

HOUSE OF REPRESENTATIVES FINAL BILL ANALYSIS

BILL #:	CS/HB 631	FINAL HOUSE FLOOR ACTION:		
SUBJECT/SHORT TITLE	Possession of Real Property	95	Y's 17	N's
SPONSOR(S):	Civil Justice & Claims Subcommittee; Edwards-Walpole and others	GOVERNOR'S ACTION:	Pending	
COMPANION BILLS:	CS/SB 804			

SUMMARY ANALYSIS

CS/HB 631 passed the House on February 14, 2018. The bill was amended in the Senate on March 5, 2018, and was returned to the House on March 6, 2018. The House concurred in the Senate amendment and subsequently passed the bill as amended on March 8, 2018.

Ejectment is a cause of action to recover possession of property from a second person possessing it in hostility to the first person's rights. CS/HB 631 modernizes the statute and requires that a party attach, to the party's initial pleading, a copy of all documents that the party relies on for establishing chain of title and ownership.

Unlawful entry, forcible entry, and unlawful detainer are also causes of action based on a party forcefully or unlawfully taking possession of another party's land or tenements without his or her consent. The bill:

- Creates statutory definitions for each cause of action consistent with the common law;
- Provides that the statutes governing these actions do not apply to certain residential tenancies or to the possession of real property involving a mobile home;
- Specifies the measure of damages and remedies available;
- Allows a court to determine questions of title in limited circumstances, provided that such determination is not binding on a future action for trespass, injury to real property, ejectment, or quiet title; and
- Provides special requirements for service of process in such actions.

The state generally owns the property under navigable waters up the mean high water mark, whereas upland landowners own the land down to such mean high water mark. The term "customary use" refers to a general right of the public at large to possess and use certain dry sand areas for recreational purposes. Where a customary use of a dry sand area is shown, the property owner may not use traditional causes of action like ejectment, forcible entry, or trespass to stop such public use of the private land.

The bill prohibits a governmental entity from adopting or keeping in effect an ordinance or rule establishing customary use of privately owned dry sand areas. A governmental entity seeking to establish the customary use of privately owned lands is required to adopt, at a public hearing, a formal notice of intent, provide notice to affected parcel owners, and file a complaint with the circuit court to determine whether the land is subject to the customary use doctrine. This section of the bill does not apply to a governmental entity that had an ordinance or rule adopted and in effect prior to January 1, 2016. A governmental entity may raise customary use as an affirmative defense in proceedings challenging an ordinance or rule adopted prior to July 1, 2018.

The bill does not appear to have a fiscal impact on state or local governments.

Subject to the Governor's veto powers, the effective date of this bill is July 1, 2018.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0631z.CJC

DATE: March 23, 2018

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Ejectment

"Ejectment" is an action at law for a person to recover possession of real property from a second person possessing it in hostility to the first person's right. Ejectment proceedings are governed by ch. 66, F.S. To be entitled to recover property in ejectment, the plaintiff must have a present right of possession to the property that is the subject of the action and must show that he or she has been ousted or deprived of possession by the defendant.¹ Although ch. 66, F.S., is silent as to which court has jurisdiction over ejectment actions, s. 26.012(2)(f), F.S., grants circuit courts exclusive original jurisdiction over such actions.

Current law provides that all parties to the action must, in their initial pleading (that is, in their complaint or answer), attach a statement setting forth chronologically the chain of title on which he or she will rely at trial.² For portions of the chain of title that are recorded, the party must state the names of the grantors and the grantees and the book and page of the record. For instruments in the chain of title that are unrecorded, the party is required to attach a copy of the instrument to their statement setting forth chain of title and the court may require the party to produce the original for inspection by the opposing party. Lastly, where a party relies on a claim or right without color of title, the statement must specify how and when the claim originated and the facts on which the claim is based.³

Effect of Proposed Changes

CS/HB 631 amends s. 66.021, F.S., to clarify the circumstances under which an individual has a right of action of ejectment, provides that circuit courts have exclusive jurisdiction in an action of ejectment, and specifies that a plaintiff is not required to provide any presuit notice or demand to a defendant prior to filing suit.

With respect to the statement setting forth the chronological chain of title, the bill allows a party to provide the instrument number of a recorded instrument instead of providing the book and page number. Moreover, the bill removes the distinction between recorded instruments and unrecorded instruments for purposes of attachment. Under the bill, a party must attach any instrument, whether recorded or unrecorded, to the statement setting forth the chain of title.

Lastly, the bill provides that an action brought pursuant to s. 66.021, F.S., is cumulative to other existing remedies and does not limit other remedies that are available under current law.

Unlawful Entry, Forcible Entry, and Unlawful Detention

Section 82.01, F.S., entitled "'Unlawful entry and forcible entry' defined" states that "no person shall enter into any lands or tenements except when entry is given by law, nor shall any person, when entry is given by law, enter with strong hand or with multitude of people, but only in a peaceable, easy and open manner." Similarly, s. 82.02, F.S., provides that "[n]o person who enters without consent in a peaceable, easy and open manner into any lands or tenements shall hold them afterwards against the consent of the party entitled to possession." The possession protected is actual possession, as disclosed by some visible act or evidence of continuous control. Constructive or theoretical possession

is an insufficient basis for suit.⁴ Moreover, as stated in ss. 82.01 and 82.02, F.S., these actions do not apply to residential tenancies.

¹ *Davis v. Hinson*, 67 So.3d 1107 (Fla. 1st DCA 2011).

² S. 66.021(4), F.S.

³ *Id.*

⁴ *Goffin v. McCall*, 108 So. 556 (1926)

A party alleging unlawful entry, forcible entry, or unlawful detention is entitled to relief under the summary procedure statute, s. 51.011, F.S., if the action is instituted within three years from the date of entry.⁵ Under the summary procedure statute, the plaintiff's initial pleading must contain the matters required by the statute prescribing such procedure or, if none are so required, must state a cause of action. If no person can be found at the usual place of residence of defendant, summons may be served by posting a copy in a conspicuous place on the property described in the complaint and summons.⁶ The defendant's answer must contain all defenses of law or fact and must be served within five days after the service of process.⁷

In actions under ch. 82, F.S., the trial court is not allowed to resolve or make determinations as to questions involving title. Rather, the court may only determine the right of possession and damages.⁸ Section 82.071, F.S., provides that if the fact finder grants judgment for the plaintiff, damages are fixed at double the rental value of the premises from the time of the unlawful or wrongful holding. Additionally, the judgment must state that the plaintiff recover possession of the property described in the complaint, together with damages and costs, and award a writ of possession to be executed without delay and execution for the plaintiff's damages and costs.⁹ Where judgment is entered for the defendant, current law requires the court to enter an order dismissing plaintiff's complaint and ordering that the defendant recover costs.

Lastly, current law provides that no judgment rendered either for a plaintiff or defendant bars any action of trespass for injury to the property or ejectment between the same parties respecting the same property. Moreover, no verdict is conclusive of the facts found in any action of trespass or ejectment.¹⁰

Effect of Proposed Changes

CS/HB 631 amends portions of ch. 82, F.S., related to unlawful entry, forcible entry, and unlawful detention. The bill provides definitions for forcible entry, real property, record titleholder, unlawful detention, and unlawful entry. The definitions created by the bill are consistent with current common law. Furthermore, the bill specifies that these actions do not apply to residential tenancies under part II of ch. 83, F.S., to the possession of mobile homes or recreational vehicles in a lodging park under ch. 513, F.S., or to mobile home tenancies in a mobile home park under ch. 723, F.S.¹¹

The bill also amends ss. 82.03 and 82.04, F.S., related to remedies in such actions and adds additional language addressing a court's role in such proceedings. Specifically, the bill:

- Specifies that a party bringing an action pursuant to ch. 82, F.S., is not required to provide notice to a defendant prior to filing an action;
- Requires the court to award a plaintiff damages equal to double the reasonable rental value of the real property if it is determined that the entry or detention by the defendant was willful and knowingly wrongful;
- Allows the court to award a plaintiff other damages, including but not limited to, damages for waste;
- Allows the court to bifurcate actions for possession and damages;
- Requires the court to advance cause of actions brought pursuant to ch. 82, F.S., on the calendar; and

⁵ The statute of limitations on all of these actions is 7 years. See s. 95.12, F.S. The three-year limitation only applies to actions where a party wishes to use the expedited procedures under the summary procedure statute.

⁶ S. 82.061, F.S.

⁷ S. 51.011(1), F.S.

⁸ S. 82.05, F.S.

⁹ S. 82.091, F.S.

¹⁰ S. 82.101, F.S.

¹¹ The eviction actions in those statutes appear to provide an adequate remedy.

- Allows the court to determine questions of title in such actions, but only when it is necessary to determine a right of possession or determine the record titleholder.

Additionally, the bill expands the service of process requirements for parties instituting an action of unlawful entry, forcible entry, or unlawful detention. A plaintiff is required to attempt to obtain service as provided by law at least twice. If a plaintiff cannot effect service in those two attempts and the defendant does not have a residence in the county or no person 15 years of age or older is residing at the defendant's residence in the county, then the sheriff is required to serve the summons and complaint by posting it in a conspicuous place on the property. The minimum amount of time allowed between the two attempts to obtain service is six hours. Where a plaintiff intends to effect service solely through the posting in a conspicuous place on the property, the bill requires the plaintiff to additionally provide the clerk of court with copies of the summons and complain as well as two prestamped envelopes containing specific information.¹²

The bill amends s. 82.101, F.S., to provide that a judgment rendered pursuant to ch. 82, F.S., may be superseded, in whole or in part, by a subsequent judgment in an action for trespass for injury to the real property, ejectment, or quiet title involving the same parties and the same real property.

The bill repeals ss. 82.061, 82.071, and 82.081, F.S., relating to service of process, damages, and trial evidence, respectively. The substance of those sections are addressed elsewhere in the bill and the forms are outdated. Lastly, the bill makes conforming changes to other portions of ch. 82, F.S.

Customary Use of Real Property

The common law public trust doctrine is embodied in Art. 10, s. 11 of the state's Constitution. Under that provision, title to the portion of lands beneath navigable waters up to the mean high water line is owned by the state and held in trust for the people. The doctrine applies to all navigable waters, both freshwater and salt water.

The state's beaches include more land than what is set aside for the people under the public trust doctrine. While areas above the mean high water line are subject to private ownership,¹³ Florida courts have recognized the public may acquire rights to the dry sand areas of privately owned portions of a beach through common law prescription, dedication, and custom. In 1974, in the case of *City of Daytona Beach v. Tona-Rama*,¹⁴ the Florida Supreme Court found that:

If the recreational use of the sandy area adjacent to the mean high tide has been ancient, reasonable, without interruption and free from dispute, such use as a matter of custom, should not be interfered with by the owner. However, the owner may make any use of his property which is consistent with such public use and not calculated to interfere with the exercise of the right of the public to enjoy the dry sand area as a recreational adjunct of the wet sand or foreshore area.

This is the general description of the customary use doctrine.

Application of the customary use doctrine was limited by the 2007 case of *Trepanier v. County of Volusia*.¹⁵ The Volusia County beaches of Daytona Beach and New Smyrna Beach have a large width of firmly packed sands. On those beaches, custom and use has historically allowed automobiles to drive and park on the beach. A county ordinance established a method for marking the travel and parking lanes that, due primarily to the effects of hurricanes, crept closer to beachfront homes over time. Homeowners challenged the county's lane markings, and the county argued in defense that

¹² The bill's service of process requirements are similar to service of process in actions for possession of residential premises, under s. 48.183, F.S.

¹³ S. 117.28(1), F.S.

¹⁴ 294 So.2d 73 (Fla. 1974)

¹⁵ 965 So.2d 276 (Fla. 5th DCA 2007)

customary use allowed for driving and parking on the beach. The Fifth District Court of Appeal (DCA) acknowledged the doctrine of customary use enunciated in *Tona-Rama*, but noted that the doctrine is based on the common law concept of prescriptive easement, which is based on the law of adverse possession. The court noted:

Acquisition of rights by one in the lands of another, based on possession or use, is not favored in the law and the acquisition of such rights will be restricted. Any doubts as to the creation of the right must be resolved in favor of the owner.¹⁶

The Fifth DCA further held:

While some may find it preferable that proof of these elements of custom be established for the entire state by judicial fiat in order to protect the right of public access to Florida's beaches, it appears to us that the acquisition of a right to use private property by custom is intensely local and anything but theoretical. "Custom" is inherently a source of law that emanates from long-term, open, obvious, and widely-accepted and widely-exercised practice. It is accordingly impossible precisely to define the geographic area of the beach for which evidence of a specific customary use must be shown, because it will depend on the particular geography and the particular custom at issue.¹⁷

Notably, the Fifth DCA has also held that a customary use determination "requires the courts to ascertain *in each case* the degree of customary and ancient use the beach has been subjected to"¹⁸

In addition to state courts addressing the issue of customary use, in 2002, an opinion by the state Attorney General discussed the issue following an inquiry by the mayor of Destin and the Okaloosa County Sheriff's Office.¹⁹ In that opinion, the Attorney General found:

1. The City may regulate in a reasonable manner the beach within its corporate limits to protect the public health, safety, and welfare. This regulation must have a rational relation to and be reasonably designed to accomplish a purpose necessary for the protection of the public. The city may not exercise its police power in an arbitrary, capricious, or unreasonable manner. Such regulation may be accomplished regardless of the ownership of this area, with the exception of state ownership, and without regard to whether the public has been expressly or impliedly allowed to use that area of the beach by a private property owner who may hold title to the property.
2. The right of a municipality to regulate and control dry sand beach property within its municipal boundaries is not dependent on the finding of the Florida Supreme Court in *City of Daytona Beach v. Tona-Rama, Inc.*
3. Private property owners who hold title to dry sand areas of the beach falling within the jurisdictional limits of the City may utilize local law enforcement for purposes of reporting incidents of trespass as they occur.²⁰

In 2017, the United States District Court for the Northern District of Florida addressed the related issue of whether adopting a customary use ordinance was beyond the power of a county or municipality. Walton County in 2016 adopted an ordinance declaring the dry sand areas of the county subject to the customary use doctrine. Based on that finding, the ordinance prohibits signs, fencing and other obstructions within the dry sand areas. The court ruled that the adoption of a customary use ordinance

¹⁶ Id. at 284, quoting *Downing v. Bird*, 100 So.2d 57, 64-65 (Fla.1958).

¹⁷ Id. at 289.

¹⁸ Id. at 288, quoting *Reynolds v. County of Volusia*, 659 So.2d 1186 (Fla. 5th DCA 1995)(emphasis added).

¹⁹ 2002-38 Fla. Op. Att'y Gen., June 24, 2002.

²⁰ Id.

was within the power of the county. The court left open the question of whether an individual property owner may file an as-applied challenge to the ordinance as it affects his or her property rights.²¹

These court decisions and the Attorney General opinion show that local officials, municipalities, and private property owners have struggled to determine the scope of local authority regarding customary use ordinances and determining who may affect the property rights of private property owners through the common law doctrine of customary use.

Effect of Proposed Changes

CS/HB 631 establishes a process by which a governmental entity may seek the judicial determination of a recreational customary use of private beach property. The process appears designed to reduce ongoing and protracted litigation among property owners and governments. After defining what a governmental entity is, the bill provides that a governmental entity may not adopt or keep in effect an ordinance or rule that is based upon customary use of any portion of a beach above the mean high-water line, unless the ordinance or rule is based upon a judicial declaration affirming recreational customary use of the beach.

Notice

The new procedure created in the bill requires that the governmental entity, at a public hearing, adopt a formal notice of intent to affirm the existence of a recreational customary use on private property. The notice must specifically identify:

- The parcels of property or the specific portions of the property, for which the customary use affirmation is sought;
- The detailed, specific, and individual use or uses of the parcels to which the customary use affirmation is sought; and
- Each source of evidence the governmental entity will rely upon to prove that the recreational customary use has been ancient, reasonable, without interruption, and free from dispute.

The governmental entity must provide notice of the public hearing to the owner of each parcel of property at the address recorded in the county property appraiser's records. The notice must:

- Be provided at least 30 days before the public meeting by certified mail with return receipt requested;
- Be published in a newspaper of general circulation in the area where the parcels of property are located; and
- Be posted on the governmental entity's website.

Judicial Determination

Within 60 days after adopting the notice of intent, the governmental entity must file a Complaint for Declaration of Recreational Customary Use with the circuit court in the county where the subject property is located. This is a newly created cause of action and is similar to a declaratory judgment.²² The governmental entity must provide notice of filing the complaint to the owner of each parcel as required above for the notice of intent. The notice must allow the owner to intervene in the proceeding within 45 days after receiving the notice. The governmental entity must also provide verification that the notice has been served to the property owners so that the court may establish a schedule for the proceedings.

²¹ *Alford, et al v. Walton County*, 3:16-cv-00362-MCR-CJK, Order dated November 22, 2017.

²² A declaratory judgment is a binding adjudication in which a court establishes the rights of the parties without requiring enforcement of its decision. It is generally used to resolve legal uncertainties for the parties. BLACK'S LAW DICTIONARY (10th ed. 2014).

The proceedings will be conducted de novo, or anew. The court must determine whether the evidence presented by the governmental entity demonstrates that the recreational customary use or uses identified in the notice of intent have been ancient, reasonable, without interruption, and free from dispute. No presumption exists regarding the existence of a recreational customary use of the property in question. The governmental entity bears the burden of proof to demonstrate that the recreational customary use exists. A parcel owner who is subject to the complaint may intervene in the proceeding as a party defendant in the proceeding.

Application

These customary use provisions do not apply to a governmental entity having an ordinance or rule that was adopted and in effect on or before January 1, 2016. Additionally, the provisions do not deprive a governmental entity from raising customary use as an affirmative defense in any proceeding that challenges an ordinance or rule that was adopted before July 1, 2018.

The bill provides an effective date of July 1, 2018.

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:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.