

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: HB 799 Easements Affecting Real Property Owned by Same Owner

SPONSOR(S): Robinson, W.

TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 814

FINAL HOUSE FLOOR ACTION: 113 Y's 1 N's

GOVERNOR'S ACTION: Pending

SUMMARY ANALYSIS

CS/HB 799 passed the House on March 4, 2024, as amended, and subsequently passed the Senate on March 6, 2024.

The institution of private property is a fundamental element of the economic and social structure of the United States. Within this institution, different ownership principles define the existence and limits of private property rights. One such set of principles concerns the enforcement of private land use arrangements, known as "servitudes." A servitude is, essentially, an arrangement that ties rights and obligations to property ownership or possession so that such rights and obligations "run with the land" to successive owners and occupiers. Because a servitude can be terminated only by expiration of its terms, by agreement of all involved parties, by merger of the dominant and servient estates, by court order, or by abandonment by the benefiting party, servitudes are significant for their ability to foster stable, long-term property use arrangements for a variety of purposes.

Florida law recognizes three basic types of servitudes: easements, real covenants, and profits à prendre. Generally speaking, a servitude cannot exist between parcels of land held in common ownership, or where the benefit and the burden of a servitude would both be held by one person. In Florida, however, it has been the custom of developers and other persons intending to divide property which they currently own to first create servitudes upon the affected real property before its division and sale. It has also been common practice for such persons to record real covenants in the public records of the state before the first sale of any portion of the affected property. In some instances, the establishment of servitudes before the property's division is mandated by land planning entities to further their land planning schemes.

However, recent Florida case law has called into question the validity of easements, and by extension other servitudes, contained in a written instrument, if such easements were created at a time when all of the affected property was held in common ownership. This development in case law has the potential to upend decades of land planning, to the extent that any such planning was implemented through the establishment of servitudes at a time when the affected property was held in common ownership. It also has the potential to frustrate the goals of property owners who bought into a property association with the understanding that the covenants and other servitudes established before the division of the property into separate parcels would remain in full force and effect, absent modifications or extinguishment under applicable law.

The bill creates s. 704.09, F.S., to provide that a real property owner may create an easement, servitude, or other interest in the owner's real property even where the owner owns all of the affected real property. Under the bill, an easement, servitude, or other interest in real property created by an owner in the owner's real property before the bill's effective date is valid unless invalidated by a court on grounds other than unity of title. Further, the bill:

- Provides legislative intent.
- Provides a directive to the Division of Law Revision.

The bill does not appear to have a fiscal impact on state government but may have a fiscal impact on local governments. Subject to the Governor's veto powers, the bill takes effect upon becoming a law.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Servitudes

The institution of private property is a fundamental element of the economic and social structure of the United States.¹ Within this institution, different ownership principles define the existence and limits of private property rights.² One such set of principles concerns the enforcement of private land use arrangements, known as “servitudes.”³

A servitude is, essentially, an arrangement that ties rights and obligations to property ownership or possession so that such rights and obligations run with the land to successive owners and occupiers.⁴ Because a servitude can be terminated only by expiration of its terms, by agreement of all involved parties, by merger of the dominant and servient estates,⁵ by court order, or by abandonment by the benefiting party, servitudes are significant for their ability to foster stable, long-term property use arrangements for a variety of purposes, including:

- Shared land uses;
- Maintaining the character of a residential neighborhood, commercial development, or historic property; and
- Establishing infrastructure and common facilities.⁶

Florida law recognizes three basic types of servitudes: easements, real covenants, and profits à prendre.

Easements

An easement gives a person a nonpossessory right of use or enjoyment in another person’s land for a specific purpose not inconsistent with the property owner’s general rights.⁷ An easement may be “appurtenant,” such that the benefit attaches to land ownership, or an easement may be “in gross,” such that the benefit attaches to a person, not to land ownership.⁸ An easement may also be “affirmative,” in that it gives the easement’s beneficiary the right to use the land in a particular way, or “negative,” in that it prevents the owner of the land burdened by the easement from using the land in a particular way.⁹

¹ Ronald H. Rosenberg, *Fixing a Broken Common Law— Has the Property Law of Easements and Covenants Been Reformed by a Restatement*, William & Mary Law School Scholarship Repository, Faculty Publications (2016), <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2932&context=facpubs> (last visited Mar. 6, 2024).

² *Id.*

³ *Id.*

⁴ Susan French, *Servitude*, The Encyclopaedia Britannica, Dec. 19, 2003, <https://www.britannica.com/topic/servitude-property-law> (last visited Mar. 6, 2024); Michael J.D. Sweeney, *The Changing Role of Private Land Restrictions: Reforming Servitude Law*, 64 Fordham L. Rev. 661 (1995) <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3208&context=flr> (last visited Mar. 6, 2024).

⁵ The “dominant estate” is the property that benefits from the servitude, while the “servient estate” is the property burdened by the servitude. Legal Information Institute, *Dominant Estate*, https://www.law.cornell.edu/wex/dominant_estate (last visited Mar. 6, 2024); Legal Information Institute, *Servient Estate*, https://www.law.cornell.edu/wex/servient_estate (last visited Mar. 6, 2024).

⁶ *Id.*

⁷ Michael T. Olexa, et al., *Handbook of Florida Fence and Property Law: Easements and Rights of Way*, Oct. 3, 2022, <https://edis.ifas.ufl.edu/publication/FE108> (last visited Mar. 6, 2024).

⁸ Easements appurtenant typically provide the beneficiary with a right of ingress or egress. For example, an easement appurtenant might allow a property owner whose property is cut off from access to the public roadway by an adjacent property to pass through such adjacent property to reach the public roadway. In contrast, easements in gross are typically seen in connection with the offering of utility services. For example, an easement in gross might allow the utility company to place electric power lines across a burdened property.

C. Ryan Maloney, *Understanding Easements, Rights-of-Way and Their Affects on Property Value*, July 9, 2020,

<https://www.jimersonfirm.com/blog/2020/07/easements-rights-of-way-building-rights-property-value/#:~:text=Easements%20by%20necessity%20are%20created,Stat> (last visited Mar. 6, 2024).

⁹ *Id.*

Typically, an easement is expressly created in a written agreement, title, deed, deed reservation, or other legal instrument, which writing shows the landowner's intention to create a permanent right in a specific property.¹⁰ However, an easement may also be created by the passage of a state statute or local ordinance, or by implication through the doctrines of either necessity or prescription.¹¹

Real Covenants

A real covenant is a set of rules limiting a property owner's use of his or her property, typically for the benefit of other property owners in the community.¹² A real covenant may be "affirmative," that is, a covenant requiring the property owner to do something; or it may be "restrictive," that is, a covenant prohibiting the property owner from doing something.¹³ In either case, to establish a valid and enforceable real covenant, a party must show:

- The covenant touches and concerns the land;
- The original parties to its creation intended for the covenant to run with the land; and
- The party against whom enforcement of the covenant is sought had notice of the restriction.¹⁴

Unlike an easement, a real covenant cannot be created by implication; instead, a real covenant must be expressly set out in a written deed or in another legal instrument referenced or incorporated therein, which deed or instrument should then be recorded in the public records of the state.¹⁵ Such recording puts all subsequent purchasers of the property to which the real covenant applies on constructive notice of the covenant's existence.¹⁶

Profits à Prendre

A profit à prendre ("profit") is a non-possessory right to enter upon and remove natural resources (such as minerals, timber, produce, wildlife, or grass¹⁷) from the property of another.¹⁸ A profit may be "appurtenant," such that the benefit attaches to a particular estate, or it may be "in gross," such that the benefit attaches to a person, not to land ownership.¹⁹ Generally speaking, a profit can be created in the same manner as an easement; that is, it may be expressly created in a writing, be implied by the doctrine of prescription, or result from the enactment of a state statute or local ordinance.²⁰

Recent Case Law on Servitude Establishment

¹⁰ Under the common law, now codified in the Florida Statutes, an easement by necessity is created when land is divided in such a way that a parcel is cut off from any reasonable route of ingress or egress; in such an instance, a right-of-way is presumed to have been granted or reserved. S. 704.01, F.S. An easement by necessity is also created by statute when land used for a dwelling or for agricultural, timber raising, or stockraising purposes is shut off or hemmed in by lands, fencing, or other improvements by other persons so that no practicable route of ingress or egress is available therefrom; unlike with an easement of necessity under the common law, such land does not have to once have been joined with the property to which the easement attaches. Meanwhile, a prescriptive easement is created where a party can show: actual, continuous, and uninterrupted use of a limited and defined area of land for 20 years; use, under a claim of right, in conflict with the landowner's use (that is, the use was without the landowner's consent); and the landowner's knowledge of the use or use so open, notorious, visible, and uninterrupted that knowledge is imputed to the landowner. Olexa, *supra* note 6; s. 704.01, F.S.; *Downing v. Bird*, 100 So. 2d 57 (Fla. 1958); *Crigger v. Fla. Power Corp.*, 436 So. 2d 937 (Fla. 5th DCA 1983).

¹¹ Maloney, *supra* note 8.

¹² Legal Information Institute, *Covenant that Runs with the Land*, https://www.law.cornell.edu/wex/covenant_that_runs_with_the_land (last visited Mar. 6, 2024).

¹³ *Id.*

¹⁴ *Hayslip v. U.S. Home Corp.*, 336 So. 3d 207 (Fla. 2022).

¹⁵ FindLaw, *Creation and Termination of CC&Rs*, <https://www.findlaw.com/realestate/owning-a-home/creation-and-termination-of-cc-rs.html> (last visited Mar. 6, 2024).

¹⁶ *Hayslip*, 336 So. 3d at 210; s. 695.11, F.S.

¹⁷ Grazing rights are considered a profit.

¹⁸ LexisNexis, *Profits à Prendre* https://www.lexisnexis.com/uk/lexispsl/property/document/393788/55KG-P261-F18C-41F9-00000-00/Profits_prendre (last visited Mar. 6, 2024).

¹⁹ *Id.*

²⁰ Oxford Reference, *Profit à Prendre*, <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803100348484> (last visited Mar. 6, 2024).

Generally speaking, a servitude cannot exist between parcels of land held in common ownership, or where the benefit and the burden of a servitude would be held by one person.²¹ In Florida, however, it has been the custom of developers and others persons intending to divide property which they currently own to first create servitudes upon the affected real property before its division and sale.²² It has also been common practice for such persons to record real covenants in the public records of the state before the first sale of any portion of the affected property, which puts all subsequent purchasers on notice of the real covenants' existence and could make the planned property owners' association, if any, responsible for bearing the costs of establishing and maintaining surface water management facilities, drainage and retention areas, roads, parks, environmental areas, and other shared components of the planned community.²³ Indeed, in some instances, the establishment of servitudes before the property's division is mandated by land planning entities to further their land planning schemes.²⁴

However, recent Florida case law has called into question the validity of easements, and by extension other servitudes, contained in a written instrument, if such servitudes were created at a time when all of the affected property was held in common ownership.²⁵ This development in the common law has the potential to upend decades of land planning, to the extent that any such planning was implemented through the establishment of servitudes at a time when the affected property was held in common ownership.²⁶ It also has the potential to frustrate the goals of property owners who bought into a property association with the understanding that the covenants and other servitudes established before the division of the property into separate parcels would remain in full force and effect, absent modifications voted on by association members pursuant to the appropriate governing statute²⁷ or extinguishment under the Marketable Record Title Act.²⁸

Effect of the Bill

The bill creates s. 704.09, F.S., to provide that a real property owner may create an easement, servitude, or other interest in the owner's real property even where the owner owns all of the affected real property. Under the bill, an easement, servitude, or other interest in real property created by an owner in the owner's real property before the bill's effective date is valid unless invalidated by a court on grounds other than unity of title. Further, the bill:

- Provides that it is the Legislature's intent to respect the intent of the parties to real property transactions that occurred before the bill's effective date and the parties' reliance on easements, servitudes, or other interests created by those transactions.
- Directs the Division of Law Revision to replace the phrase "the effective date of this act" wherever it occurs in s. 704.09, F.S., as created by the bill, with the date the bill becomes a law.

Subject to the Governor's veto powers, the bill takes effect upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

²¹ Olexa, *supra* note 7; *J.C. Vereen & Sons v. Houser*, 167 So. 45, 47 (Fla. 1936).

²² Real Property, Probate, and Trust Law Section of the Florida Bar, *White Paper: Creation of Easements, Servitudes, and Other Matters Affecting Real Property Owned by the Same Person* (July 21, 2023).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*; see *King v. Roorda*, 355 So. 3d 1001 (Fla. 2d DCA 2023)(reh'g granted on other grounds); *AFP 103 Corp. v. Common Wealth Trust Serv., LLC*, 2023 WL 2146247 (Fla. 3d DCA 2023).

²⁶ RPPTL, *supra* note 22.

²⁷ Chapter 718, F.S., governs condominium associations; chapter 719, F.S., governs cooperative associations; and chapter 720, F.S., governs homeowners' associations.

²⁸ The Marketable Record Title Act simplifies the title examination process by confirming real property's marketability based on a 30-year marketable record period, automatically extinguishing clouds on title (including servitudes) after this period unless a statutory exception applies or the clouds are preserved from extinguishment. *Id.*; s. 712.02(1), F.S.

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The bill may have a positive fiscal impact on local governments, to the extent that it preserves servitudes that, if extinguished, would result in the shifting of costs to a local government entity.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have a positive economic impact on the private sector to the extent that it preserves servitudes that, if extinguished, would result in a reduction in the dominant estate's value or cause the beneficiary to suffer another form of economic loss.

D. FISCAL COMMENTS:

None.