

The reinstatement of covenants, conditions, and restrictions extinguished by The Marketable Record Title Act.(Florida). Gary A. Poliakoff and Donna D. Berger. *Florida Bar Journal* 79.5 (May 2005): p14(5).

Full Text :COPYRIGHT 2005 Florida Bar

The Marketable Record Title Act (MRTA) seemed like a good idea when it was enacted by the Florida Legislature in 1963. (1) The intent was to simplify title searches to stabilize property law, by clearing old defects from land titles, limiting the period of record searches, and clearly defining marketability by extinguishing old interests of record not specifically claimed or reserved.

No longer would a title examination have to search title back to the Spanish land grants. Any person having legal capacity (2) to own land in the state, who, alone or together with the predecessor in title, was vested with any estate in land of record for 30 years or more, is deemed to have a record title to such estate and land, which shall be free and clear of all claims except the matters set forth in F.S. [section] 712.03. An unanticipated consequence of MRTA, which apparently was not recognized by its drafters, was its impact on the covenants, conditions, and restrictions of planned developments.

MRTA's Impact on Covenants, Conditions, and Restrictions

The intent of covenants, conditions, and restrictions (CC&Rs) is to promote and preserve the symmetry, beauty, and general good of all interested in the scheme of planned developments. (3) Regrettably, as a consequence of MRTA, some large planned communities found themselves without the legal authority to enforce their covenants, hire managers, provide lawn maintenance and security, and/or levy assessments to maintain and operate the common areas. Communities were in shambles due to their complete inability to function. This was caused in part by the legislature's use of broad language that extinguishes "all claims" that are at least 30 years old and that predate the root of title of the property in question. (4) Fortunately, the legislature recognized and thankfully corrected part of the problem by providing a device to those property owners who sought to preserve their CC&Rs that were set to expire. As such, "the Marketable Record Title Act was also designed to be a recording act in that it provides for a simple and easy method by which the owner of an existing older interest may preserve it." (5) As Florida's Supreme Court noted, "the legislature did not intend to arbitrarily wipe out old claims and interests without affording a means of preserving them and giving a reasonable period of time within which to take the necessary steps to accomplish that purpose." (6) This preservation mechanism can be found in F.S. [section] 712.05 (1991), which allowed any person claiming an interest in land to protect the interest from the operation of MRTA by filing a written notice.

HOAs and Their Inability to Preserve Covenants Yet to Expire

Despite the proffered remedy of allowing property owners to renew their CC&Rs through proper notice, MRTA resulted in certain other problems that the original version of

[section] 712.05 could not cure. Although [section] 712.05 allowed individuals to renew their CC&Rs through written notice, the law failed to permit homeowners' associations (HOAs) to act on behalf of their constituents to preserve the original CC&Rs of that particular community. In addition, the common procedure for how planned communities are deeded and recorded provided a major hurdle for renewing CC&Rs for these neighborhoods. For planned communities, a developer typically files a plat and then the developer records covenants and restrictions that govern the property within the platted area. When the developer deeds the property to an initial purchaser, the legal description usually used in the deed only references the plat, and not the recorded covenants and restrictions. Customarily, when the initial purchaser reconveys title to someone else, the same legal description originally used by the developer is what is used in the subsequent deeds. Thus, the covenants and restrictions are not found in the chain of title for the particular lot. (7) Consequently, if a development is more than 30 years old, then the subdivision restrictions and covenants are voided by MRTA. This is very different from the chain of title in a condominium community where a deed specifically references the recorded declaration of condominium by official records book and page numbers on the face of the deed itself.

As a result, many large planned developments that were unaware of the existence of MRTA and its application to their communities suddenly found themselves without legal authority to enforce their covenants. (8) Boards began to ponder the possibility of purple and green houses sprouting up throughout planned developments as well as the reality that the association would no longer be able to collect assessments to maintain, repair, replace, and insure the common areas.

HOAs Receive Help to Prevent Expiration of C&Rs

Faced with the prospect of being unable to collect association fees and enforce various covenants and conditions of their neighborhoods, HOAs finally received a statutory mechanism to extend their CC&Rs before they were set to expire. In 1997, an amendment to F.S. [section] 712.05 passed. In pertinent part, the statute provided: "[S]uch notice may be filed by a homeowners' association only if the preservation of such covenant or restriction or portion of such covenant or restriction is approved by a majority vote at a meeting of the membership where a quorum is present."

This amended statute allowed homeowners' associations to extend their community's particular CC&Rs before they were set to expire. A later amendment to [section] 712.05, which originated as S.B. 1410 in 2003, further refined the process for which planned developments could extend the term of their expiring CC&Rs. That amendment provided that homeowners' associations could file a notice to preserve a covenant or restriction if that action is approved by two-thirds of the board of directors of the association at a meeting of which the members of the association are informed. Under the prior law, the preservation of the covenant or restriction required approval by a majority of the association members, at a meeting of the membership where a quorum is present. (9) Obviously, the amendment streamlined this procedure by requiring only board approval to extend the life of the CC&Rs.

One Last Hurdle: How to Renew Expired Covenants

Despite this needed legal patch, there was still one major unintended consequence of MRTA that had not been solved. Unfortunately, the right to extend expiring, but not yet unexpired CC&Rs, could not save those CC&Rs that had already been extinguished by operation of MRTA. In other words, [section] 712.05 provided a remedy to extend CC&Rs before they actually expired, but there was no statutorily proscribed remedy for those communities seeking to renew their CC&Rs after their CC&Rs had already expired.

One such community was the Woodlands. The Woodlands is located in the City of Tamarac and was founded over 35 years ago. As one of Broward County's oldest and largest planned communities, the Woodlands is situated on approximately 640 acres and consists of 892 private homes, divided into eight sections, interlaced with canals, lakes, and two championship golf courses. Each home is maintained as a private property with the homeowner fully responsible for upkeep and maintenance. Each section in the community has its own board and budget, and each section had its own deed restrictions and covenants that ensured the community would always maintain a level of uniformity, upkeep, and aesthetic beauty. In the year 2000, CC&Rs for each of the eight Woodlands sections expired under the provisions of MRTA. No longer would people in the community be required to cut their lawn, repair their houses, or pay their homeowners' association fees pursuant to their private recorded restrictions. The homeowners' associations were left without any legal authority to enforce their covenants.

Creating Process to Renew Expired CC&Rs: Failed Attempts

The Florida Legislature recognized the unintended consequences MRTA legislation had on communities such as the Woodlands and made attempts to create legislation to solve the problem. One such effort was H.B. 589. This bill would have created a process that allowed communities to revive declarations of covenants, subject to a few requirements. However, certain constitutional issues ended up killing the bill. One such constitutional issue was the argument that the proposed legislation could constitute a taking under the Fifth Amendment to the U.S. Constitution, thus depriving homeowners of due process of law. (10) The Fifth Amendment provides, in pertinent part, that "private property shall not be taken for public use, without just compensation." Similarly, the Florida Constitution contains a provision, specifying that "no private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner." (11) An owner of real property could argue that reviving extinguished covenants on his or her property diminishes its value, thereby constituting a taking of the difference, and thus is either forbidden for a private purpose, or requires just compensation. (12)

Another attempt at creating legislation to solve the inability to revive CC&Rs was S.B. 1438. The bill limited the covenants or restrictions that may be reinstated to those that have been "routinely enforced" by a homeowners' association. As the Senate staff analysis commented, there was some ambiguity as to how this term would be enforced.

(13) In addition, the staff analysis pointed out that the bill had the potential to create civil litigation expenses for any property owner that has covenants or restrictions reinstated on property due to reinstated encumbrances on property. (14) Despite the numerous efforts to allow HOAs to revive CC&Rs rendered void under MRTA, no remedy was provided.

Problem Solved: New Process to Renew Expired CC&Rs

No remedy was provided, that is, until Senator Skip Campbell introduced an amendment during the 2004 Legislative Session, which eventually became law. The Campbell Amendment, F.S. [section] 720.401 et seq., Preservation of Residential Communities; Revival of Declaration of Covenants, which was placed in S.B. 1184 and S.B. 2984, establishes the parameters and procedures for revising extinguished CC&Rs. These bills were passed and signed by the governor, and became effective as law on June 23, 2004.

This law created a new F.S. [section] 720.403, to encourage and allow all communities previously governed by covenants and restrictions that have expired under the application of MRTA to use a process to revive those documents. Under the new law, the preservation of extinguished CC&Rs is a two-part process. First, it requires the approval of the parcel owners of the planned development whose covenants were extinguished. Second, it requires the approval of the State of Florida Department of Community Affairs.

In order for a residential community to be eligible to revive extinguished covenants, all of the following requirements must be met:

- 1) All parcels to be governed by the revived declaration must have once been governed by a previous declaration that has ceased to govern some or all of the parcels in the community.
- 2) The revived declaration must be approved, in writing, by a majority of the affected parcel owners, at a meeting of the affected parcel owners, conducted in accordance with the provisions of the Homeowners' Association Act.
- 3) The revived declaration may not contain covenants that are more restrictive on the parcel owners than the covenants contained in the previous declaration, with the following exceptions:
 - a) The declaration may have an effective term of longer duration than the term of the previous declaration.
 - b) The declaration may omit restrictions contained in the previous declaration.
 - c) The declaration may govern fewer than all of the parcels governed by the previous declaration.

d) The declaration may provide a procedure to amend the declaration and other governing documents.

e) The declaration may contain other provisions as may be required by law. (15)

The process for reviving extinguished covenants begins with an "organizing committee" consisting of not less than three parcel owners from the affected community. The names, addresses, and telephone numbers of the members of the organizing committee must be contained in all notices. The organizing committee prepares, or causes to be prepared, the complete text of the proposed revived declaration of covenants. The proposed revived documents must identify each parcel that is to be subject to the governing documents by its legal description, and the names of the parcel owners, as the same appears on the tax assessment roll. In addition, the organizing committee must prepare the full text of the proposed articles and bylaws of the revived homeowners' association. In the alternative, the organizing committee can elect to utilize an existing homeowners' association, in which event the existing articles and bylaws shall be produced. (16)

4) The voting interest of each parcel shall be the same as the voting interest under the previous governing documents.

5) The proportional assessment obligations of each parcel shall be the same as the proportional assessment obligation under the previous governing documents.

6) The amendment provisions for the revived declaration shall be the same as the previous governing documents, unless the previous documents did not contain an amendment provision, in which case the revived documents must provide for an amendment provision that requires the approval of not less than two-thirds of the affected parcel owners.

7) The covenants within the revived declaration cannot be more restrictive on the affected parcel owners than the original covenants other than as permitted by law.

A copy of the complete text of the proposed, revived declaration of covenants, along with the proposed new or existing articles and bylaws of the homeowners' association, and a graphic depiction of the property to be governed by the revived declaration, shall be presented to all of the affected parcel owners by mail or hand delivery not less than 14 days prior to the meeting at which the members will vote to approve the revived declaration, articles, and bylaws. As previously advised, the vote to approve the revived declaration is a majority of the affected parcel owners. (17)

No later than 60 days after the parcel owners approve reinstatement of the CC&Rs, the organizing committee, or its designee, must submit the proposed revived governing documents and supporting materials to the Department of Community Affairs for review and determination of whether to approve or disapprove the proposal to preserve the residential community. From date of receipt of the documents, the DCA then has 60 days to decide whether to approve or disapprove the submission. (18)

No later than 30 days after DCA approval, the approved, revived declaration shall be recorded in the county where the planned development is located. Immediately after recording the documents, a complete copy of all of the approved, recorded documents must be mailed or hand delivered to the owner of each affected parcel. The revived documents shall become effective upon recordation of same in the public records. (19)

Utilizing the aforesaid process, on December 17, 2004, The Woodlands became the first planned development in Florida to have the DCA approve reinstatement of its extinguished covenants, conditions, and restrictions.

Where Do We Go From Here?

As of this writing, there is still no legal remedy for voluntary homeowners' associations not governed by Ch. 720 to reinstate their extinguished CC&Rs. That may be a fix that the legislature can provide in the upcoming session by amending Ch. 712 and cross-referencing the relief now found in Ch. 720. Nevertheless, the Campbell amendment that passed last year has provided untold relief to tens of thousands of Floridians living in mandatory homeowners' associations whose reliance in their private recorded restrictions has now been restored. It is imperative that every older homeowners' association assess the effect of MRTA on its CC&Rs and determine if extension or reinstatement action is needed.

(1) See generally FLA. STAT. ch. 712.

(2) FLA. STAT. [section] 712.02.

(3) *Pelican Island POA, Inc. v. Murphy*, 554 So. 2d 1179, 1181 (Fla. 2d D.C.A. 1989). See also *Payne v. Cudhoe Gardens POA, Inc.*, 837 So. 2d 458 (Fla. 3d D.C.A. 2002).

(4) It is important to note that generally the MRTA does not impact condominium associations since condominium deeds reference the CC&Rs, and, therefore, the CC&Rs are considered part of the "root of title."

(5) *City of Miami v. St. Joe Paper Co.*, 364 So. 2d 439, 442 (Fla. 1978).

(6) *Id.*

(7) Joseph E. Adams. *Title Claims Issue Looming For State Associations*, FORT MYERS NEWS PRESS (2004).

(8) Gary Poliakoff, *MRTA, Community Update* June 2004.

(9) Senate Staff Analysis and Economic Impact Statement, S.B. 1410.

(10) House of Representatives Staff Analysis of H.B. 589(b).

(11) FLA. CONST. art. X, [section] 6.

(12) House of Representatives Staff Analysis of H.B. 589(b).

(13) House of Representatives Staff Analysis of S.B. 1438.

(14) Id.

(15) Gary Poliakoff, MRTA, Community Update June 2004.

(16) Id.

(17) Id.

(18) Id.

(19) Id.

Gary A. Poliakoff is a founding principal of Becker & Poliakoff, P.A., and has served as its president since the inception of the firm. He is on the board of governors of the Shepard Broad Law Center of Nova University, where he is an adjunct professor. Mr. Poliakoff is co-author of Florida Condominium Law and Practice and author of The Law of Condominium Operations. He is serving as the ABA advisor to the Uniform Law Commission's efforts to revise and rewrite the Uniform Common Interest Ownership Housing Act.

Donna D. Berger counsels condominium, cooperative, timeshare, mobile home, and homeowner associations throughout the South Florida area. Her work with these communities includes covenant enforcement, covenant amendment, contract review and drafting, collections, and foreclosures, as well as counseling these associations about the statutory and documentary guidelines. Ms. Berger is the executive director of CALL, the Becker & Poliakoff Community Association Leadership Lobby.

Source Citation: Poliakoff, Gary A., and Donna D. Berger. "The reinstatement of covenants, conditions, and restrictions extinguished by The Marketable Record Title Act.(Florida)." *Florida Bar Journal* 79.5 (May 2005): 14(5). *Expanded Academic ASAP*. Thomson Gale. Nova Southeastern University. 10 April 2006
<http://0-find.galegroup.com.novacat.nova.edu:80/itx/infomark.do?&contentSet=IAC-Documents&type=retrieve&tabID=T002&prodId=EAIM&docId=A132239524&source=gale&srcprod=EAIM&userGroupName=novaseu_main&version=1.0>.

Thomson Gale Document Number: A132239524