**WHITE PAPER**

**REVISIONS TO CHAPTER 712**

(Commonly known as Florida’s Marketable Record Title Act)

**I. SUMMARY**

This legislation is designed to clarify the operation of Florida’s Marketable Record Title Act (the Act) in response to (i) a common real estate practice of making specific reference to title restrictions in deeds and thereby, arguably, unintentionally extending the life of restrictions that would otherwise be extinguished by operation of the Act and (ii) the judicial exception created by *Save Calusa Trust v. St. Andrews Holdings, Ltd.,* 193 So. 3d 910 (Fla. 3d DCA 2016) for restrictions imposed in connection with governmental zoning, development, or building approvals.

The bill does not have a fiscal impact on state funds.

**II. SECTION-BY-SECTION ANALYSIS**

**A. Section 712.03**

**Current Situation:** A common practice among real estate practitioners in Florida is to except from the seller’s warranties of title in a deed outstanding encumbrances or restrictions. This is frequently done by making the deed “subject to,” not just “all matters of record,” generally, but to specific instruments identified by official record book and page. In these situations, it is rarely the intention of the parties to that deed to restart the Act’s 30 year marketability period on the particular encumbrance or restriction referred to. Nevertheless, it could be argued that reciting the official records book and page of a restriction in a deed brings the restriction within the scope of one of the Act’s limited exceptions under s. 712.03(1). The intended purpose of the Act is to help clear title of ancient defects, encumbrances, and restrictions and not to inadvertently preserve them. This revision is thus designed to clarify the existing statute so that these “subject to” conveyances do not restart the Act’s 30 year marketability period on encumbrances or restrictions against title, unless the parties expressly make that intent clear on the face of the deed.

**Effect of Proposed Changes:** The proposed revision is designed to clarify the existing statute so that conveyances “subject to” matters specifically identified by official records book and page do not restart the Act’s 30 year marketability period on the referenced encumbrances or restrictions unless the parties to the deed also include an affirmative statement of their intent to do so.

**B. Section 712.04 and 712.12**

**Current Situation:** In *Save Calusa Trust v. St. Andrews Holdings, Ltd.,* 193 So. 3d 910 (Fla. 3d DCA 2016), the court found that a restrictive covenant, recorded in compliance with a government-imposed condition of a land use approval, is not a subject to being extinguished by section 712.04 of the Act. Instead, the court found that this restrictive covenant constituted a governmental regulation with the force of law.

The problem with this judicial exception to the operation of the Act is that, in many cases, there is no way to tell from the face of a restrictive covenant recorded in the official records that it was “recorded in compliance with a government-imposed condition of a land use approval,” or not. The result is there is no way to tell from the face of the official records whether a restrictive covenant has been cut off by the operation of the Act or preserved from operation of the statute by this judicially created exception. This is contrary to the intent of the Act, which is to clear ancient defects, restrictions, and encumbrances of record, and threatens to undermine operation of the statute on such restrictions.

**Effect of Proposed Changes:** The proposed revision is designed to make clear that the intent of the Act is to cut off all “estates, interests, claims, covenants, restrictions, or charges,” that are recorded in the official records even if they depend on any “zoning, building, or development approval,” unless the restriction or covenant expressly says on its first page that it was accepted by a governmental entity as part of, or as a condition of, any governmentally-imposed condition. The proposed revision also makes clear that it will not to alter or invalidate the effect of any local government regulation, such as a comprehensive plan, zoning ordinance, land development regulation, building code, development permit, or development order, operating independently of matters recorded in the official records.

Additional revision to s. 712.12(1) providing a definition of “covenant or restriction” was required in order to remove the language that excluded limitations “required by a governmental agency as a condition of a development permit.”

**III. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS**

The proposal does not have a fiscal impact on state or local governments.

**IV. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR**

The proposal does not have a direct negative economic impact on the private sector, but will more readily allow for the free and less expensive alienation of title to real property.

**V. CONSTITUTIONAL ISSUES**

Because the proposed revisions to s. 712.03(1), 712.04, and 712.12(1) are intended to clarify existing law and thus to be retroactive in effect, the proposed revision would give any person having an interest in land potentially extinguished by the act, and whose interest has not been extinguished prior to July 1, 2022, until July 1, 2023, to file a notice in accordance with s. 712.06 to preserve that interest.

**VI. OTHER INTERESTED PARTIES**

None.

July 11, 2021