

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** HB 589 Residential Communities  
**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>	<u></u>	<u>Jaroslav</u>	<u>Havlicak</u>
3) <u></u>	<u></u>	<u></u>	<u></u>
4) <u></u>	<u></u>	<u></u>	<u></u>
5) <u></u>	<u></u>	<u></u>	<u></u>

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**SUMMARY ANALYSIS**

Homeowners' associations are governed by declarations of covenants. The declarations of covenants of many homeowners' associations have been extinguished because the declarations were not preserved as authorized by statute.

This bill creates a process that allows communities to revive declaration of covenants. 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.

Under this bill, 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.

This bill provides that the revived declaration may not retroactively affect actions on parcels taken after they had ceased to be governed by the previous declaration. Covenants in the revived declaration may not be more restrictive than the original covenants.

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

**STORAGE NAME:** h0589b.ju.doc  
**DATE:** April 12, 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 checked="" type="checkbox"/> | N/A <input type="checkbox"/>            |
| 3. Expand individual freedom?        | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/>            | N/A <input type="checkbox"/>            |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/>            | No <input checked="" type="checkbox"/> | N/A <input 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:

Because this bill allows for the revival of legal obligations that have been extinguished by operation of law, it could arguably be described as diminishing personal responsibility.

Although assessments are imposed by private entities, this bill's provision for the revival of expired declarations of covenants could arguably be described as having the same effect on property as an increase in taxes, since it would allow for the imposition of assessments where none currently exist.

#### B. EFFECT OF PROPOSED CHANGES:

##### Present Situation

Homeowners' associations are non-profit 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.

Homeowners' 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 ... in which the owners of the parcels, or their association representatives, must be members."<sup>2</sup>

Like any other private covenant or restriction affecting real property, these recorded documents are subject to extinguishment under the Marketable Record Title Act<sup>3</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 a statutory 30-year period.<sup>4</sup> A record of notice may be filed by a homeowners' association 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'

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

<sup>2</sup> Section 720.301(4), F.S.

<sup>3</sup> Under ch. 712, F.S., Florida's Marketable Record Title 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. See s. 712.02, F.S.

<sup>4</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. See s. 712.06, F.S.

association.<sup>5</sup> 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>6</sup>

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.

### **Proposed Changes**

This 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.

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; and
- The revived declaration may not be more restrictive than the covenants contained in the previous declaration, except that 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; or
  5. contain provisions required by the Homeowners' Association Act, ch. 720, F.S.

This bill provides that an organizing committee made up of parcel owners must prepare a complete text of the proposed revived declaration of covenants, containing the legal description of affected parcels and the names of parcel owners, which is to be submitted to the parcel owners for approval. In addition, the committee is to prepare proposed articles of incorporation and bylaws of the revived homeowners' association to be submitted to parcel owners for approval.

This 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 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 in this bill. DCA must approve or reject the revived declaration and notify the committee of its decision in writing within 60 days of receipt of the submission.

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<sup>5</sup> See ss. 712.05 and 712.06, F.S.

<sup>6</sup> See s. 720.301(6), F.S.

Within 30 days of receiving approval from DCA, the committee is required to file the articles of incorporation with the Division of Corporations of the Department of State. Within 30 days after filing the articles of incorporation the division, the revived declaration of covenants must be executed and recorded with the clerk of the circuit court covering the county in which the community is located.

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.

This bill further provides that the revived declaration may not retroactively affect actions on parcels taken after they had ceased to be governed by the previous declaration. For example, if a parcel owner built a fence on the parcel after the previous declaration expired, 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 only prospectively.

C. SECTION DIRECTORY:

**Section 1.** Amends s. 720.301, F.S., providing that the definitions in this section apply to the entire chapter.

**Section 2.** Amends s. 720.302, F.S., providing scope and purpose.

**Section 3.** Creates s. 720.401, F.S., 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, F.S., providing requirements for the revival of the declaration of covenants.

**Section 5.** Creates s. 720.403, F.S., 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, F.S., providing requirements for submission to the Department of Community Affairs ("DCA"); providing DCA review requirements.

**Section 7.** Creates s. 720.405, F.S., providing recording and notice requirements; providing a nonretroactivity 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 owner's real property.

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, does not appear to reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not appear to reduce the percentage of state tax shared with counties or municipalities.

2. Other:

#### Takings

The Fifth Amendment to the United States Constitution provides, in pertinent part, that "private property [shall not] be taken for public use, without just compensation." The Fifth Amendment generally, and the Takings Clause in particular, are binding on the states through the Due Process Clause of the Fourteenth Amendment.<sup>7</sup> The federal constitution does not expressly forbid taking private property for private use; the U.S. Supreme Court has implied such a prohibition, but generally allowed takings that substantially benefit private parties so long as such takings are premised on an underlying public purpose.<sup>8</sup>

Article X, section 6(a) of the Florida Constitution specifies that "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner." Although the state courts do not appear to have ever said so explicitly, in practice, Florida's public purpose doctrine seems to be stronger than its federal counterpart. Private use of condemned property must be truly incidental,<sup>9</sup> and any private benefit should only be a necessary adjunct to the public purpose underlying the taking.<sup>10</sup> It is also important in judging the validity of a taking that the condemning public authority retain some continuing control of the project.<sup>11</sup>

<sup>7</sup> See *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>8</sup> See, e.g., *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984).

<sup>9</sup> See *State v. Manatee County Port Auth.*, 193 So.2d 162 (Fla. 1967).

<sup>10</sup> See *Baycol, Inc. v. Downtown Development Auth. of Fort Lauderdale*, 315 So.2d 451 (Fla. 1975); *City of West Palm Beach v. State*, 113 So.2d 374 (Fla. 1959); *City of Panama City v. State*, 93 So.2d 608 (Fla. 1957).

<sup>11</sup> See *City of West Palm Beach*, *supra*.

A parcel owner might argue that reviving extinguished covenants on his or her property diminishes its value, therefore constituting a taking of the difference, and thus is either forbidden as a taking for a private purpose, or requires just compensation, whether from the other parcel owners imposing the revived covenants, or from the state for authorizing the revival. This could be argued even if the property right alleged to be taken, i.e., the value of the property unencumbered by the declaration of covenants, is treated as having been destroyed rather than transferred as a benefit to the other parcel owners;<sup>12</sup> however, individual cases may require a closer analysis of whether, in particular cases, this bill's effects are for the prevention of a public harm, and thus an exercise of the police power not requiring compensation, or merely create a benefit, and thus are an indirect form of eminent domain that would require compensation.<sup>13</sup> Of course, it also possible that, in some cases, reviving the declaration of covenants could actually increase the value of the property.

**B. RULE-MAKING AUTHORITY:**

None

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

It is unclear what the remedy would be for failing to strictly comply with the terms of this bill, i.e., if one step, such as incorporation was timely filed, but then the declaration of covenants was not timely recorded, whether the entire process would have to begin anew or could be somehow recommenced from an earlier point.

#### **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, F.S., the Homeowners' Association Act, rather than ch. 712, F.S., the 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 addressed this issue by providing governmental oversight, proper notice, and an opportunity for affected parties to vote and be heard. The original bill created a potential impairment of contracts issue by providing that revived covenants would apply retroactively and that such covenants would be exempt in any existing title policy, whereas the amendment provided for no title policy exemptions and applied revived covenants prospectively.

In addition, the language of the original bill appeared to unintentionally apply to all properties and covenants, not just homeowners' associations; 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 narrowed the scope of the bill and corrects potential ambiguities as to its application.

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<sup>12</sup> See *Albrecht v. State*, 444 So.2d 8 (Fla 1984); *Conner v. Reed Bros., Inc.*, 567 So.2d 515 (Fla 2d DCA 1990).

<sup>13</sup> See *Graham v. Estuary Props., Inc.*, 399 So.2d 1374 (Fla 1981); *State Plant Bd. v. Smith*, 110 So.2d 401 (Fla 1959).