

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

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

**SPONSOR(S):** Robinson, W.

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	16 Y, 0 N	Mawn	Jones
2) Infrastructure Strategies Committee	21 Y, 0 N	Gawin	Harrington
3) Judiciary Committee		Mawn	Jones

### SUMMARY ANALYSIS

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 the 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 others 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 this 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.

HB 799 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 and such easement, servitude, or other interest is valid even though the owner owns all of the affected real property. The bill:

- Applies to any easement, surface water management agreement, or other rights in the nature of an easement, servitude, profit, use right, restriction, obligation, condition, reservation, or other covenant, contained in a written instrument, however denominated.
- Does not revive or reinstate any right or interest that has been fully and finally adjudicated as invalid before the bill's effective date.

The bill does not appear to have a fiscal impact on state government but may have a fiscal impact on local governments. The bill provides an effective date of upon becoming a law.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### Servitudes

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

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.<sup>4</sup> Because a servitude can be terminated only by expiration of its terms, by the agreement of all involved parties, by merger of the dominant and servient estates,<sup>5</sup> 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 the establishment of infrastructure and common facilities.<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

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

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<sup>1</sup> 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 Jan. 26, 2024).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Susan French, *Servitude*, The Encyclopaedia Britannica, Dec. 19, 2003, <https://www.britannica.com/topic/servitude-property-law> (last visited Jan. 26, 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 Jan. 26, 2024).

<sup>5</sup> 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](https://www.law.cornell.edu/wex/dominant_estate) (last visited Jan. 26, 2024); Legal Information Institute, *Servient Estate*, [https://www.law.cornell.edu/wex/servient\\_estate](https://www.law.cornell.edu/wex/servient_estate) (last visited Jan. 26, 2024).

<sup>6</sup> *Id.*

<sup>7</sup> 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 Jan. 26, 2024).

<sup>8</sup> 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 Jan. 26, 2024).

<sup>9</sup> *Id.*

specific property.<sup>10</sup> 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.<sup>11</sup>

### *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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup> Such recording puts all subsequent purchasers of the property to which the real covenant applies on constructive notice of the covenant's existence.<sup>16</sup>

### *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 grass<sup>17</sup>) from the property of another.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup>

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<sup>10</sup> 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); *Criggerv. Fla. Power Corp.*, 436 So. 2d 937 (Fla. 5th DCA 1983).

<sup>11</sup> Maloney, *supra* note 8.

<sup>12</sup> Legal Information Institute, *Covenant that Runs with the Land*, [https://www.law.cornell.edu/wex/covenant\\_that\\_runs\\_with\\_the\\_land](https://www.law.cornell.edu/wex/covenant_that_runs_with_the_land) (last visited Jan. 26, 2024).

<sup>13</sup> *Id.*

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

<sup>15</sup> FindLaw, *Creation and Termination of CC&Rs*, <https://www.findlaw.com/realestate/owning-a-home/creation-and-termination-of-cc-rs.html> (last visited Jan. 11, 2024).

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

<sup>17</sup> Grazing rights are considered a profit.

<sup>18</sup> LexisNexis, *Profits à Prendre* [https://www.lexisnexis.com/uk/lexispsl/property/document/393788/55KG-P261-F18C-41F9-00000-00/Profits\\_\\_prendre](https://www.lexisnexis.com/uk/lexispsl/property/document/393788/55KG-P261-F18C-41F9-00000-00/Profits__prendre) (last visited Jan. 26, 2024).

<sup>19</sup> *Id.*

<sup>20</sup> Oxford Reference, *Profit à Prendre*, <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803100348484> (last visited Jan. 26, 2024).

## Recent Case Law on Servitude Establishment

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.<sup>21</sup> 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.<sup>22</sup> It has also been common practice for such persons to record real covenants in the public records of this 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.<sup>23</sup> 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.<sup>24</sup>

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.<sup>25</sup> 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.<sup>26</sup> 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 statute<sup>27</sup> or extinguishment under the Marketable Record Title Act.<sup>28</sup>

### **Effect of Proposed Changes**

HB 799 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 and such easement, servitude, or other interest is valid even though the owner owns all of the affected real property. The bill:

- Applies to any easement, surface water management agreement, or any other rights in the nature of an easement, servitude, profit, use right, restriction, obligation, condition, reservation, or other covenant, contained in a written instrument, however denominated.
- Does not revive or reinstate any right or interest that has been fully and finally adjudicated as invalid before the bill's effective date.

The bill provides an effective date of upon becoming a law.

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

<sup>22</sup> 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).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *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).

<sup>26</sup> RPPTL, *supra* note 22.

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

<sup>28</sup> 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.

**B. SECTION DIRECTORY:**

**Section 1:** Creates s. 704.09, F.S., relating to creation of easements, servitudes, and other interests affecting real property owned by the same owner.

**Section 2:** Provides an effective date of upon becoming a law.

**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:

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.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not applicable.

2. Other:

Retroactivity

In determining whether a law may be applied retroactively, courts first determine whether the law is procedural, remedial, or substantive in nature. A purely procedural or remedial law may apply retroactively without offending the Constitution, but a substantive law generally may not apply retroactively absent clear legislative intent to the contrary. However, even where the Legislature has expressly stated that a law will have retroactive application, a court may reject that application if the law impairs a vested right, creates a new obligation, or imposes a new penalty.

HB 799 applies, without limitation, to any easement, surface water management agreement, or other rights in the nature of an easement, servitude, profit, use right, restriction, obligation, condition, reservation, or other covenant, contained in a written instrument, however denominated, and the bill

specifies that it “clarifies existing law.” Thus, the bill appears intended to apply to servitudes established before the bill’s effective date. However, in recent years, some persons have litigated the validity of certain servitudes created when the affected property was held in common ownership, and some courts have held such servitudes invalid; other cases challenging servitude validity on such grounds may still be pending in the courts.

Courts have held that a cause of action that has evolved into a judgment is generally a vested right and may not be abrogated by legislation, but that no one has a vested right in the common law generally, which the legislature may change.<sup>29</sup> Accordingly, the bill specifies that it does not revive or reinstate any right or interest that has been fully and finally adjudicated as invalid before the bill’s effective date.

**B. RULE-MAKING AUTHORITY:**

Not applicable.

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

None.

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**

None.

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<sup>29</sup> *Williams v. American Optical Corp.*, 985 So. 2d 23 (Fla. 4th DCA 2008); *State Dept. of Transportation v. Knowles*, 402 So. 2d 1155 (Fla. 1981); *Plylerv. Moore*, 100 F. 3d 365 (4th Cir. 1996); *Miles v. Weingrad*, 164 So. 3d 1208 (Fla. 2015); *Clausell v. Hobart Corp.*, 515 So. 2d 1275 (Fla. 1987).