

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.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL: SPB 7058

INTRODUCER: For consideration by the Judiciary Committee

SUBJECT: Adverse Possession

DATE: February 17, 2010 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Treadwell	Maclure		Pre-meeting
2.				
3.				
4.				
5.				
6.				

I. Summary:

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

- Requires the adverse possessor to provide notice to the owner of record that an adverse possession claim was made;
- Requires the adverse possessor to provide proof of compliance with the notice requirement to the property appraiser;
- Specifies that the Department of Revenue shall develop a uniform adverse possession return;
- Compels 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;
- Specifies when the property appraiser may add and remove the adverse possessor to and from the parcel information on the tax roll; and
- Requires property appraisers to include a notation of an adverse possession claim in any searchable property database maintained by the property appraiser.

The bill also 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. The bill stems from the Senate Committee on Judiciary's interim report relating to the study of the current adverse possession framework.

This bill substantially amends section 95.18, Florida Statutes. The bill also creates section 197.3335, Florida Statutes.

II. Present Situation:

Origins of Adverse Possession

The doctrine of adverse possession “dates back at least to sixteenth century England and has been an element of American law since the country’s founding.”¹ The first adverse possession statute appeared in the United States in North Carolina in 1715.²

Adverse possession is defined as “[a] method of acquisition of title to real property by possession for a statutory period under certain conditions.”³ An adverse possessor must generally establish five elements in relationship to possession. The possession must be:

- Open;
- Continuous for the statutory period;
- For the entirety of the area;
- Adverse to the record owner’s interests; and
- Notorious.⁴

In most jurisdictions, state statutory law prescribes the limitations period – the period in which the record owner must act to preserve his or her interests in the property – while the state’s body of common law governs the nature of use and possession necessary to trigger the running of the statutory time period.⁵ As legal scholars have noted, “[a]dverse possession decisions are inherently fact-specific.”⁶ Therefore, an adverse possessor must establish “multiple elements whose tests are elastic and provide the trier of fact with flexibility and discretion.”⁷

Adverse Possession in Florida

In Florida, there are two ways to acquire land by adverse possession, which are prescribed by statute.⁸ 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.⁹ It is

¹ Alexandra B. Klass, *Adverse Possession and Conservation: Expanding Traditional Notions of Use and Possession*, 77 U. COLO. L. REV. 283, 286 (Spring 2006).

² Brian Gardiner, *Squatters’ Rights and Adverse Possession: A Search for Equitable Application of Property Laws*, 8 IND. INT’L & COMP. L. REV. 119, 129 (1997).

³ *Id.* at 122 (quoting BLACK’S LAW DICTIONARY 53 (6th ed. 1990)).

⁴ *Id.*

⁵ Klass, *supra* note 1, at 287.

⁶ Geoffrey P. Anderson and David M. Pittinos, *Adverse Possession After House Bill 1148*, 37 COLO. LAW 73, 74 (Nov. 2008).

⁷ *Id.*

⁸ *Candler Holdings Ltd. I v. Watch Omega Holdings, L.P.*, 947 So. 2d 1231, 1234 (Fla. 1st DCA 2007). In addition to adverse possession, a party may gain use of adversely possessed property by acquiring a prescriptive easement upon a showing of 20 years of adverse use.

⁹ Section 95.16, F.S. *See also Bonifay v. Dickson*, 459 So. 2d 1089 (Fla. 1st DCA 1984). The Florida Legislature, by acts now embodied in statute, reduced the period of limitations as to adverse possession to seven years but left at 20 years the period

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.¹⁰ Alternatively, in the event a person occupies land continuously without color of title – i.e., 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.¹¹ 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.¹²

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.”¹³ 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.¹⁴ The adverse possessor must prove each essential element of an adverse possession claim by clear and convincing evidence.¹⁵ Therefore, the adverse possession claim cannot be “established by loose, uncertain testimony which necessitates resort to mere conjecture.”¹⁶

Abuse of the Adverse Possession Process

Despite certain policy considerations supporting the application of adverse possession in Florida,¹⁷ abuse of the statute may be occurring in certain contexts because the adverse possessor may acquire title to property in instances where the record owner attempts to pay taxes and monitors the property. Some landowners in Florida¹⁸ have expressed concern that individuals are capitalizing on the current adverse possession laws to gain title to adjoining properties, and that the burden to overcome these claims unfairly rests with the property owner of record. For example, in some counties, adjoining landowners have filed numerous adverse possession returns on several properties and have paid property taxes on those parcels in an attempt to claim

for acquisition of easements by prescription. *Crigger v. Florida Power Corp.*, 436 So. 2d 937, 945 (Fla. 5th DCA 1983).

¹⁰ Section 95.16, F.S.

¹¹ Section 95.18(1), F.S. The 1939 Legislature added to what is now s. 95.18(1), F.S., a provision which required that an adverse possessor without color of title must file a tax return and pay the annual taxes on the property during the term of possession. Chapter 19254, s. 1, Laws of Fla. (1939). A 1974 amendment to the statute eliminated the requirement that taxes be paid annually. Chapter 74-382, s. 1, Laws of Fla.

¹² Section 95.18(2), F.S.

¹³ *Candler Holdings Ltd. I*, 947 So. 2d at 1234.

¹⁴ *Id.*

¹⁵ *Id.* (citing *Bailey v. Hagler*, 575 So. 2d 679, 681 (Fla. 1st DCA 1991)).

¹⁶ *Id.* (quoting *Grant v. Strickland*, 385 So. 2d 1123, 1125 (Fla. 1st DCA 1980)).

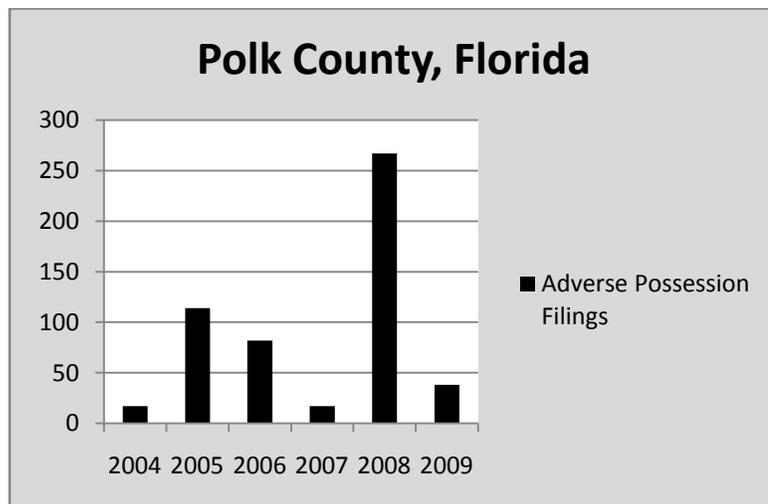
¹⁷ See Comm. on Judiciary, Fla. Senate, *Review of the Requirements for Acquiring Title to Real Property through Adverse Possession* (Interim Report 2010-123) (Oct. 2009), 2, available at http://www.flsenate.gov/data/Publications/2010/Senate/reports/interim_reports/pdf/2010-123ju.pdf.

¹⁸ Senate professional staff interviewed landowners subject to adverse possession claims, as well as real property practitioners, to gauge their experiences with the process. In some instances the record landowner may reside in another state. This absence from Florida may further impair the landowner’s ability to oppose an adverse possession claim.

title to the property by adverse possession despite any good faith claim to title. There is no boundary line dispute or other good faith belief that the title to the property lawfully belongs to the adverse possessor. In order to protect the owner’s property interests, he or she may be required to initiate litigation to eject the adverse possessor or to receive a judgment declaring his or her rights to the property. Significant legal fees and other costs may be associated with countering adverse possession claims.

Adverse Possession Trends in Florida

Some counties in Florida have experienced an influx of adverse possession claims, while other counties have received very few filings, or none at all, in recent years. For example, the following figure illustrates the number of adverse possession returns submitted to the Polk County Property Appraiser’s Office in recent years.¹⁹



Currently, Polk County has more than 500 adverse possession returns on record. In Orange County, there are 51 adverse possession returns on record out of 434,940 total parcels. The Brevard County Property Appraiser’s Office has between 100 and 150 adverse possession returns on record. Although the incidence of adverse possession claims appears to be more prevalent in rural areas in Florida, urban areas also experience adverse possession claims.

Senate Review of the Adverse Possession Framework

During the 2010 interim, the Florida Senate Committee on Judiciary (committee) studied the current adverse possession framework in Florida and identified potential reforms to the adverse possession process for landowners, particularly those who are subject to adverse possession claims.²⁰ Problems associated with the current adverse possession framework identified by the report include:

- **Notice to owners of record.** In some counties, owners of record may not receive notice that an adverse possession claim is being pursued against their property. The report

¹⁹ Data provided by the Polk County Property Appraiser’s Office.

²⁰ Comm. on Judiciary, Fla. Senate, *supra* note 17.

recommended requiring the adverse possessor or the property appraiser to provide actual or constructive notice to the owner of record of the disputed property, if the owner can be determined, upon the submission of an adverse possession return to the property appraiser.

- **Enhancements to adverse possession return.** The adverse possession return, the first step in initiation of the adverse possession process, is not used uniformly throughout the state and does not require adverse possessors to submit significant information that protects the interests of owners of record without interfering with a person's right to pursue legitimate adverse possession claims. To address these concerns, the report recommended:
 - Adopting a uniform return for adverse possession claims to promote uniformity throughout the state;
 - Providing that the adverse possessor must give a detailed description of his or her possession and use of the disputed property on the return; and
 - Requiring adverse possessors to attest to the truthfulness of the information required in the return under penalty of perjury.
- **Adverse possession notations.** Some property appraisers do not provide a clear notation in the public property database maintained on their websites of an adverse possession claim. In these counties, a property owner cannot search the property appraiser's website to quickly discern whether an adverse possession claim has been filed against a particular parcel. The report recommended requiring property appraisers to include clear notations that adverse possession filings have been made in their public searchable property databases.
- **Administration of adverse possession claims.** Property appraisers do not currently have guidance regarding how to administer the adverse possession return once it has been submitted by the adverse possessor. The report noted that the Legislature could explore the option of prescribing the process for adding the adverse possessor to the parcel information on the tax roll, as well as when a property appraiser may remove the adverse possessor from that parcel information and remove the adverse possession return from the official records.
- **Priority of tax payments.** Under the current statutory framework, if an adverse possessor makes an annual property tax payment prior to the owner of record, the tax collector cannot accept a subsequent payment from the owner of record. The report noted that the Legislature could explore the option of establishing priority of tax payments to improve an owner of record's ability to pay taxes on his or property even if the adverse possessor makes the first tax payment.

The committee report included additional options available to the Legislature to discourage abuse of the adverse possession process and to improve the administration of these claims for the benefit of record landowners, adverse possessors, and those governmental entities that are responsible for the administration of these claims.

III. Effect of Proposed Changes:

This proposed committee bill includes some of the recommendations from the Committee on Judiciary's interim study of the adverse possession framework and amends the current process for gaining title to real property via an adverse possession claim without color of title.

Possession of the Property

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

- It is protected by a substantial enclosure; *or*
- When it has been usually cultivated or improved.

It was unclear from existing statutory language whether the adverse possessor must satisfy both of these statutory elements for possession, or whether he or she must only satisfy one of the delineated criteria. The statute is currently interpreted to allow the person claiming adverse possession to satisfy the possession element by demonstrating that the subject property was substantially enclosed or, alternatively, by demonstrating that he or she cultivated or improved the property.²¹

Adverse Possession Return

The bill makes several changes to the information contained in the adverse possession return submitted by an adverse possessor to initiate the adverse possession claim. The 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, the bill requires the adverse possessor to provide a "full and complete" legal description on the return.²² The adverse possessor must also attest to the truthfulness of the information contained on the form under penalty of perjury.²³

Finally, under the bill, the adverse possessor must provide a description of his or her use of the property in the return. For example, the adverse possessor may state in the return that he or she has fenced in the property subject to the claim, or is allowing his or her cattle to graze over the subject property. The property appraiser is authorized to refuse to accept a return if it fails to comply with the requirements prescribed in the bill.

²¹ 2 FLA. JUR 2D *Adverse Possession* s. 20; see also *Grant v. Strickland*, 385 So. 2d 1123, 1124 (Fla. 1st DCA 1980).

²² The Department of Revenue created a sample form return for use by property appraisers, which included 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).

²³ 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.

Notice to Owner of Record

The bill requires the adverse possessor to provide notice to the owner of record that an adverse possession claim was made. The adverse possessor must send to the owner of record a copy of the return, via certified mail. The adverse possessor is relieved from this requirement if the owner of record cannot be determined after a review of the property appraiser's records or cannot otherwise be located by reasonable means.

The bill specifies that, after providing notice to the owner of record, the adverse possessor has 15 business days to submit a copy of the proof of mailing of the return to the property appraiser. If the adverse possessor fails to provide the proof of notice within 15 business days, the property appraiser may not add a notation to the legal description on the tax roll that an adverse possession claim has been initiated, and the property appraiser may remove the return from the property appraiser's official records.

Property Appraiser's Administration of the Return

Under the bill, upon receipt of the proof of mailing from the adverse possessor within the 15-day timeframe, the property appraiser must add a notation that an adverse possession claim has been initiated to the first line of the legal description on the tax roll and not as an "owner" in the parcel information on the tax roll. Until a recent bulletin by the Department of Revenue advising otherwise, some property appraisers were adding the adverse possessor as an "owner" on the tax roll.²⁴ The property appraiser is also required to maintain the adverse possession return in the property appraiser's official records.

The bill also delineates when the property appraiser may remove the adverse possessor from the parcel information contained in the tax roll. Under the bill, the property appraiser must 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 establishing title in the owner of record;
- The property appraiser receives a deed transferring title of the subject property from the adverse possessor to the owner of record; or
- The 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 official records.

²⁴ 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).

Adverse Possession Filing Notation

The bill requires every county property appraiser to provide a clear and obvious notation in the parcel information of any public searchable property database maintained by the property appraiser that an adverse possession return has been submitted to the property appraiser for the particular parcel.

Priority of Tax Payments

The bill provides for priority of property tax payments made by owners of record whose property is subject to an adverse possession claim. Under current law, 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. Conversely, under the bill, 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 timely tax payment, the tax collector is required to accept the owner of record's payment. Within 60 days, the tax collector must then refund the adverse possessor's tax payment. The bill specifies that the refund to the adverse possessor is not subject to approval from the Department of Revenue.²⁵

The bill also specifies how the adverse possessor is to remit payment to the tax collector. When the adverse possessor pays property taxes and matured installments as required to perfect the adverse possession claim, he or she must include with the tax payment a copy of the return that was submitted to the property appraiser, if the payment is made in person or by mail. If the payment is made by electronic or other means, the person must, via regular mail, provide to the tax collector, within 7 business days, a copy of the adverse possession return.

Other Potential Implications:

Establishment of priority of tax payments made by owners of record whose properties are subject to an adverse possession claim would represent a significant 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.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

²⁵ 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.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Some landowners whose properties are subject to adverse possession claims may be relieved from certain litigation costs associated with opposing the claim. Adverse possessor's may experience a minimal increase in expenses associated with the new requirement to provide notice to the owner of record, as well as to comply with the tax payment requirements under the bill.

C. Government Sector Impact:

The property appraiser's office may experience a minimal fiscal impact associated with the new requirement to provide a clear-and-obvious notation in the parcel information of any public searchable property database maintained by the property appraiser that an adverse possession return has been submitted. In addition, the property appraiser may experience a minimal increase in administrative costs associated with processing the proof of mailing from the adverse possessor, as well as determining when an adverse possessor may be removed from the parcel information on the tax roll.

Tax collectors may also experience an increase in administrative costs associated with processing payments by adverse possessors and remitting refunds to adverse possessors when duplicate tax payments are made by owners of record. Because the number of adverse possession filings in most counties is minimal, these costs are not likely to be significant.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
