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WHITE PAPER

CLARIFYING THE LAW OF COMMON OWNERSHIP AND THE CREATION OF EASEMENTS

I. SUMMARY

This Bill clarifies that to the extent there is a rule at common law that would void, invalidate prohibit or subject a newly created interest in land to the doctrine of merger, it is abolished.

Florida has been one of the fastest-growing states in the nation for decades, and has led other states in passing laws requiring proper planning at all levels of Florida government.[1] These include requirements for statewide, regional, county and local planning and comprehensive plans, which are then implemented through zoning ordinances, land use restrictions, and development orders as well as easements, covenants, restrictions, declarations and other instruments establishing servitudes upon the land, which are often imposed and recorded while the property owner owns all of the affected and benefitted land.

Some recent judicial interpretations, discussed below, have called into question the validity of easements, and by extension any easement, servitude, right in the nature of an easement, negative easement, environmental easement, solar easement, license, profit, use right, restriction, condition, reservation, or other covenant if such are created at a time when all of the land benefitted and burdened thereby are in common ownership.

This purported application of comparatively ancient common law doctrines is contrary to the long established land planning regime implemented in Florida and would deprive land planners, governments and property owners of an important tool long used in implementing planning and development decisions and negate the justifiable expectations of property owners as to their rights and protections when buying in a condominium, planned development or community association.

II. CURRENT SITUATION

The practice in Florida has long been for the developer of a property planned for sale to record plats, easements, restrictive covenants, homeowner's association documents, condominium declarations before the first parcel is sold.

A number of relatively recent appellate level cases have held that an easement is void if the dominant and servient estates are owned by the same party at the time the easement is created. These cases include:

[1] See e.g. Chapter 380, Florida Statutes (creating the state land planning agency, setting standards for developments of regional impact, and coastal planning); Chapter 163, Part II, Florida Statutes (mandating county and municipal comprehensive plans)

- *King v. Roorda,* 335 So. 3d 1001 (Fla. 2nd DCA 2023)
- *One Harbor Fin. Ltd. Co. v. Hynes Properties, LLC*, 884 So. 2d 1039 (Fla. 5th DCA 2004)
- *Hensel v. Aurilio*, 417 So. 2d 1035, 1038 (Fla. 4th DCA 1982)
- *Morris v. Garcia*, 224 So. 3d 268 n. 1 (Fla. 3rd DCA 2017)
- *AFP 103 Corp. v. Common Wealth Trust Services, LLC*, 2023 WL 2146247, (Fla. 3rd DCA 2023)

By implication, the logic of these cases call into question not only express stand-alone easements granted prior to, but in contemplation of a sale of a portion of the property, but many easements, servitudes, use rights, restrictions, or other covenants such as those routinely contained in recorded plats, declarations of condominium, homeowners' association documents.

Such rulings frustrate the parties who clearly intended to create an easement or other interest by recording the instruments in question. A broad application of these rulings has the potential to adversely and unexpectedly impact the owners of properties in any number of subdivisions, homeowners' associations, and condominiums across the state, who bought rightly expecting to have the access, use of parks and common areas and be subject to the community standards spelled out in the recorded instruments governing their communities.

The broad application also has to potential to upend decades of land planning under Chapters 380, Florida Statutes (creating the state land planning agency, setting standards for developments of regional impact, and coastal planning) and Chapter 163, Part II, Florida Statutes (mandating county and municipal comprehensive plans) to the extent those were implemented through recorded easements, declarations, covenants and restrictions at a time when the affected land was under common ownership.

III. EFFECT OF PROPOSED CHANGES

New section 704.09(1) will abrogate existing common law doctrines to the extent that those doctrines might prevent the creation of easements or other interests in land or declare those interest void at the inception.

New section 704.09(2) makes clear that this applies to a broad group of rights and interests in land – specifically listing "any easement, servitude, right in the nature of an easement, negative easement, environmental easement, solar easement, license, profit, use right, restriction, condition, reservation, or other covenant, contained in an instrument recorded in the official records" – without regard to the nature of the instrument by which it is created – listing "an easement, deed, plat, declaration of condominium, homeowners' association covenant, condition, restriction, servitude, or otherwise."

The bill limits the application of the common law doctrines only as of the time of creation of an easement or other interest. It does not alter the application of the Doctrine of Merger after properties have been reacquired into common ownership, or the ability of the holders of all

properties burdened, benefitted or affected to terminate or modify easements, covenants and reservations in accord with existing law. Nor does it affect the application of the Marketable Record Title Act or other statutes of limitation or repose or other legal doctrines which may have the effect of terminating or limiting interests in land after their initial creation.

The bill is expressly a clarification of existing law, so should be interpreted to preserve previously granted easements, restrictions and other covenants of record and to apply prospectively to such interests created after the effective date.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

There is no direct fiscal impact on state or local governments.

The bill may have an indirect operational benefit by preserving easements, covenants, restrictions and the like which were imposed as part of land planning, comprehensive plans or development orders.

V. DIRECT IMPACT ON PRIVATE SECTOR

Private sector landowners are, for the most part, impacted positively by this legislation positively through having their reasonable expectations met as far as receiving the benefit of recorded easements, plats, condominium declarations, homeowners' association documents and community covenants, restrictions and reservations.

VI. CONSTITUTIONAL ISSUES

There are no constitutional issues in the clarification of this law.

VII. OTHER INTERESTED PARTIES

None contacted yet