate, which is land owned by another. A utility easement allows entry for the purpose of constructing or maintaining utilities serving the public. The holder of an easement has the right to do what is reasonably necessary to utilize the easement for its original purpose, but no more. The bill requires a utility easement to be recorded in the public records, allows the holder of the easement full property rights in the easement unless expressly provided otherwise in the easement, and provides that assignment of an easement is not an undue burden upon the servient estate.

MRTA simplifies property transactions and modernizes land use by eliminating property rights that are more than 30 years old and predate the root of the title of the property in question. There are, however, numerous exceptions to MRTA whereby a property right is not extinguished by MRTA. The bill amends MRTA to:

- Modify an exception to extinguishment to require that a general reference to a prior right must include an affirmative statement of intent to preserve such property right.
- Specify that MRTA may extinguish a covenant or restriction related to a zoning requirement, building permit, or development permit. However, this will not extinguish the underlying

zoning or building codes or ordinances; nor will it extinguish a covenant or restriction that says on its first page that it was required by local codes.

- Allow revitalization of a covenant or restriction that had been required by a government agency as a condition of a development permit.

The bill includes a statement that the changes to MRTA apply to all real property interests. A person who wishes to protect a property interest potentially extinguished by the bill has until July 1, 2022 to file a Statement of Marketable Title Action in the public records in order to preserve the property interest.

The bill is effective upon becoming law.

## II. Present Situation:

### Utility Easements

Ownership of real property includes many rights. Maybe one of the most important is the right to exclude others from entering onto the land. Like the other real property rights, the right to exclude others can be transferred in part to another individual or entity. Giving someone else the right to enter a specified portion of one's property for a specific use is known as granting an easement, and the real property subject to the easement is referred to as the servient estate.

A utility easement is a form of easement held by a utility company for the specific purpose of furnishing utilities, generally for benefit of society at large.

The law governing easements generally provides that an easement holder has the right to do what is reasonably necessary for the full enjoyment of the easement, but that the right must not be increased to any greater extent than reasonably necessary and contemplated at the time the easement was created.<sup>1</sup> The "holder of an electric transmission line easement may avail itself of modern inventions and improvements so long as such action is within the scope of the easement."<sup>2</sup> An easement, like any other contract, is construed according to its plain terms. "The scope of an easement is defined by what is granted, not by what is excluded, and all rights not granted are retained by the grantor. Likewise, the scope of an express easement for a stated purpose cannot be expanded to include any use merely because such use does not impose an added burden on the servient estate."<sup>3</sup>

### The Marketable Record Title Act

The Marketable Record Title Act (MRTA) was enacted in 1963 "to simplify conveyances of real property, stabilize titles, and give certainty to land ownership."<sup>4,5</sup> Specifically, MRTA extinguishes most rights in real property that are more than 30 years old based on the date of the

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<sup>1</sup> *Crutchfield v. F.A. Sebring Realty Co.*, 69 So. 2d 328 (Fla. 1954).

<sup>2</sup> *Florida Power Corp. v. Silver Lake Homeowners Ass'n*, 727 So. 2d 1149, 1150 (Fla. 5th DCA 1999) (allowing electric utility to change from wood poles to stronger and larger steel poles).

<sup>3</sup> *City of Orlando v. MSD-MATTIEK, L.L.C.*, 895 So. 2d 1127 (Fla. 5th DCA 2005)(it was an undue burden on the servient estate to allow installation of fiber optic lines along an electric easement)(internal citations omitted).

<sup>4</sup> *Save Calusa Trust v. St. Andrews Holdings, Ltd.*, 193 So. 3d 910, 914 (Fla. 3d DCA 2016).

<sup>5</sup> The Marketable Record Title Act is ch. 712, F.S.

root of the title. The 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 on which it was recorded.”<sup>6</sup> Any person who has been 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 that occurred prior to that record title. This allows a prospective buyer, for example, to rely on the first title transaction that occurred more than 30 years ago, together with all title transactions to date, as opposed to searching through decades of possible title transactions. Specifically, MRTA extinguishes the following rights, subject to exceptions:

[A]ll estates, interests, claims, or charges, the existence of which depends upon any act, title transaction, event, or omission that occurred before the effective date of the root of title.<sup>7</sup>

MRTA includes a number of exceptions—real property rights that MRTA expressly does not extinguish even if the rights were created in a pre-root instrument. One exception provides that MRTA does not extinguish any property right or title defect disclosed in an instrument recorded in the chain of title from the root forward. However, a general reference to the right or defect is insufficient notice to the title examiner, the reference must be made to the book and page, or to the name of the recorded plat.<sup>8</sup>

Section 712.04, F.S., lists the real property interests that are extinguished where MRTA applies. Unless one of the exceptions of s. 712.03, F.S., applies, a marketable record title is free and clear of all estates, interests, claims, or charges, the existence of which depends upon any act, title transaction, event, or omission that occurred before the effective date of the root of title.

Property owners, particularly those with recorded covenants and restrictions designed to preserve the character of the neighborhood, were often dismayed in the past when they discovered that their neighborhood covenants and restrictions had been invalidated by the operation of MRTA. In response, MRTA was amended to allow for covenant revitalization. Different procedures apply, depending upon whether the covenants created a homeowners’ association. Section 712.12, F.S., governs covenant or restriction revitalization by parcel owners not subject to a homeowners’ association. It does not apply to a covenant or restriction required by a governmental agency as a condition of a development permit.

### **Save Calusa Trust**

In *Save Calusa Trust v. St. Andrews Holdings, Ltd.*, 193 So. 3d 910 (Fla. 3d DCA 2016), the court addressed the issue of “whether a restrictive covenant, recorded in compliance with a government-imposed condition of a land use approval, is a title interest subject to extinguishment by MRTA.”<sup>9</sup> The court held that the 99-year restrictive covenant was not a title interest under MRTA, and thus was not subject to extinguishment by MRTA. The court reasoned that the

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<sup>6</sup> Section 712.01(6), F.S.

<sup>7</sup> Section 712.04, F.S. The exceptions are set forth at s. 712.03, F.S.

<sup>8</sup> Section 712.03(1), F.S.

<sup>9</sup> *Id.* at 914. The restrictive covenant at issue required the owner of a golf course, as a prerequisite to redeveloping the property, to have the consent of 75 percent of the homeowners whose homes were in a ring around the course.

restrictive covenant in question was an inseparable part of a governmental action to rezone the property at issue. The court concluded that, based on MRTA's language and case law, MRTA did not extinguish zoning regulations, including the one at issue in the case.<sup>10</sup>

### III. Effect of Proposed Changes:

#### Utility Easements

**Section 1** of the bill creates s. 704.09, F.S., regarding utility easements. A utility easement is an easement, created by a written grant of easement, for the purpose of providing utility services such as water, wastewater, reclaimed water, natural gas, electricity, drainage, and other utility services.

The bill requires a utility easement to be recorded under the general recording statute, s. 95.01, F.S.

The bill provides that a utility easement may be alienated, assigned, partially assigned, divided, transferred, or apportioned as a divided or undivided interest by its grantee and its successors and assigns, unless otherwise expressly provided in the instrument by which it is created. The bill further provides that an assignment is not an undue burden upon the servient estate if the assignment is consistent with the terms set forth in the instrument creating the utility easement.

#### The Marketable Record Title Act

**Section 2** of the bill amends the exception to MRTA at s. 712.03(1), F.S., for real property rights or title defects referenced in an instrument recorded after the root of title, to require that such instrument is not extinguished by MRTA if it either:

- Specifically references the official records book and page, instrument number, or plat name, of the pre-root instrument; or
- Generally references the estate, interest, easement or use restriction, together with an affirmative statement of intent that the property is subject to such estate, interest, easement or use restriction.

**Section 3** of the bill amends the scope of real property rights that may be extinguished by MRTA, at s. 712.04, F.S., to specifically include covenants and restrictions, including any covenant or restriction that depends upon a zoning requirement, building permit, or development permit.

**Section 3** also creates two exceptions to the otherwise broad scope of s. 712.04, F.S., to provide that MRTA does not alter or invalidate:

- A comprehensive plan or plan amendment; zoning ordinance; land development regulation; building code; development permit; development order; or other law, regulation, or regulatory approval, to the extent such law, regulation, or regulatory approval operates independently of matters recorded in the official records; or

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<sup>10</sup> *Id.* at 915-16.

- Any 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, or as a condition of, any such comprehensive plan or plan amendment; zoning ordinance; land development regulation; building code; development permit; development order; or other law, regulation, or regulatory approval.

**Section 4** amends s. 712.12, F.S., to allow covenant or restriction revitalization by parcel owners not subject to a homeowners' association where such covenant or restriction was required by a governmental agency as a condition of a development permit.

**Section 5** provides an affirmative statement to declare that the amendments made to ss. 712.03, 712.04, and 712.12, F.S., pursuant to this bill are to provide clarification to already existing law. This clarification applies to all estates, interests, claims, covenants, restrictions, and charges, whether imposed or accepted after the effective date of the bill.

**Section 6** requires that an individual who seeks to avoid losing a property interest because of the changes to MRTA in this bill file a notice in the public records no later than the earlier of the expiration of the interest or July 1, 2021. The form of notice is governed by s. 712.06, F.S.<sup>11</sup>

**Section 7** directs the Division of Law Revision to replace any language in the bill regarding "the effective date of this act" to the date that the bill becomes law.

**Section 8** provides that the bill is effective upon becoming law.

#### **IV. Constitutional Issues:**

**A. Municipality/County Mandates Restrictions:**

None.

**B. Public Records/Open Meetings Issues:**

None.

**C. Trust Funds Restrictions:**

None.

**D. State Tax or Fee Increases:**

None.

**E. Other Constitutional Issues:**

None identified.

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<sup>11</sup> The notice must contain name and address of the claimant, name and address of the owner, legal description of the affected land, a statement of the legal claim, and the recording information for the document supporting the claim. The notice must be executed and recorded the same as a deed.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Professionals working in the real estate and title industry may need to revise certain documents to clarify what property interests are part of the marketability in the MRTA.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 712.03, 712.04, and 712.12.

This bill creates section 704.09, Florida Statutes.

**IX. Additional Information:****A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Judiciary on March 9, 2020:**

The committee substitute removed telephone service from the description of a utility easement.

**B. Amendments:**

None.