



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill creates a new magistrate court within the 13th and 6th Judicial Circuits with jurisdiction to hear certain disputes between property owners and community associations of deed-restricted communities.

#### B. EFFECT OF PROPOSED CHANGES:

##### **Present Situation**

Many condominiums, cooperatives, residential neighborhoods, and community development districts in Florida are deed-restricted communities. Property purchased in a deed-restricted community is subject to certain limitations or restrictions on the use or design of the property. These restrictions are usually described in a declaration of covenants that is agreed to by the property owner when they purchase property within the deed-restricted community.

Most deed-restricted communities have associations for the purpose of carrying out the management responsibilities of the community. These duties typically include maintenance of the common elements and enforcement of all covenants or deed restrictions. The association, through its governing documents, is typically granted the authority to enforce any deed-restrictions, which can include the imposing fines and placing liens on property for failure to pay the fines for violating the covenants or deed restrictions.

Disputes between property owners and their association are common, and usually arise out of the violation of a deed restriction, the penalty imposed for such violation, or an allegation that the association is selectively enforcing a restriction or covenant. Condominium, cooperative, and homeowners association law provides a means for resolving these disputes through arbitration and mediation programs maintained within the Department of Business and Professional Regulation. Where mediation is unsuccessful, a lawsuit may be filed in the county or circuit court having jurisdiction. Chapter 44, F.S. also provides for a mediation and arbitration program within the state court system.

##### **Effect of Bill**

This bill creates a Home Court Advantage Pilot Program (Pilot Program) for the purpose of establishing an inexpensive, expedient, simplified court procedure as an independent venue for ownership or managing entities in deed-restricted communities to resolve disputes relating to deed restrictions or covenants informally without the restrictions and procedures required for formal actions in circuit court. This bill provides that the Pilot Program be carried out for a period of one year.

This bill provides that the Pilot Program will be implemented and administered by the chief judges of the 13th and 6th Judicial Circuits, and is subject to the supervision of the Florida Supreme Court. The bill asks the chief judges of the 13th and 6th Judicial Circuits to adopt rules and procedures for operating the Pilot Program, and provides that the chief judges must report to the Supreme Court at the end of the program and provide an analysis of the results of the program. The Chief Judge of the Supreme Court must then review the reports and make determinations and recommendations to the legislature by February 1, 2009, on whether it is feasible to implement this Pilot Program statewide.

The jurisdiction of the Pilot Program will consist of complaints about the reasonableness of any deed-restriction to real property or fine imposed for failure to comply with a deed restriction. The Pilot Program authorizes magistrates to be empowered to issue orders, impose fines, and authorize the imposition of a lien on real property in the same manner as a circuit judge. However, this bill provides

that magistrates cannot hold a party in contempt of court, or hear a case involving any dispute other than a deed restriction.

Any party can file a compliant that alleges:

- A violation of a deed restriction or covenant and seeking enforcement of a deed restriction or covenant; or
- An unlawful enforcement of a deed restriction or covenant and seeking an injunction against the enforcement.

An applicant for the position of magistrate must be a member in good standing of The Florida Bar with at least 5 years of experience in litigation actions involving enforcement of deed restrictions or covenants, or be a community association manager licensed under s. 468.433, F.S.<sup>1</sup> This bill provides that a magistrate in this Pilot Program serve without compensation and at the pleasure of the chief judge of the judicial circuit in which her or she hears cases. Magistrates under the Pilot Program are subject to the Code of Ethics for Arbitrators in commercial Disputes published by the American Arbitration Association, or the standards established by the Florida Supreme Court.

The filing fee for complaints filed under this Pilot Program is \$75. The compliant must contain a completed checklist specifying:

- What restriction or covenant is being violated.
- When the violation occurred or began if it is still occurring.
- Whether the violating party was given notice of the violation, and if so, when the notice was given and whether it was in writing.
- Whether the violating party was provided an opportunity to comply with the covenants or restrictions, or stop the violation.
- Whether the restriction or covenant was selectively enforced or otherwise improper.
- Whether there were any special considerations relating to the failure to comply with the restriction or covenant.
- The remedy being sought.

After service of process requirements have been met, the magistrate must issue an order to appear for a final hearing within 60 days after receipt of service of the complaint. The defendant must provide the plaintiff with a copy of their response to the compliant within 10 days prior to the final hearing. At the hearing, the magistrate must make findings of reasonableness of the restriction or covenant and any fines to be imposed under the restriction. The magistrate must also rule on the validity of the restriction and the fine imposed by the association. The purpose of the hearing is for the magistrate to issue an order imposing a fine on the party in violation, to compel the party in violation to comply with the restriction, and to enjoin the party in violation from continuing. The party in violation has 30 days to comply with any order unless good cause is shown to allow for a longer period of time. If good cause is not shown, the plaintiff can file a lien to be placed upon the property notwithstanding any law restricting the perfecting of a lien on real property. The maximum fine the magistrate may impose is the fine alleged by the party who brought the compliant. An order of a magistrate can be appealed to the circuit court.

This Pilot Program also requires parties to attend mediation conducted under ch. 44, F.S., within 30 days after the magistrate issues the order requiring the final hearing. The parties to the mediation must provide copies of the documents referenced in the checklist described above. This bill provides the means which a party or mediator can apply to the court for the issue of a subpoena, and provides that the magistrate can issue subpoenas for the attendance of necessary witnesses and for the production

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<sup>1</sup> Requires that a community association manager must pass an examination and be of good moral character in order to be licensed in the State of Florida, and provides that any pre-examination education cannot consist of more than 24 hours of in-person instruction by a department-approved provider and which must cover all areas of the examination.

of books, records, documents, and other evidence and may administer oaths. Where a witness cannot be subpoenaed, the mediator can permit a deposition to be taken of the witness.

C. SECTION DIRECTORY:

Section 1 creates an unnumbered section relating to the legislative intent of establishing the Home Court Advantage Pilot Program.

Section 2 creates an unnumbered section providing definitions.

Section 3 creates an unnumbered section relating to the reporting requirements of the chief judge of the 13th and 6th Judicial Circuit.

Section 4 creates an unnumbered section relating to the jurisdiction of the home court magistrates.

Section 5 creates an unnumbered section relating to the filing requirements of a compliant.

Section 6 creates an unnumbered section providing that an order of a home court magistrate can be appealed to the circuit court.

Section 7 creates an unnumbered section relating to the qualification requirements for a home court magistrate.

Section 8 creates an unnumbered section providing that a home court magistrate must serve without compensation.

Section 9 creates an unnumbered section providing that a home court magistrate is subject to the Code of Ethics for Arbitrators in Commercial Disputes.

Section 10 creates an unnumbered section providing a non-severability clause.

Section 11 provides an effective date of July 1, 2007.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

Unknown. This bill requires a filing fee of \$75, and payment of 10% of all fines assessed.

2. Expenditures:

Unknown.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

In order to participate in the court services provided by this Pilot Program a property owner or community association must pay a \$75 filing fee plus 10% of any fine.

D. FISCAL COMMENTS:

It is unclear where revenues paid to the program are deposited.

**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:

This bill creates a "home court" that is headed by a judicial officer entitled a magistrate. The magistrate is appointed by the chief judge of the circuit. A nonlawyer may be a magistrate. The rules of court used by the magistrate are set by the chief judge of the circuit. The magistrate has the apparent power to issue final judgments that may be appealed to a higher court. It is possible that this bill may be impacted by one or more of the following constitutional provisions:

- Article V, s. 1 of the Florida Constitution, creates the Supreme Court, the District Courts of Appeal, the Circuit Court, and the County Courts. The section also provides that "no other courts may be established by the state, any political subdivision or any municipality." This bill appears to create a tribunal for hearing disputes within the judicial branch.
- Article V, s. 2 of the Florida Constitution, gives the Florida Supreme Court exclusive rulemaking authority over Florida courts.
- Article V, s. 8 of the Florida Constitution contains certain requirements for persons to be appointed to the position of a judge. This bill appears to create a judicial office that can be filled by a person not eligible to be a judge.
- Article V, s. 10 of the Florida Constitution provides for election and retention of judges.
- Article V, s. 11 of the Florida Constitution provides a process for the filling of judicial vacancies by committee review and Gubernatorial appointment from a slate provided by the committee.
- Article V, s. 13 of the Florida Constitution requires judicial officers to devote full time to their judicial duties.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

This bill empowers a magistrate to decide whether a restriction imposed by a covenant or restricted deed is reasonable. As worded, it appears that the restrictions are presumptively unreasonable. The bill does not define a standard for reasonableness.

This bill also provides that a magistrate must issue an order requiring the complainant and the defendant to appear for a final hearing within 60 days after receipt of service of the complaint. However, the bill provides in the next paragraph that within 30 days after the issuance of the order requiring the final hearing, the parties must attend mediation. The way the bill is currently drafted could result in a conflict between these two timing requirements. A magistrate could set a hearing for two weeks or three weeks from that day and this would result in a hearing being completed before the expiration of the mediation deadline.

This bill provides in section 7 that a home court magistrate must be a member of the Florida Bar with at least 5 years of relevant experience, or be a community association manager. It is unclear why there is no experience requirement for community association managers.

It is unclear how this program will interact with the arbitration and mediation requirements in the condominium, cooperative, and homeowners association laws, which are implemented by the Department of Business and Professional Regulation (DBPR). Before a case may be litigated under the condominium laws, the parties must participate in arbitration or mediation depending on the situation. This bill does not provide for exclusivity between the different statutes, and therefore, it is unclear whether a person would still have to participate in dispute resolution with DBPR before appearing in court under this program. If the parties have to participate in both programs, it appears that parties will be required to attend numerous mediations and arbitrations before attending a final hearing.

This bill provides in section 5 of the bill that the magistrate can hear actions for the payment of dues and special assessments, but this is not provided for in the section which provides for the types of complaints the magistrate has jurisdiction over.

Section 5 of the bill provides the procedures that a mediator must follow in order to apply to have the magistrate issue subpoenas. It is unclear why a mediator would subpoena witnesses for a mediation. In addition, this bill has a provision that grants the mediator authority to permit a deposition to be taken. Again, it is unclear why the mediator would order a deposition be taken, or be given the responsibility to decide discovery issues instead of the magistrate.

The organization of the sections in this bill causes some problems with clarity and understanding how this Pilot Program is going to be implemented. In section 5 of the bill, subsection (3) begins discussing the mediation requirements, then in the same subsection the bill jumps and begins discussing how the hearing can continue, the purpose and procedures for the hearing, and the powers of the magistrate. Then in subsection (5), the bill returns to discussing the mediation procedures and powers of the mediator. The bill provides that the magistrate may continue the hearing upon a showing of good cause, but there is no mention why a hearing would be suspended in the first place, or whether the hearing is to begin a certain period of time after mediation. There is also nothing in the bill to explain or give guidance as to what is considered a good cause, and what must be proven by the parties to show good cause.

#### D. STATEMENT OF THE SPONSOR

Thank you for the opportunity to respond to the staff analysis on HB 923. There are a number of drafting errors in the proposed bill that will be clarified along with the revised proposal that includes input from the appropriate stakeholders who have been working closely with the sponsor to address all of the concerns raised by staff in this analysis. The Home Court Advantage Pilot Program will be harmonized to work with other existing dispute resolution programs. Home Court is intended to be another tool in the toolbox to owners living in deed restricted communities to be able to resolve their disputes at a minimum of costs.

### IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

n/a

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