

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** HB 589                      Marketable Record Titles to Real Property  
**SPONSOR(S):** Domino  
**TIED BILLS:**                              **IDEN./SIM. BILLS:** SB 1438

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<b>REFERENCE</b>	<b>ACTION</b>	<b>ANALYST</b>	<b>STAFF DIRECTOR</b>
1) <u>Business Regulation</u>	<u>34 Y, 2 N w/CS</u>	<u>Gallen</u>	<u>Liepshutz</u>
2) <u>Judiciary</u>	_____	_____	_____
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

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**SUMMARY ANALYSIS**

Homeowner associations are governed and financed by a declaration of covenants. The declarations of covenants of many homeowner associations have been extinguished because the declarations were not preserved as required by statute.

The bill creates a process that allows communities to revive the declaration of covenants and the homeowners association of the community. Communities that seek to revive covenants must have been previously subject to a declaration of covenants that has ceased to govern one or more parcels in that community.

In order to revive a declaration of covenants, parcel owners of a community must initiate an organizing committee comprised of community members. The committee must prepare the declaration of covenants and the declaration must be approved by a majority of affected parcel owners. The committee must gain approval by the Department of Community Affairs upon consent of the community members.

The bill provides that the revived declaration may not retroactively affect parcels that had ceased to be governed by the previous declaration. Covenants in the revived declaration may not be more restrictive than the original covenants.

The bill does not appear to have a direct economic impact on state or local government.

The bill takes effect July 1, 2004.

**This document does not reflect the intent or official position of the bill sponsor or House of Representatives.**

**STORAGE NAME:** h0589a.br.doc  
**DATE:** February 6, 2004

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. DOES THE BILL:

- |                                      |                              |                             |   |
|--------------------------------------|------------------------------|-----------------------------|---|
| 1. Reduce government?                | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes?                      | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom?        | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families?                 | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a “no” above, please explain:

#### B. EFFECT OF PROPOSED CHANGES:

##### Present Situation

Homeowner associations are non-profit Florida corporations that are responsible for the operation of residential communities.<sup>1</sup> Ch. 720, F.S, provides procedures for the operation of homeowner associations and protects the rights of association members.

Many homeowner associations are governed and financed by a declaration of covenants that have been recorded by the developer against the individual parcels of land. A “declaration of covenants” is a recorded written instrument in the nature of covenants running with the land which subjects the land comprising the community to the jurisdiction and control of an association which owners of the parcels must be members.

Like any other private covenant or restriction affecting real property, these recorded documents are subject to extinguishment under the Marketable Record Titles Act<sup>2</sup> if they are not properly preserved in accordance with the act.

Currently, a homeowners association (or individual) desiring to *preserve* any covenants may preserve and protect them from extinguishment by filing a record of notice during the statutory 30 year period.<sup>3</sup> A record of notice may be filed by a homeowners association<sup>4</sup> only if the preservation of the covenant or restriction is approved by at least two-thirds of the members of the board of directors of a homeowners association. Additionally, homeowners associations may amend their governing documents. Governing documents of an association include the recorded declaration of covenants, the articles of incorporation, and bylaws, and all adopted and recorded amendments of such documents.<sup>5</sup>

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<sup>1</sup> s. 720.301(7), F.S.

<sup>2</sup> Under Florida’s Marketable Record Titles Act, any owner of real property who, alone or with predecessors in title, has held any estate in land of record for 30 years or more will have a marketable record title. A marketable record title means the land is free and clear of all claims. s. 712, F.S.

<sup>3</sup> The major notice requirements include: name and address of claimant or homeowners’ association, name and address of the property owner, an affidavit from homeowners’ association stating the action taken (if applicable), a description of all land affected, a statement of claim showing description and extent of claim or copy of covenant or restriction, provide an instrument of record if record exists, and the notice must be acknowledged in the same manner as deeds. Additionally, a notice must be filed with the clerks of the circuit court in order for the notice to be entered, filed, and indexed, in the same manner as a deed. 712.06, F.S.

<sup>4</sup> “Homeowners’ association” means a Florida corporation responsible for the operation of a community which the voting membership is made up of parcel owners or their agents, and in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lie on the parcel. S. 720.301(7), F.S.

<sup>5</sup> s. 720, F.S

Prior to the 1997 legislative session, homeowner associations did not have the authority to preserve existing covenants. As a result, many covenants and restrictions were extinguished.

Current law does not permit a homeowners association to revive a declaration of covenants that has been extinguished.

### **Effect of Proposed Changes**

The bill creates a process that allows communities to revive the declaration of covenants and the homeowners association of the community. Communities that seek to revive covenants must have been previously subject to a declaration of covenants that has ceased to govern one or more parcels in that community.

“Community” means the real property that is or will be the subject to a declaration of covenants which is recorded in the county where the property is located.

“Governing documents” mean the articles of incorporation and bylaws of a homeowners association and recorded declaration of covenants for a community.

The parcel owners in a community must seek approval from the Department of Community Affairs (DCA) and must meet the following requirements:

- All parcels to be governed by the revived declaration of covenants must have been once governed by a previous declaration that has ceased to govern some or all parcels in a community.
- The revived declaration and governing documents must be approved in writing by a majority of affected parcel owners or approved by a vote at a meeting of the affected parcel owners.
- The revived declaration may not be more restrictive than the covenants contained in the previous declaration, except the revived covenants may;
  - 1.) have an effective term of a longer duration,
  - 2.) omit restrictions contained in the previous declaration,
  - 3.) govern fewer than all parcels,
  - 4.) provide for amendments to the documents, and
  - 5.) contain provisions required by this act.

The bill provides that an organizing committee (committee) made up of parcel owners will prepare a complete text of the proposed revived declaration of covenants which will be submitted to parcel owners for approval. The legal description of affected parcels and the names of parcel owners will be contained in the declaration. In addition, the committee will prepare the proposed articles of incorporation and bylaws of the revived homeowners association to be submitted to parcel owners for approval

The bill requires that a copy of the complete text of the revived declaration of covenants and other documents be presented to the affected parcel owners no less than 14 days before consent is sought by the committee.

The declaration and other documents must be sent to the DCA within 60 days after approval by the committee. The submission must include, among other things, a verified copy of the previous declaration of covenants, a verified copy of the written consents of parcel owners or the record of the meeting if approved by vote, and an affidavit verifying satisfaction of the requirements set forth under

this act. The DCA must approve or disapprove of the revived declaration and notify the committee of its decision in writing within 60 days of receipt of the submission.

Within 30 days after receiving approval from the DCA the committee is required to file the articles of incorporation of an association with the Division of Corporations of the Department of State. Within 30 days after receiving approval from the division the revived declarations must be executed and recorded with the clerk of the circuit court.

The revived declaration and other governing documents will be effective upon recordation in the public records. A complete record of all approved recorded documents must be delivered to the owner of each affected parcel.

The bill provides that the revived declaration may not retroactively affect parcels that had ceased to be governed by the previous declaration. In other words, if a parcel owner built a fence while the parcel was not governed by the previous declaration and the newly revived declaration prohibits such a fence, the parcel owner will not be required to comply by taking down the fence. Therefore a revived declaration applies prospectively.

The definitions provided in s. 720.301 [Homeowner Associations] apply to Ch. 720.

The bill takes effect July 1, 2004.

#### C. SECTION DIRECTORY:

Section 1: Amends s. 720.301; providing that the definitions in this chapter apply to the entire chapter.

Section 2: Amends s. 720.302; providing scope and purpose.

Section 3: Creates s. 720.401; providing that parcels in a community that were previously subject to a declaration of covenants may revive the declaration and the homeowners association for the community.

Section 4: Creates s. 720.402; providing requirements for the revival of the declaration of covenants.

Section 5: Creates s. 720.403; providing the creation of an organizing committee to prepare and submit a revived declaration of covenants; providing requirements that must be included in the declaration; providing that a majority of affected parcel owners must agree to the revived declaration

Section 6: Creates s. 720.404; providing requirements for submission to the Department of Community Affairs (DCA); providing DCA review requirements.

Section 7: Creates s. 720.405; providing recording and notice requirements; providing a non-retroactive clause; providing the revived declaration becomes effective upon recording.

Section 8: Provides an effective date of July 1, 2004.

## 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:

Property owners currently not paying community assessment fees may be subject to such fees under a revived declaration of covenants. Additionally, a revived declaration has the potential to affect the value of an owners real property.

D. FISCAL COMMENTS:

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because the bill does not require the counties or cities to spend funds or take an action requiring the expenditure of funds.

2. Other:

Article I, Section 9, of the Florida Constitution provides, "No person shall be deprived of life, liberty, or property without due process of law."<sup>6</sup> The bill creates a process to revive covenants on real property. Reviving extinguished property interests without the consent of the property owner and without just compensation may create constitutional due process concerns.

However, the process created by the bill provides notice to affected parcel owners as well as the right to comment, vote, and disapprove of the proposed revived declaration of covenants. In addition, the proposed declaration must be approved by the Department of Community Affairs; such modification of property use would be similar to a zoning change imposed by local government.

B. RULE-MAKING AUTHORITY:

None

C. DRAFTING ISSUES OR OTHER COMMENTS:

Technical error: Lines #75 and #112 delete the word "revised" and insert revived.

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<sup>6</sup> see also Amendment V, United States Constitution

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

On March 29, 2004, the Committee on Business Regulation adopted a strike all amendment to HB 1215. The amendment achieves the same purpose of the original bill and resolves a variety of issues by amending Ch. 720, Homeowners Associations, rather than Ch. 712, Marketable Record Titles Act.

The original bill provided for the revival of extinguished covenants on real property and appeared to raise constitutional due process concerns. The amendment addresses this issue by providing governmental oversight, proper notice, and an opportunity for affected parties to vote and be heard. The original bill created an impairment of contracts issue by providing that revived covenants would apply retroactively and that such covenants are required to be exempt in any existing title policy, whereas the amendment provides no title policy exemptions and applies revived covenants prospectively.

In addition, the language of the original bill appeared to unintentionally apply to all properties and covenants, not just homeowners association; consequently, this could have revived expired property interests on properties that were not governed by a homeowners association and caused substantial harm to property owners. The amendment properly narrows the scope of the bill and corrects any ambiguities as to its application.