Property (A2/C1)

FALL 2024

SUPPLEMENTARY MATERIALS
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Ramon Carresquillo and Angelico Lopez lived a door apart, in concrete barracks where vegetable pickers at Sorantino Farms stay. Both called their cinderblock rooms home. Last Saturday night, Mr. Carresquillo, 38 years old, was blasted to death with a .357 Magnum. Angelico Lopez, 42, was arrested. The police said he shot Mr. Carresquillo over a beer.

But farm workers who lived with them say, well, yes and no. The two men did fight over a Coors, their favorite brand. But they had been fighting — fighting and drinking — for a very long time.

The thinking here is that the living quarters just aren't big enough for people who don't get along. And to see the barracks — which are like most places farm workers all over stay — it is easy to understand why.

The men lived in the larger of two squat buildings that look like self-storage lockers, in a compound surrounded by the lush fields of Cumberland County farm country. The building holds two rows of seven rooms on each side. (Women stay on one side, men on the other. Showers and toilets are communal.)

The rooms are dark 10-foot-by-10-foot boxes with concrete floors. They hold cots, small stoves fueled by propane tanks out front and whatever their residents can stuff inside. Privacy is nil. Sneeze and the person across the road might say "Bless you." Argue and everyone will hear.

After a back-breaking day that may begin at 6:30 and often doesn't end until 4:30, this is the place workers have to retreat to. Work is hard to get, no one complains.

Even for the migrant worker, living rent-free for a few months while making $5.05 an hour, the situation seems hardly tolerable. But Messrs. Carresquillo and Lopez lived in the compound, year-in, year-out, for five years. Neither had a car. And both had drinking problems. They, like most of the other farm workers, were stuck.

Most of the workers are Latin American or Puerto Rican. Most don't have cars. They work five days. On days off, some wait for a farm van to take them to Bridgeton, the nearest commercial hub, to shop. Three vans also stop at the compound to sell goods. Two vans sell food — staples like beans and cooked meals, like tacos. The third sells clothes. So once they leave the fields, some workers never leave the compound. It might as well have a razor-wire fence around it.

On weekends, some farm workers walk to the convenience store 10 minutes down the road, return with a six-pack and drink the night away. "What else is there?" said Melecio Duarte Ambalont Jr., who is 66 years old and has been a farm worker all his adult life. "This is a ghetto."

Despite the conditions, Mr. Carresquillo and Mr. Lopez were among about a dozen workers employed all year by the owner, Dennis Sorantino, who grows squash, zucchini, eggplant and tomatoes on his farm. "They were two good men," he said. "They used to do most of our irrigating for us."

But Mr. Carresquillo's drinking made him ugly, Mr. Ambalont said. "He was a bully," he said. "He would spend his paycheck, then he'd borrow money from the others and never pay it back." Or he would bum cigarettes and beer off others, he added.

He and Mr. Lopez apparently argued a lot. Mr. Ambalont, who lived next door to Mr. Carresquillo, said few others dared talk back to the man. "He was a big, muscular man, and if someone asked for their money back, he could get rough."

Joe Alvarez, the farm workers' foreman, said he is not the only one to remember the time, last November or December, when Mr. Carresquillo pulled a shotgun on Mr. Lopez. "He had cocked it," he said. "If that guy had pulled the trigger, the situation here would have been reversed."

That may have done it for Mr. Lopez, who had a wife and children back home in Puerto Rico. He picked up the .357 Magnum in Florida.

Last Saturday night, Mr. Lopez had some beers in his room. Mr. Carresquillo wanted one.

Some of the seasonal workers whispered that drugs, heroin and cocaine, perhaps, were involved in the altercation. Others said they had rubbed shoulders once too many times, igniting an explosion.

"It's sad to see one gone and one in jail," Mr. Alvarez said. "But life goes on."

By Wednesday, the padlock that the police placed on Mr. Carrasquillo's room was still in place. But Mr. Lopez's room, where the shooting took place, had been opened and stripped.

"Now," Mr. Ambalont said, "all they have to do is air the room out and it'll be ready for someone else."

The workers' foreman nodded. Quite a few other people, he said, want that room.

State v. Shack, 277 A. 2d 369 (N.J. 1971)

The casebook version (CB 224-228) omits two paragraphs of interest. These follow after *the paragraph on CB 227 (bottom) (beginning, "Thus approaching the case, we find it unthinkable that the farmer-employer ..."), and* before *the paragraph on CB 228 (beginning, "It follows that the defendants here invaded no possessory right ..."):*

It is not our purpose to open the employer's premises to the general public if in fact the employer himself has not done so. We do not say, for example, that solicitors or peddlers of all kinds may enter on their own; we may assume for the present that the employer may regulate their entry or bar them, at least if the employer's purpose is not to gain a commercial advantage for himself or if the regulation does not deprive the migrant worker of practical access to things he needs.

And we are mindful of the employer's interest in his own and in his employees' security. Hence he may reasonably require a visitor to identify himself, and also to state his general purpose if the migrant worker has not already informed him that the visitor is expected. But the employer may not deny the worker his privacy or interfere with his opportunity to live with dignity and to enjoy associations customary among our citizens. These rights are too fundamental to be denied on the basis of an interest in real property and too fragile to be left to the unequal bargaining strength of the parties.

Jerry L. Anderson, *Comparative Perspectives on Property Rights: The Right to Exclude*, 56 J. LEG. ED. 539 (2006)

. . . The United States derived its conception of private property from England, and we have historically looked to old English cases to provide the fundamental composition of the bundle of sticks. . . . Blackstone's declaration of ownership as a despotic dominion comported well with the American desire to protect property, both for moral reasons and more utilitarian ones-to fuel economic progress and westward expansion. Thus, it is safe to say that the British property system is the nearest to our own in the world. Although the United Kingdom has no constitutional property protection similar to our own Fifth Amendment, Parliament regularly provides compensation for government condemnations. The British position on the right to exclude therefore makes for a particularly apt comparison to our own.

Although British courts for centuries protected the landowner's right to exclude, Parliament recently enacted a statutory "right to roam" giving the public access to millions of acres of privately owned land. The Countryside and Rights of Way Act of 2000 (CRoW) declares private land that contains mountains, moorland, heath, or downland[1] to be "open country," on which the public is now free to walk.[2] The private landowner may not bar the public from wandering over these lands. CRoW therefore represents a rather dramatic reallocation of the sticks in the bundle; by negating the right to exclude on private lands, it presents a fascinating study of how the balance of private and public interests in land may be modified.

The British have always held "wandering" in high regard. There are over 130,000 miles of footpaths crisscrossing England and Wales, in many cases directly across farmers' fields or through meadows full of grazing sheep. Footpaths follow historic trails connecting villages and, because their use by the public predates enclosure,[3] the right to exclude the public from them was not part of the original grant of private property. The legal basis of the extensive British footpath system also comports with American concepts of easements by prescription or implied dedication.

The CRoW Act, however, goes far beyond existing footpath rights of way. Under CRoW, if private land contains mountains, moors, heath, or downland, a government agency may classify it as open country. The landowner then must give the public access to the open country land, for walking or even picnicking; any barriers to access must be removed. Land that is cultivated or used as a garden is exempt, as is land near a house or barn. Notably, the law does not provide any compensation to the affected landowners.

Lands qualifying for access comprise about 12 percent of England and Wales, an estimated four million acres in England alone. Some of the country's most scenic real estate has been or will be opened up, including areas fought over by nature lovers and landowners for more than a century. Vast landholdings that were previously shut off from the public, including the downs of *Wuthering Heights* fame in West Yorkshire, and the moors of Dartmoor, currently occupied by the Prince of Wales, will now be accessible.

Even Madonna has been affected by

[1] "Downland" is characterized by unimproved grassland, often with scattered scrub.

[2] Countryside and Rights of Way Act of 2000 (CRoW) § 1.

[3] "Enclosure" refers to the privatization of common land over several centuries, through Parliamentary Acts and private agreement, which profoundly transformed English village society. Frank A. Sharman, An Introduction to the Enclosure Acts, 10 J. Leg. Hist. 45, 47 (1989). Most enclosures occurred between 1700 and the mid-1800s.

CRoW. In 2001, Madonna and her husband Guy Ritchie bought Ashcombe House in south Wiltshire-over 1000 acres-for £9 million (about $16.5 million). Thereafter, the Countryside Agency announced it planned to classify about 350 acres of their estate as downland, which would have opened the property to public access. The famous couple objected at a public inquiry into the matter, arguing that the land was not suitable as open country and that free access would violate their privacy rights under the European Convention on Human Rights. Ultimately, an independent inspector appointed to resolve the matter decided that only 130 acres, all of which was out of sight of Madonna's home, should be opened to access. Because privacy was not therefore at issue, the inspector declined to consider the privacy aspects of the case.

Although Madonna's case eventually resulted in a compromise that seemed to please all sides, newspaper and blog commentators mercilessly criticized the singer for an "American" view of property rights that disregarded the needs of the public. Indeed, the Ritchies must have been surprised to find that their heretofore private property could be suddenly opened to public access-in effect the grant of a public easement-without their consent and without compensation. Yet, in Parliament's view, the Act merely made amends for the loss of public access during the enclosure period and brought a more equitable balance between public and private rights.

CRoW illustrates that even among capitalist countries that place a high value on property right protection, there may be different views of the "essential" nature of the right to exclude. Britain is not alone in this regard. Norway and Sweden have long recognized an even broader "Allemansrätten"-every person's right to cross the lands of another and even camp there temporarily. Imagine jumping in a canoe and heading down the river, knowing you had the right to pull over and eat lunch or even spend the night wherever you liked. All land is included, except cultivated land and homestead areas. It is even permissible to pick mushrooms, wild berries, and wildflowers on someone else's land. Interestingly, Allemansrätten are not found in the law books, but rather have developed by custom, which the Scandinavians find unnecessary to codify. The right emerged as an ethical obligation on the part of both the landowner-to allow access-and the visitor-to not disturb the landowner's privacy or damage his land.

While Britain and the Scandinavian countries understand the private property owner's legitimate desire for privacy, they also strive to accommodate the public's interest in access, in ways they believe do not unduly burden private interests. Thus, assuming the benefits of public access outweigh the burden on the landowner, an overall enhancement of societal land use value is obtained. These differing notions of the right to exclude open the students' minds to the possibility that it need not be absolute, that different allocations of the bundle of sticks may be possible, without causing undue harm to the underlying concept of private ownership. At a minimum, considering comparative property norms helps students grasp that defining property is ultimately an exercise in finding a balance that will best promote the goals of property ownership and meet the needs of society.

Once we accept that a property right is not a given, but rather a product of this balancing, we can ask what the proper scope of the right to exclude in the United States should be. For example, in Rhode Island, private landowners own more than 90 percent of Narragansett Bay's 350-mile shoreline, severely reducing the possibilities of public access to this scenic resource. Would it be possible to recognize the owners' desire for privacy while still providing the public greater means to enjoy what is, after all, their beach? What interests would be diminished by recognizing greater access? What interests would be promoted?

Increased access to private lands would not

only promote the public's interest in recreation, it could also result in psychic and health benefits. Health officials have warned that Americans face an obesity epidemic and about two-thirds of American adults are now classified as overweight. Although the problem is partially due to our diet, of course, Americans also walk, on average, much less than Europeans. Researchers have already identified our land use planning system as a major barrier to creating a culture of walking. Perhaps the right to exclude also plays a role, by increasing the difficulty of walking from one place to another and by placing some of the most inviting territory for a hike off limits. Would it make a difference if you could start a hike by simply hiking across the fields near your house, rather than having to drive to a park or nature preserve many miles away? Advocates of rambling also point to a feeling of community, of common interest in the land that comes from shared access.

Obviously, the right to exclude has important benefits to the landowner. Privacy is an important attribute of property and one of the fundamental desires of those who own land. Public access may limit the uses of property and a landowner may have to increase vigilance and security to protect against damage or theft from the invading public. The landowner may have to invest in fences to separate public and private portions of land. But, as the British determined, the landowner's concerns may be diminished with regard to certain types of property-it is harder to damage heath, for example, than a cultivated field, and privacy concerns lessen when the land is far from a homestead. In those instances, moreover, the public's interest in the use of the property is heightened.

By examining these competing policies behind the right to exclude, it is possible to paint with a finer brush. Perhaps the bundle of sticks can be modified without causing undue damage to the interests at its core. . . .

Brooke Jarvis, The Fight for the Right to Trespass, NY Times Magazine, July 26, 2023

The signs on the gate at the entrance to the path and along the edge of the reservoir were clear. "No swimming," they warned, white letters on a red background.

On a chill mid-April day in northwest England, with low, gray clouds and rain in the forecast, the signs hardly seemed necessary. But then people began arriving, by the dozens and then the hundreds. Some walked only from nearby Hayfield, while others came by train or bus or foot from many hours away. In a long, trailing line, they tramped up the hill beside the dam and around the shore of the reservoir, slipping in mud and jumping over puddles. Above them rose a long, curving hill of open moorland, its heather still winter brown. When they came to a gap between a stone wall and a metal fence, they squeezed through it, one by one, slipping under strings of barbed wire toward the water below.

On the steep grassy bank above the reservoir, coats and sweaters came off, revealing wet suits and swimsuits. Thermoses of tea and hot chocolate were readied for quick access; someone had brought along a banged-up trumpet with which to provide the appropriate fanfare. There were seasoned winter swimmers, people who had stories of breaking through ice for a dip, and complete newbies, deciding as they shivered whether this particular symbolic act was really for them. There was a 7-year-old who swam in a knit beanie with a purple pom-pom and a man with a Yorkshire accent who told his wife, in mock horror, "I had to ask a strange woman to zip me up, Mary!"

Down on the shore, giggling and shrieking people picked their way across slippery rocks. Then, with a great deal of cheering and splashing, they took to the water en masse, fanning out in all directions. Some carried a large banner that read, "The Right to Swim."

The water was somewhere around 50 degrees Fahrenheit, but it felt, a 61-year-old swimmer announced after climbing out and wrapping up again, "bloody wonderful." She handed her sister a Cheddar-and-Branston-Pickle sandwich and told me she usually hates encountering crowds when they go swimming but that this one was delightful.

More rounds of cheers went up as new waves of swimmers splashed into the water. An older woman wearing a pink floral swimsuit paused on the shore to turn to the crowd still on land.

A protester at Kinder Reservoir.

"Don't be beaten down!" she shouted, raising a

fist above her flower-bedecked bathing cap. "Rebel!" Then she, too, flopped into the lake.

On the bank above the reservoir, a choir serenaded the swimmers:

"He said 'All this land is my master's,' at that I stood shaking my head
No man has the right to own mountains, any more than the deep ocean bed."

The song, by the folk singer Ewan McColl, was about another mass trespass, one that took place 91 years earlier above this very reservoir, during which protesters were arrested for daring to walk on hills they were told to keep off. Over the decades that followed, the protesters' contention that people had some inherent rights of access even to lands they did not own — which in England is most land, because the vast majority of the country is in private hands — was enshrined in law, guaranteeing public access to this and many other parts of the countryside.

Lately, though, the swimmers told me, those hard-won gains had begun to seem both less expansive and less secure than they once imagined. During the pandemic, many took up open-water swimming or paddling or walking, only to be surprised at the number of places they weren't allowed to go. (The reservoir, owned by a private utility company even though it is inside the Peak District National Park, was one such place: England's national parks are full of land that is privately owned — and inhabited, farmed, mined and hunted.) The government began to push to criminalize forms of trespass never before considered to be crimes. Then, in January, the High Court sided with a wealthy couple who wanted to keep the public from camping on an estate they bought inside Dartmoor National Park, in an area called the Commons, the only place in England where wild camping, what we would call backpacking, was still considered a right. Robert Macfarlane, the English nature writer, called the ruling a nationwide wake-up call: Only when "the last relic of a long-lost openness" was threatened did it become clear just how much was at stake.

Like the trespassers whose anniversary they were commemorating, the swimmers believed they were fighting for something bigger than the chance to walk up a hill or swim in a river — something fundamental about their relationship to the land where they lived.

"It's not so much that we need to be granted permission," explained a woman with long gray hair and a sweatshirt that read, "Kayaking Is Not a Crime." "It's that we need it to be recognized that we don't need permission."

Centuries ago, high moors like those of Kinder Scout, the plateau that stretched above the reservoir, were considered King's Land, uncultivated areas to which access was free. In the villages below, land was often claimed by the aristocracy and gentry, who collected taxes from the peasants who worked it, but many villagers, called commoners, held shared rights to "common" land, where they could graze their animals or plant crops or gather firewood.

This type of land disappeared rapidly during the enclosure movement of the 18th and 19th centuries, when the wealthy claimed wild and common lands — lands that, as the jurist William Blackstone put it, previously belonged "generally to everybody, but particularly to nobody" — as their own. The movement leaned on the work of philosophers such as John Locke, who argued that people could gain ownership of "waste" lands by working and improving them. But there were others who believed that separating people from the land was a gross injustice. "What crimes, wars, murders, what miseries and horrors, would the human race have been spared," wrote Jean-Jacques Rousseau, "by someone who, pulling up the stakes or filling in the ditch, had cried out to his fellow humans: 'Beware of listening to this impostor. You are lost if you forget that the fruits are everyone's and the earth's is no one's!'"

As enclosure spread, many former users of the land were pushed out. With no way to make a living, they drifted to cities. Kinder is not far from Manchester and Sheffield, two early centers of the Industrial Revolution, whose residents liked to escape the choking air by going on long walks in the countryside. But many of the landowners who controlled the hills weren't fond of having walkers, known as ramblers, exploring properties they used for raising sheep and hunting grouse. They hired armies of gamekeepers, who sometimes used attack dogs, to kick the ramblers out.

Some ramblers, in their city lives, were involved in trade unions and other labor movements, and they began to bring the same spirit of organization and protest to their weekend walks. (As the most shoutable line of the McColl song has it, "I may be a wage slave on Monday/But I am a free man on Sunday!") The land they were walking might be private property, they argued, but its owners weren't the only ones with the right to use it: English law acknowledges that a right can be established through long custom, and the walkers were following ancient paths and bridle ways onto upland that had only recently been privatized.

Some walkers began holding rallies and undertaking purposeful trespasses in places where they knew they would be ejected. This had been going on for decades when, in April 1932, a rambler named Benny Rothman alerted the press that he and others would be heading up past the reservoir to the plateau above it, an area owned by the Duke of Devonshire. Hundreds of ramblers tussled with keepers, making national headlines. Six were arrested and five sentenced to as much as six months in jail.

At the time, England was home to a number of groups working to protect commons, parks and walking trails as part of what the campaigner Octavia Hill, at an 1888 meeting of what eventually became the Open Spaces Society (O.S.S.), called "a common possession we ought to try to hand down undiminished in number and in beauty." Most saw the trespassers' actions as counterproductive. Eventually, however, the Kinder Trespass became what the O.S.S. now calls "a sacred event in rambling circles," and its leaders' beliefs were more widely embraced. Beginning in the 1940s, Parliament began to codify the idea that people had an inherent right to move across the landscape, culminating in the Countryside Rights of Way (CROW) Act, in 2000. The act recognized the right not only to use designated paths but also to roam freely on certain mountains, moors, heaths and downs mapped as "open country" or on land registered as common. In 2009, the Marine and Coastal Access Act designated the shore as access land as well and promised an additional 2,700 miles of coastal footpaths.

Today there are about 140,000 miles of legally protected paths in England, and the countryside is full of signs marking public footpaths or rights of way. I found them leading past fields of rapeseed or sheep, along a creek that flowed behind the walls of private gardens, through woods to a country pub. The first time I encountered such a sign, it marked a charming little trail leading over a brook at the end of the lane where I was staying in Little Hayfield. I had other plans for the morning and only meant to take a tiny walk, but suddenly I couldn't help myself: Having grown up in rural Tennessee, where the "No Trespassing" signs were so ubiquitous as to hardly be necessary, I was overcome by the mere fact of permission. Here was a path, to who knew where, on which I was decidedly welcome — not just welcome, in fact, but entitled. It would have felt almost disrespectful to ignore it.

To an American, traversing the land in rural England can feel a bit like looking in a funhouse mirror — a system just different enough that it forces you to see your own expectations in a new way. Some of the people I met in England had heard that the United States has a lot of public land, which is true. But access to it depends a lot on where you live; nearly all federal land is in just 11 Western states and

Alaska. (And even there, the courts are still working out what "public" really means, mulling, for example, when anglers are allowed to walk on public streambeds that run through private property or whether hunters can cross "private airspace" by using a ladder to get from one checkerboard square of public land to another.) Others had heard that the United States is a warren of private lands, governed by threatening signs and stand-your-ground laws: The week of the swim trespass, the news back home was full of stories of people being shot after accidentally driving up the wrong driveway or knocking on the wrong door. Kate Rew, the founder of England's Outdoor Swimming Society, remembered with shock when she arrived at the Pacific, eager to swim, but couldn't find a beach that wasn't private property. Another activist, Owen Hayman, told some friends he was visiting in Montana that he was headed out for a walk and was surprised when they replied that they would first need to drive him somewhere. A farmer I met in Gloucestershire, who thought the English already had plenty of access to his land, nonetheless seemed to sympathize with my plight as an American: "You can't go anywhere, can you?"

After following that first right-of-way sign, I stumbled on a spring full of plump tadpoles and followed a red-striped bumblebee from flower to flower. I thought about how nice the word "ramble" was, how it evoked wandering and whimsy and openness instead of the determined, point-to-point rush of the American "hike." I navigated a brief standoff with a pair of rams, soaked my feet in a boggy cow pasture and skirted private houses. One resident nodded politely from behind a sign, "Please respect our privacy," that I liked rather better than the sign one of my mother's neighbors in the United States displays on her mailbox: "If you can read this, you're in range."

I emerged at the top of a hill called Lantern Pike, said to have gotten its name because it once served as a place to light beacon fires. In one direction, I could see the buildings of Manchester, and in the other, the long brown line of Kinder Scout, notched in the middle where a waterfall tumbles down. Below it were fields of bright green pasture squared in by dark stone walls.

A little over a decade ago, a young illustrator named Nick Hayes was staying with his parents in West Berkshire, not far from London, while he worked on a graphic novel. One day, walking near a lightning-struck willow, he spotted a kingfisher, the first he ever saw. He hoped to show it to his mother, but as they approached the tree, a man on a four-wheeler raced over, announcing: "You've no right to be here. You're trespassing."

The pair immediately turned around. Hayes walked home, struck by the power of that single word. He typed "trespass" into a search engine, surprised to learn that his actions were merely a civil offense, typically punishable only in the case of property damage, and that trespass hadn't always been considered an offense at all. The more he read, the more Hayes began to believe that the building of a wall, not the climbing of it, was the bigger crime. He began working on a book about what he was learning, taking himself on small trespasses around the country, climbing over the walls of large estates or slipping past them by kayak. Sometimes there was shouting, sometimes threats. Everywhere he found reminders of a long, ever-evolving relationship with the land. It was in the land use (the fox hunts and deer parks of the wealthy) and in the literature (all that wide-open walking in Tolkien and Wordsworth) and in the language: "Beyond the pale" originates from the Middle English word for fence, and acre comes from the Old English for "open field," though the word eventually stopped meaning unoccupied land and came to define standardized measures by which land could be bought and sold.

"You can chuck a stone in England, and there's a story of land dispossession wherever it

lands," Hayes told me when I first spoke to him last year. Fencing people off from nature, he believed, caused each to suffer: People felt bereft and disconnected, and problems like pollution or biodiversity loss became less visible, harder to care about. Hayes became convinced that society put too much emphasis on the sacredness of private property and the accompanying threat of trespass. Kinder Trespass was evidence of that: "To cheer a man for walking through heather and likewise to beat him up for it are both absurdly disproportionate to the act itself," he wrote. "But inside the logic of the bubble, such an act is tantamount to anarchy, because it threatens the spell."

In this context, even the CROW Act began to look less like a victory for the public and more like a consolation prize that disguised how much had already been lost.

The right of way officially applies only to movement; paths are for walking (and bridle ways for riding), not for camping or picnicking or drawing or hula-hooping. Paths and access land are concentrated in the least populated rural regions and are scarce where most people live. Many protected areas are difficult to navigate. (People who spend time in the countryside rely on detailed maps from the government to figure out where they are or aren't allowed to walk. Echoing their military heritage, they're called O.S., or Ordnance Survey, maps.) Some places offer no real access, because they are islands floating in a sea of private property — you would need a helicopter or a parachute to get to them — while others require constant vigilance to keep open. In one famous case, a company associated with the tycoon Nicholas van Hoogstraten, who was known for his involvement in the killing of a business rival and once referred to ramblers as "scum of the Earth," erected buildings and fences that blocked a protected right of way in East Sussex. The path was closed for 13 years before Hoogstraten lost in court and Kate Ashbrook, a former chairwoman of the Ramblers and now general secretary of the O.S.S., reopened the path by taking a pair of bolt cutters to a padlocked gate.

The CROW Act was also time-limited; there is likely less than a decade left during which new access paths can be certified. But the process for adding them is byzantine. To certify a right of way, you have to prove that you've never asked a landowner for permission to walk there (which turns a right into a retractable handout); that you have used it for at least 20 years (an accepted stand-in for proof that a right has been earned by virtue of being exercised since "time immemorial," a period which, because of quirks of English law, officially ended with the death of Henry II in 1189); and that you and others have used the path openly without your right to do so being challenged. Open-access land cannot have been "improved" by agriculture, proof of which often requires expensive certifications by botanists. This can lead to absurdity, says Ashbrook, who likes to walk up a hill near her house in the Chilterns. It looks the same all over, but because of what Ashbrook described as "botanical issues of great detail," only one side qualified as access land, open for rambling. The other is closed.

To Hayes, it seemed as if all these technicalities undercut the rights that the CROW Act was supposed to enshrine. They made clear that the rules about who owned what and who could go where were cultural and historical artifacts, not laws of nature. They were just choices.

Another approach was visible just across the border. In 2003, the Scottish Parliament passed a land-reform bill that recognized the uncontested right to walk, camp, cycle, swim, canoe and perform any other form of nonmotorized exploration throughout the country. Known as the "right to roam," it came with a code of responsibilities: Access didn't apply to private gardens immediately around houses or to fields in active cultivation, and people were expected to clean up their litter and dog poop, to cook on stoves instead of open fires, to avoid rock

climbing near nesting birds, to close gates behind them and so on. But it was clear and direct and not even unique to Scotland. Similar systems had long been in place in other European countries, including Finland, Norway, Iceland, Austria, Latvia, Estonia, Lithuania, the Czech Republic and Switzerland. In some cases, the right was considered so old and so fundamental, so obvious, that for a long time no one bothered to codify it. In Sweden, the tourism board developed an ad campaign around the allure of what the country calls *allemansrätten*, or everyman's right. "It's a right protected by the law that allows me to sleep and eat and walk pretty much wherever I want," the voice-over explains. "Now you can, too."

As Hayes began researching land ownership, he came across the work of Guy Shrubsole, an environmental campaigner who, in an effort to find out who owned the land whose management practices he was worried about, had spent years filing records requests and poring over maps, writing a blog and later a book called "Who Owns England?" In answering the question, Shrubsole painted a stark picture of inequality and secrecy: Only 5 percent of the country was owned by ordinary householders. Large chunks were held by corporations and by the aristocracy and gentry, often following boundaries that were relics of the land divisions and gifts made after the Norman Conquest in 1066. (The Land Registry does not track land using these categories.) "A few thousand dukes, baronets and country squires own far more land than all of middle England put together," Shrubsole wrote. He cited a remark by the late Duke of Westminster, who advised aspiring entrepreneurs in Britain to "make sure they have an ancestor who was a very close friend of William the Conqueror." If you wanted to know how much of England's land offered no right of access, even to ramblers, even after the CROW Act, the answer was 92 percent.

"Property," Shrubsole told me, "isn't really a thing. It's a bundle of rights," a series of possible actions that are associated with tracts of land but that can be severed, bought, sold and expanded or curtailed by the specific legal codes that govern that land. This was why you hear people speak of mineral rights or surface rights or water rights or commoners' rights or treaty rights, which in the United States often include ongoing rights to fish, hunt and gather on land that tribes no longer control. "Part of that bundle of rights in England for the last several hundred years has been the right to exclude other people from your land," Shrubsole says. "The thing is, that's not always the case in every country, and even in other liberal, capitalist democracies."

England had exported its view of private property to much of the world, but it also had its own long history of resistance to privatization. (Notable examples include the Diggers, who seized a hill in Surrey in 1649, planting crops and declaring to the gentry, "The earth was not made purposely for you, to be Lords of it, and we to be your Slaves, Servants and Beggers, but it was made to be a common Livelihood of all.") "Sure, you can have private property," Shrubsole says. "But does it always have to be on such extreme terms that you can't share it with anyone else?"

In late 2019, the Conservative Party was elected in a landslide and proposed charging unpermitted campers with criminal trespass. Hayes and Shrubsole started a petition opposing the idea. It received enough signatures to trigger a debate in Parliament, but the bill continued to move forward. Shrubsole remembers sitting with Hayes around a kitchen table in London, wondering what to do next — how to convince their country that access to the land was a right worth fighting for.

Shortly afterward, Covid hit. Lockdowns were strict in England, where illicit parties were enough to eventually bring down a once-popular prime minister. Indoor gathering places shut

down, and outdoor exercise, which was allowed only once a day and only in the area where a person lived, became precious. Catherine Flitcroft, of the British Mountaineering Council, told me that across the country, "the outdoors became the new pub and the new playground," a lifeline for people who felt trapped and alone.

But many soon found that a frustrating amount of the countryside was closed off to them. Paths that people had assumed to be legal rights of way turned out to be only permissive paths; landowners, overwhelmed by the surge of eager walkers, some of whom left large messes behind, could and did revoke access. Swimmers, canoers, climbers and kayakers struggled to understand where they were allowed to go, because many landowners maintained that ownership of a lakefront or riverbed included a right to exclude people from "their" section of water. Though it was illegal to block public paths with gates or fences, or to hide signs designating them as such, or put up new ones threatening dangerous dogs or bulls, would-be walkers told me that they encountered all of this. And community leaders from marginalized groups pointed out that many barriers to access were invisible: People were often dissuaded from rambling at all because they had good reason to fear the outcome if they ended up somewhere they weren't allowed to be.

During that first Covid summer, Hayes's account of his explorations, "The Book of Trespass," was released. The book argued that the hard-won public paths, in enshrining some rights, forestalled others: "They simultaneously legitimize the space that is off limits." It soon became a best seller. Hayes and Shrubsole set up a campaign website, encouraging people to make their own respectful trespasses into areas that were closed off to them. They also started to work with other organizers to call for a full, Scottish-style "right to roam" in England.

"Our desire to access nature," they wrote, "should not be a crime."

The first trespasses were small: groups of friends poring over local maps, considering the land around them in new ways. In Totnes, the town in Devon where Shrubsole lives, he and a few others explored Berry Pomeroy, a nearby estate owned by the Duke of Somerset. There was a permissive footpath through one section, but though the estate dominates the landscape and though it receives taxpayer subsidies, they had never seen the rest. The woods turned out to be full of pheasants — nonnative game birds imported to Britain each year by the tens of millions for shooting.

In Devon, local people began holding trespasses every month. As Hayes did while writing his book, they stayed well away from houses and stuck to actions that would be considered trespasses in England but legal in Scotland. Lewis Winks, a researcher and environmental campaigner who helped organize the gatherings, told me that it felt like being a detective in your own backyard: You were figuring out who owned what and why and suddenly realizing that there was a great deal more land around than you ever visited or even really noticed. Moving in a group, you felt empowered, almost immune to signs telling you that you didn't belong. You also noticed, he added, that a country that some politicians liked to describe as full or overcrowded, and therefore in need of tighter borders, was full of open space.

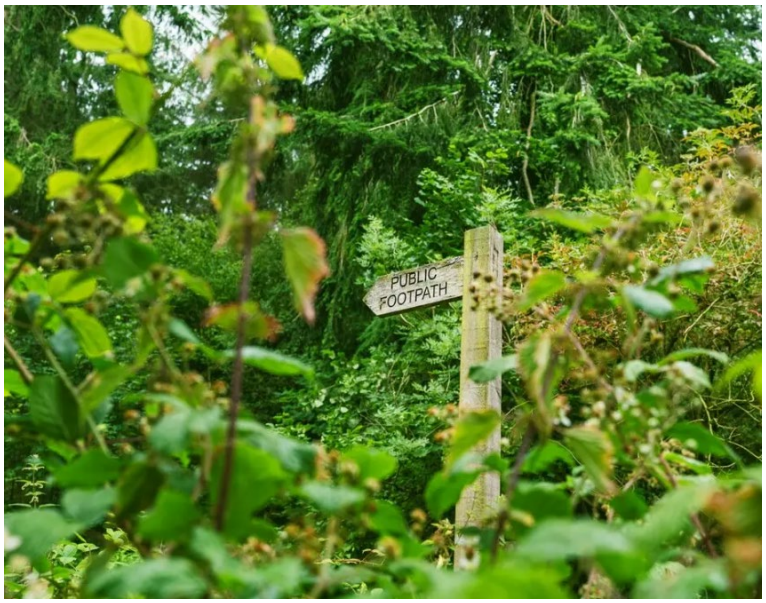
"You realize," Winks said, "that we basically exist in the corridors between these big estates."

In 2022, Parliament passed the promised anti-trespassing bill. The core group of Right to Roam organizers continued to grow, while encouraging people to form their own local chapters. In Northumberland, organizers arranged buses to take children who live in light-polluted cities into the countryside at night, because so many English people now grow up without be-

ing able to see the Milky Way. In Gloucestershire, trespassers climbed a stone wall into an estate owned by the Duke of Beaufort, where botanists taught attendees about the native plants they found there — the idea being that people who feel attached to a landscape will be inspired to protect it. The campaigners organized another trespass at Berry Pomeroy, this time with hundreds of people, who carried a banner that read "Right to Roam" and picked up litter as they went. They walked together to a sunny hillside, where they picnicked.

The wholesomeness was purposeful: an attempt to show that people could use land not just responsibly but also in a nourishing way. Though the campaigns received a fair amount of positive coverage — even the right-leaning Daily Mail offered a friendly account of the Berry Pomeroy trespass, quoting Shrubsole's "Less room for pheasants, more room for peasants!" quip in their headline — there were plenty of doubters. Some seasoned organizers worried that a call for a right to roam might jeopardize the right-of-way system they have worked so hard to create or that embracing trespass could give all ramblers a bad name. Landowners' associations argued that the current system was adequate and that expanding it would risk public safety: "How many more wildfires will there be? How many more sheep will be attacked by dogs? What damage will be done to crops?"

In his book, Hayes argued that what he called "the cult of exclusion" was possible because it was undergirded by a powerful story of inevitability, including the belief that open access would mean disrespectful or ignorant people mistreating the land. (In the United States, this idea was most vociferously articulated in an essay called "The Tragedy of the Commons," written in 1968 by the ecologist and eugenicist Garrett Hardin, who argued that it was the fate of any communally managed property to be mismanaged and destroyed. Hardin's work has since been widely debunked, including by the Nobel Prize-winning political scientist Elinor Ostrom, who showed that communities around the world are capable of managing shared resources sustainably.) Right to Roam organizers countered that another story was possible, one in which people were educated to appreciate and protect places they saw as partially their own.



Dartmoor National Park in Britain, which is at the center of the fight over wild camping, or what Americans would call backpacking, amid a larger battle over the "right to roam" on public lands..

Amy-Jane Beer, one of the core organizers, likes to point to a study by researchers at the University of Derby, which compared 14 European Union countries according to their biodiversity and their residents' felt connection to nature. In each case, Britain ranked lowest. "Those things are not disconnected," Beer says. "People are losing without being aware of what they're losing."

And then came Dartmoor.

In England — unlike in the United States or in parks in Africa and elsewhere that are sometimes

accused of practicing "fortress conservation," cordoning off nature at the expense of local people — there's little illusion that a national park is, should or even could be a wild place untouched by human history. Dartmoor is full of ancient archaeological sites as well as mining scars, good-size towns, uncountable sheep and ponies, military practice ranges and even a large prison. You can't visit without understanding the land as a balance of uses.

One of those uses, today, is camping. For decades, Dartmoor was the only park in England that recognized camping among the forms of recreation to which users are entitled. Elsewhere, some people still camp, but they do so somewhat stealthily — "you just set up late and pack up early," as Winks told me — or with the understanding that they may be moved along. To quote the leader of a group of backpackers I met: "We just kind of walk until we hit somewhere we can't, and then we go somewhere else." Many youth groups, and those who aren't comfortable camping where it isn't allowed, stick to Dartmoor.

In 2022, the hedge-fund manager Alexander Darwall and his wife, Diana, who had purchased a 4,000-acre estate inside Dartmoor, announced that they would be suing the park to keep people from camping on what was now their land. At first, the big access organizations didn't believe that wild camping could really be under threat and paid little attention. A small group of local residents, including Winks, a walking guide named Gillian Healey and others who were organizing trespasses nearby, decided, over pints at a pub, to plan a rally on one of Darwall's moors, to be held shortly after the court was scheduled to rule on the suit. "We thought there'd probably be about 15 of us," Winks says, but no matter which way the decision went, they figured they would either want to celebrate or protest. They came up with a name for their group: the Stars Are for Everyone.

A week before the planned gathering, in January 2023, the Chancellor of the High Court ruled that the long-assumed right to camp in Dartmoor didn't actually exist. Darwall, and any other landowner who wanted to, could kick campers out right away. Suddenly, thousands of people wanted to join the protest, which was set to depart from Cornwood, a tiny village clustered around narrow lanes on the edge of the park. Organizers rented 10 buses to shuttle the protesters in. To help feed everyone, residents of the village baked pasties and delivered them to the local pub.

A parade of people set off on a two-mile walk to Darwall's land, using a right of way flanked on either side by private security guards holding dogs. It was, said one participant, "a conga line of humanity." Many people told Healey that they weren't campers themselves but that they saw the decision as part of a much bigger story about their country and where they fit inside it. Healey agreed: To her, the loss was like a new form of enclosure. That, too, had been a gradual but devastating winnowing of rights.

When the crowd arrived at the top of a hill, organizers were waiting with a surprise. Hiding just behind the crest were a group of musicians and a giant puppet they called Old Crockern, after a mythic figure from Dartmoor's past who is said to be the spirit of the moor; in one story, he warns a rich man who has come to plow the land with a steam engine, "if you scratch my back, I'll scratch out your pockets!" When the puppet crested the hill into the slanting winter sunshine, crowds of children ran toward it, dancing.

The Dartmoor National Park Authority appealed the ruling. In the meantime, it came to an agreement with some of the other landowners, paying them to continue to allow camping. What had been a right became a mere permission. Winks found himself camping less because he was no longer sure where it was actually allowed. "They've stolen the goose and are

selling us back the eggs," he said, "and we're told to be grateful."

The Labour Party, for its part, reacted to the news by promising to introduce a Scottish-style Right to Roam bill the next time it came to power.

One spring morning about a week after the swim at Kinder Reservoir, and five months after the Dartmoor ruling, I met another group of trespassers. This time they gathered on the village green of a tiny place called Ham, under the branches of a blooming horse-chestnut tree.

Most of the 70 or so people who arrived for the walk came from Bristol, 20 miles away, home to a particularly active group of right-to-roam advocates who meet twice a month and go on outings that members take turns designing.

On this day, the walk leader was Jim Rosseinsky, a member of a local choir, who brought along some of his choir mates. Rosseinsky said that "The Book of Trespass" moved him to act because "it was just so reasonable." Before setting out, he warned the group to watch out for "sharp-branch-related jeopardy" and to take care with where they placed their feet: "We want to show that we can care for the land that we're walking on."

The group set off down a narrow lane, crossed a bridge and passed a field where horses grazed. A large stone castle appeared in the distance. A woman named Mary Stevens, who had read "Who Owns England?" told those gathered that it was still owned by the same family to whom the land was granted in the aftermath of the Norman Conquest. They were also given considerable land in Bristol — where, many of the walkers told me, they could not afford to buy houses — including in the neighborhood where the choir practices.

The long trail of people wound through fields and into a tiny scrap of woodland, where the choir leader, Sorrel Wilde, led the group in an old chant: "Put your roots down/put your feet on the ground/you can hear the earth sing/if you listen," we sang, until the words lost their cheesiness and began to feel profound and peaceful. It took ages to enter another glen, because there were so many people stepping so cautiously over the bluebells.

As they walked, people told me what had brought them to spend their bank holiday Monday trespassing around a castle with strangers. Many spoke about wanting more access to nature, but they also framed the walk in grander terms. Maria Fernandez Garcia, a botanist who had become a leader of the group, said it was a balm "to hear other people's deep and similar feelings" about the ways the country wasn't working for ordinary people and how it could do better. Danny Balla listed a series of things that he wished were seen as commons, to be shared and stewarded, but which were instead enclosed, privatized and exploited: gathering places in cities, the air, the water, the climate. A mother of two young children told me that as a renter, struggling amid Britain's cost-of-living crisis, "it would be very easy to feel that I had very little power," but trespasses like this helped. The more of them she went on, the more illusory the borders that constrained her life felt. "It's an antidote to everything feeling divided and enclosed," she said.

A woman named Holly Marjoram told me that while walking is often a solitary activity, this version made it feel like part of something large and powerful, connected to a whole world of people who would fight for the land. She had also been to the big trespass at Berry Pomeroy and the protest on Dartmoor.

A few months later, in mid-July, the Royal Courts of Justice would hear the park's challenge to the ruling that favored the Darwalls. Inside the court, the two sides debated what the park's bylaws meant by allowing "open-air recreation" — Was a tent open-air? Are you recreating when you're asleep? — while protesters filled the sidewalk outside. A ruling is still pending.

In Ham, after the trespass, the group stopped in a churchyard for lunch, where more thermoses of tea emerged from backpacks. “It’s nice to imagine a world where we can walk farther and feel freer,” said a woman in tall rubber boots. And then it was back to the village green, where some people taught a folk dance, some drifted off to the pub next door and some sang along to a final song:

Ours is a wild and beautiful land
much unknown to us.
We are the land.
And the land is us.

Another group arrived late and dripping, having been lured into the cool river by the first hot day of spring. People kept asking Rosseinsky which parts of the walk were trespasses and which parts were within their rights. It had been hard for them to tell.

Gabriella Parkes, Where Next for the Right to Roam? Land Journal, 12 January 2024

Early last year people and politicians were talking about a right to roam and public access to the countryside, thanks to a decision on wild camping taken by landowners Alexander and Diana Darwall.

The Darwalls own not only the 1,600ha Blatchford estate in Dartmoor National Park, but also the 6,474ha Sutherland estate in Scotland. The Blatchford estate includes Stall Moor, an extensive area of unenclosed moorland. In 2022 they went to court, claiming there was no right under the Dartmoor Commons Act 1985, to wild camp on the moor without their permission, and in January 2023 the High Court decided they were right.

Their lawyer successfully challenged the historic interpretation of the Dartmoor Commons Act 1985 that there is a long-established precedent of wild camping on the Dartmoor National Park.

The 1985 Act states that 'the public shall have a right of access to the commons on foot and on horseback for the purpose of open air recreation'. The Darwalls' barrister argued that 'the whole point of erecting a tent was to escape from the open air' and, 'if a tent is acceptable, then why not a wooden hut?' He claimed that any form of camping was not included in the definition of 'open-air recreation'.

The Darwalls use Stall Moor for pheasant shoots, deer stalking and holiday rentals and complained that camping there was a 'real problem'. It was therefore only 'reasonable' to receive compensation for the loss of control over who could camp on their land. The problems referred to were not detailed, however.

Following the removal of the right to wild camp in January, the Dartmoor National Park Authority took the dispute to the Court of Appeal, and in August won the restoration of the right for open-air recreation, which includes wild camping.

This was because the 1985 Act does not refer to the right to roam, but to 'open-air recreation'. It is worth clarifying that elsewhere in England, the right to roam does not include wild camping. Dartmoor is unique in this giving the right to 'open air recreation' rather than 'to roam'.

It is important because access to the more remote areas of the National Park is not possible in a single day, and without overnight stays these areas will become out of reach to those seeking to assert their right to ' roam' on these remoter areas, defined as access land in the Countryside and Rights of Way (CROW) Act 2000. So some Scots saw this case as an attack on the principle of the right to roam itself.

At the time of publication, the Darwalls' legal team has announced that it will appeal to the Supreme Court.

What is the right to roam in England?

In the CROW Act 2000, the right to roam is defined as the right for walkers to access mountains, moors, heaths and downs that are privately owned, and registered common land, defined as 'access land'. The 32nd report of the Commons Select Committee on Public Accounts of 2007 records that this amounts to 8% of the English landscape, 77% of which is in the north of England.

To this has been added the King Charles III England Coastal Path, which is planned to run the entire coastline of England. As of 2023 this has been negotiated, and around half the English coast is already open.

Legislation extends definition of trespass

The movement to improve access to the countryside for the public started in 1932 with the Kinder Scout mass trespass, but it was not until

2000 that the right to roam was granted for limited parts of England. In Scotland it was enabled in the Land Reform (Scotland) Act 2003, covering 30% of the national landscape.

According to the Countryside and Rights of Way Act 2000, access land can only be used for walking, running, watching wildlife and climbing, which clearly does not include wild camping. Access land must not be confused with rights of way, which have clearly defined permissible user groups and only allow users to travel along them and not linger or camp.

In 2021, after the first year of the pandemic and the increased recognition of the health benefits that nature offers, the government began a review of access to nature under Lord Agnew. However, in 2022 this was shelved and its findings will not be published. This follows the Police, Crime, Sentencing and Courts Act 2022, which reclassifies some types of trespass as criminal rather than civil offences. Despite recognition of more need for access, legislation is restricting it further.

This has frustrated organisations pushing for greater access to the countryside such as the CPRE, Friends of the Earth, the Right to Roam campaign and groups such as walkers, climbers, kayakers and horse riders who have interpreted it as weakening their right to access the countryside.

The stated aim of the 2022 Act was to prevent unauthorised encampments; but its wording enables it to be used against anyone encroaching on someone else's property. Trespassers can now face imprisonment and a fine, depending on the location and nature of the trespass.

Landowners can remove access rights from access land for up to 28 days, at their discretion. Longer restrictions are also possible, by applying to the relevant authority, such as Natural England, the local National Park Authority or the Forestry Commission, depending on the location of the land in question, or the purposes of land management, public safety and fire prevention.

Land management includes any type of activity such as farming, forestry, sports or other events. There are several examples of such restrictions being granted for years at a time. For example, a shoot at Gurston Down in Wiltshire was able to restrict access from 2016 to 2021, on the grounds of disturbance to quarry during the pre-season and shooting season.

Alternative European models

Also in 2022, though, Green MP Caroline Lucas tabled a bill in the House of Commons to extend the right to roam in England to woods, rivers, green belt and more grassland, effectively increasing coverage to 30% of England.

She used the 2003 Act as her template. As described in the Scottish Outdoor Access Code 2005, this gives responsible access to most land and inland waters for the purpose of many listed outdoor activities, including wild camping.

Responsible access to roam exists in several other countries, including Austria, the Scandinavian nations, Switzerland, Estonia and Czechia as well as Scotland. Guy Shrubsole's 2020 *Sunday Times* bestseller Who owns England? notes that English landownership law grants the owner the right to exclude the public, whereas in these other countries the emphasis is different.

Central to all versions of the right to roam across Europe, is that:

- there are sensible, listed exceptions and modifications to this right; Scotland for instance excludes houses and gardens and land sown with crops.
- according to the Scottish Outdoor Access Code 2005, 'this right only comes with strict responsibilities to both the ecology and community of an area'; these responsibilities are expressions of the 'leave no trace' philosophy – no litter, no fires, no

damage to trees, wildlife or other elements of the environment.

The argument made by landowners who do not support the right to roam is that they believe the public will cause significant damage to the environment, wildlife and crops. However, most people accessing the countryside do behave responsibly and are unconvinced by this argument.

Nimo Omer in the *Guardian* quotes Right to Roam campaigner Jon Moses: 'The impact that people have on their environment is pretty minimal when you compare it to industrial agriculture and other practices that are destroying the ecology of the countryside.'

However, even in Scotland there is dissatisfaction with the actual level of access. One particularly important case is that of the Drumlean Estate, which is in the jurisdiction of the Loch Lomond and the Trossachs National Park Authority (LLTNPA). The estate is owned by entities in Liechtenstein, which were first reported to be obstructing public access in 2007.

Following consultations, there has been no improvement in access, despite the case being heard in the Sheriff Court in 2013, and repeatedly in the Sheriff Appeal Court from 2015 onwards. The argument used for denying access was for the 'protection of all animals, people and materials on the farm'. However this argument was consistently denied by the judges, and this case now sets a precedent in Scotland discouraging such an argument.

Overseas ownership of the estate means it remains closed to the public, and as of 2023 the LLTNPA has been unable to enforce the right to roam.

Wild camping access is contentious

Following the relaxation of lockdown in 2020, there were many reported cases of irresponsible wild campers causing damage and behaving inappropriately. National Park rangers had to deal with campers and clear up the mess, and there was considerable frustration among locals. In 2021, wild campers were also blamed for a massive wildfire in Cannich in the Highlands.

However, even before the pandemic, LLTNPA held a public consultation on the subject in 2017 and introduced a camping permit scheme to relieve the pressure on some of the park's most heavily visited spots.

But concerned landowners need to be aware that the 2003 Act prohibits signs, notices, obstructions and the like that have no purpose other than restricting access rights. In addition, the act allows the local authority to serve a notice requiring obstructions to be removed, although there are numerous reported cases of such notices being put up in the national parks and not being removed.

The act further makes local authorities and national park authorities responsible for upholding access rights by asserting, protecting and keeping them open and free from obstruction. But it also lists 14 acts of the Scottish Parliament that curtail the behaviour of those using access land.

Weighing up wider right to roam

Following Lucas's bill and the recent defence of the right for the public to access the countryside in Dartmoor, the Labour party has pledged to extend the right to roam as it exists in Scotland to England.

Earlier cases mentioned suggest, however, that the law is not effective at forcing landowners in England or Scotland, in particular overseas owners, to observe the responsibility of granting access to land categorised as access land.

Half of Scotland is owned by 432 individuals, a few of these being overseas landowners including Sheikh Mohammed bin Rashid Al Maktoum and Anders Holch Povlsen as well as the Duke of Buccleuch, each of whom own vast estates.

The relevant English authorities also seem sympathetic to granting restrictions to landowners, and in Scotland are unable or unwilling to enforce court judgments forcing landowners to open their estates, as in the case of Drumlean.

It remains to be seen whether this thorny issue can be negotiated to the satisfaction of all concerned.

The Privacy and Property Provisions of the European Convention on Human Rights

The European Convention on Human Rights, ETS 5 (1950), entered into force, 1953

The Governments signatory hereto, being Members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10 December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its Members and that one of the methods by which the aim is to be pursued is the maintenance and further realization of Human Rights and Fundamental Freedoms;

Reaffirming their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend;

Being resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration;

Have agreed as follows:

ARTICLE 1

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

. . .

ARTICLE 8

Everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Protocol to the European Convention on Human Rights CETS 9 (1952), entered into force, 1954

1. Enforcement of certain Rights and Freedoms not included in Section I of the Convention

The Governments signatory hereto, being Members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November, 1950 (hereinafter referred to as 'the Convention'),

Have agreed as follows:

ARTICLE 1

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. . . .

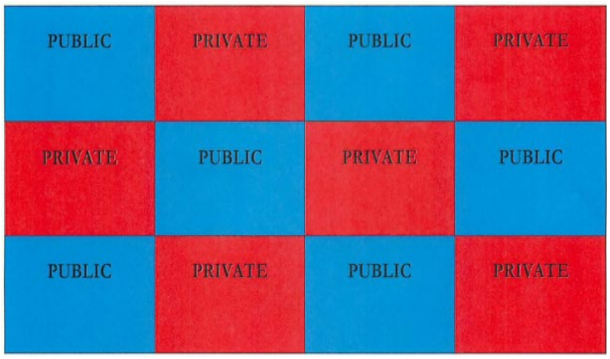
Scott W. Skavdahl, United States District Judge. This matter comes before the Court on the following cross motions for summary judgment:

(1) Plaintiff's Motion for Partial Summary Judgment and supporting memorandum (ECF 63, 64) …; and
(2) Defendants' Motion for Summary Judgment and supporting memorandum (ECF 65, 66) …

The Court heard oral argument on the motions on May 10, 2023. (ECF 76.) …

INTRODUCTION

Plaintiff privately owns a significant amount of real property on Elk Mountain in Carbon County, Wyoming. (Am. Compl. ¶¶ 1, 11; ECP 37-1.) Much of Plaintiff's private property borders and surrounds federal public lands managed by the U.S. Department of Interior Bureau of Land Management (BLM), state public lands managed by the State of Wyoming, and township lands managed by the Town of Hanna. (ECF 64-9; *see also* ECF 66-2.) Many of the private and public lands meet at their corners, forming a checkerboard pattern, as roughly demonstrated here:



The points of contact at each corner meet at an infinitely small point and, "like a point in mathematics, arc without length or width." *Mackay v. Uinta Development Co.*, 219 F. 116, 118 (8th Cir. 1914) In brief, the tortured path resulting in this generally 40-mile wide checkerboard pattern of land ownership (20 miles on each side of the railroad track) has been summarized thusly:

> History and politics have complicated the pattern of land ownership in the West. To promote western expansion in the nineteenth century, the federal government encouraged the construction of rail lines through the West by granting every other 640-acre parcel along rail corridors to a railroad company. The hope was that the lands remaining with the government would increase in value as the companies built rail lines, which the government would later sell at high prices. The plan was successful further east, but the government struggled to sell the lands in the arid West. The result of this failed venture is the checkerboard pattern of public and private land that now plagues much of the West.

Hannah Solomon, *Wyoming's Data Trespass Laws Trample First Amendment Rights*, 18 Vt. J. Envtl. L. 346, 353–54 (2016) (footnotes omitted); *see also Leo Sheep Co. v. United States*, 440 U.S. 668, 670-77, 99 S.Ct. 1403, 59 L.Ed.2d 677 (1979) (discussing the circumstances and events resulting in the creation of the checkerboard pattern of land ownership that persists today in parts of the West).

"It is at once apparent that this checkerboard ownership pattern necessarily impedes the ability of government employees and the general public to travel to and from federal land, as frequently the only access routes travers private property." *United States v. 82.46 Acres of Land, More or Less, Situate in Carbon Cnty., Wyo.*, 691 F.2d 474, 475 (10th Cir. 1982). This lawsuit involves the decades-long dispute of whether an individual is subject to civil liability for trespassing if they travel by foot through the

checkerboard from public land to public land at the corners, while never touching private land and not damaging private property, without the permission of the owner(s) of the adjoining private land(s). The Court finds the century-old case of *Mackay v. Uinta Development Co.*, 219 F. 116 (8th Cir. 1914), which also originated in the District of Wyoming, provides the answer and allows such corner crossing by foot without trespass liability.

SUMMARY JUDGMENT STANDARD OF REVIEW

Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is genuine "if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way," and it is material "if under the substantive law it is essential to the proper disposition of the claim." *Becker v. Bateman*, 709 F.3d 1019, 1022 (10th Cir. 2013) (internal quotation marks omitted). Testimony or other evidence "grounded on speculation does not suffice to create a genuine issue of material fact to withstand summary judgment." *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 876 (10th Cir. 2004).

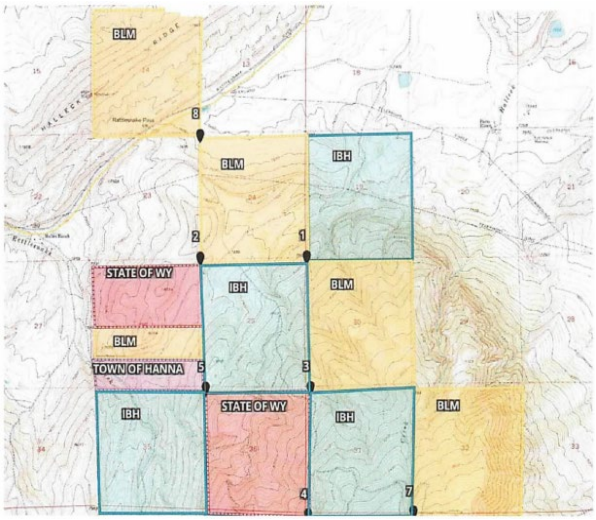
The Court views the record and all reasonable inferences that might be drawn from it in the light most favorable to the party opposing summary judgment. *Dahl v. Charles F. Dahl, M.D., P.C. Defined Ben. Pension Trust*, 744 F.3d 623, 628 (10th Cir. 2014). "Cross-motions for summary judgment are to be treated separately; the denial of one does not require the grant of another." *Buell Cabinet Co. v. Sudduth*, 608 F.2d 431, 433 (10th Cir. 1979)

Generally, the moving party has "both the initial burden of production on a motion for summary judgment and the burden of establishing that summary judgment is appropriate as a matter of law." *Kannady v. City of Kiowa*, 590 F.3d 1161, 1169 (10th Cir. 2010) (quoting *Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976, 979 (10th Cir. 2003)). If the moving party carries this initial burden, the nonmoving party may not rest on its pleadings but must bring forward specific facts showing a genuine dispute for trial. *Id.* (citing *Jenkins v. Wood*, 81 F.3d 988, 990 (10th Cir. 1996)).

FACTS

1. 2020 Hunt and Corner Crossings

In the fall of 2020, Defendants Cape, Smith, and Yeomans traveled from their homes in Missouri to Carbon County to hunt big game on Elk Mountain. (Am. Compl. ¶¶ 2-4, 18; Answer to Am. Compl. ¶¶ 3-5; 19.) They each had a valid hunting license and/or tag to hunt in the area. (ECF 66 p. 10.) They drove on a public road, Rattlesnake Pass Road, to Section 14, which is public land managed by the BLM, where they parked and set up their camp. (Cape Depo. 42:13-15.) Over the next several days, they hunted on several sections of public land in a south-southeastern direction from their camp, specifically on Sections 24, 30, 36, and 26 (*id.* 31:4-12), which are shown on the following map.



This map is an excerpt from Plaintiff's Exhibit 8 (ECF 64-9), but the Court notes Plaintiff also owns Sections 13 and 23, though not denoted on the map. (ECF 64 p. 3; ECF 68 p. 2; ECF 66 p. 4.) Each numbered Section is one square mile (640 acres) of land. (ECF 66-15 p. 7.)

Upon approaching the northwest corner of public Section 24 from public Section 14 (denoted at Pin Drop 8 on the map above), the three hunters were met with two steel posts, each with a "No Trespassing" sign, that were connected together with a chain, a padlock, and some wire. One post was installed in Section 13 (private) and the other in Section 23 (private), and the chain and wire ran through the air over the corner of Sections 13, 24, 23, and 14, as shown here from Defendants' Exhibit E (ECF 66-5).

The survey marker ("brass cap") shown in the photo between the two signs protruding about a foot out of the ground designates the "corner" where Sections 13, 24, 23, and 14 meet. (ECF 66 pp. 3-4.) Other than these chained-together signs, there were no posts, fencing, or buildings within one-quarter of a mile of the corner. (Grende Depo. 43:4-8.)

With their backpacks and hunting gear, Defendants Cape, Smith, and Yeomans could not fit between the signs and under the chain to move from Section 14 to Section 24. (ECF 66 p. 6; *see* Grende Depo. 42:19-23 (agreeing the chain and lock "present a physical obstacle to anyone who is walking from Section 14 to Section 24 across the corner").) So, one by one, each grabbed one of the steel posts and swung around it, planting their feet only on Sections 14 (BLM) and Section 24 (BLM) but passing through the airspace above Section 23 (Plaintiff) and/or Section 13 (Plaintiff). (ECF 64 p. 4; ECF 68 pp. 3-4.) In holding onto the steel posts and swinging around them to cross from Section 14 to Section 24, there is no evidence the Defendants caused any damage to Plaintiff's property. (Grende Depo. 27:3-25.)

They then proceeded with their hunt on the public land. At the other corners they crossed (denoted as Pin Drops 1, 2, and 5 on the above map), there were no further physical barriers such as steel posts and chain, so the hunters simply stepped or jumped over the survey marker/brass cap from public land to public land, again passing momentarily through airspace above Plaintiff's privately-owned land. (*See, e.g.*, ECF 64 p. 8; ECF 68 p. 2; Cape Depo. 58:11-24 (describing stepping over the survey marker from Section 36 (BLM) to Section 26 (BLM)); Yeomans Depo. 39:10-18.) The hunters spent about a week hunting in the area and crossed the corners multiple times using the methods described. (ECF 64 p. 4; ECF 68 p. 2.)

Plaintiff observed Defendants Cape, Smith, and Yeomans during their 2020 hunt and did not approve of Defendants' presence. Plaintiff never consented to Defendants entering its property or airspace in any manner. (ECF 64 p. 8; *see* ECF 68 pp. 3-5.) Prior to 2020, Plaintiff instituted an ongoing practice of having its employees confront or interact with a "suspected trespasser" found on or near Plaintiff's property, even if the person was found while on public land. (Eshelman Depo. 32:12-34:8, 66:17-25.) The suspected trespasser is instructed to leave, but if they resist, Plaintiff will contact local law enforcement, including the Wyoming Game & Fish Department, to seek a criminal trespass citation or other prosecution.

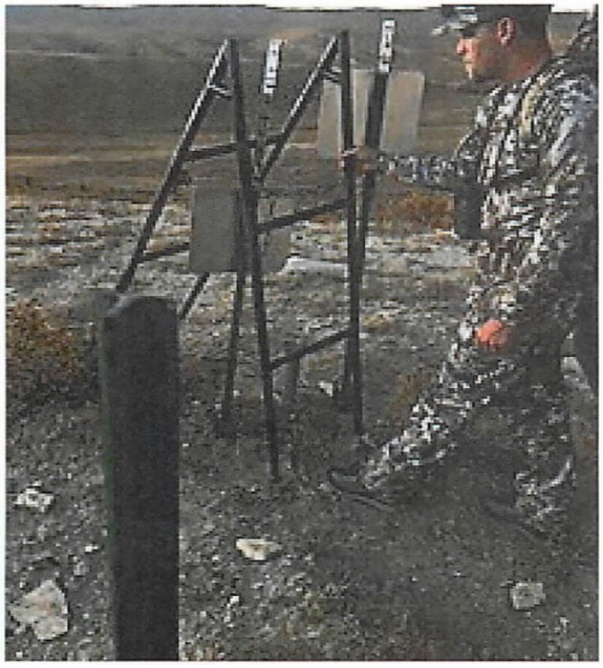
(ECF 66 p. 9.) And if in Plaintiff's view law enforcement takes insufficient action on the matter, Plaintiff will continue to contact law enforcement to push the matter and will also contact the local prosecutor's office to request criminal prosecution. (*Id.* p. 9.) Finally, as here, Plaintiff may also institute a civil action against the suspected trespasser. (*Id.* p. 10.) Probably obvious at this point, Plaintiff considers corner crossing to be an invasion of the airspace above its land that constitutes unlawful trespassing. (Eshelman Depo. 60:20-25, 63:13-23, 78:9-14, 83:25-84:8.)

In 2020, Plaintiff's property manager, Steven Grende, confronted the Defendants when he found them on public land because he determined they could only reach such public land by trespassing, whether by corner crossing through Plaintiff's airspace or otherwise. (ECF 66 p. 10; Grende Depo. 68:9-20; Smith Depo. 25:17-26:17.) When he requested they leave the area, the hunters refused. (Yeomans Depo. 81:18-82:6.) Mr. Grende then contacted law enforcement to complain about the alleged trespassing. (Smith Depo. 56:4-11.) The hunters explained to the responding sheriff's deputy that they had corner crossed from public land to public land without touching private land, and law enforcement did not issue any warning or citation to the hunters in 2020. (Cape Depo. 105:3-23; Smith Depo. 56:1-57:23; Yeomans Depo. 80:14-81:14.) The three hunters successfully completed their hunting trip as planned that year and then returned home.

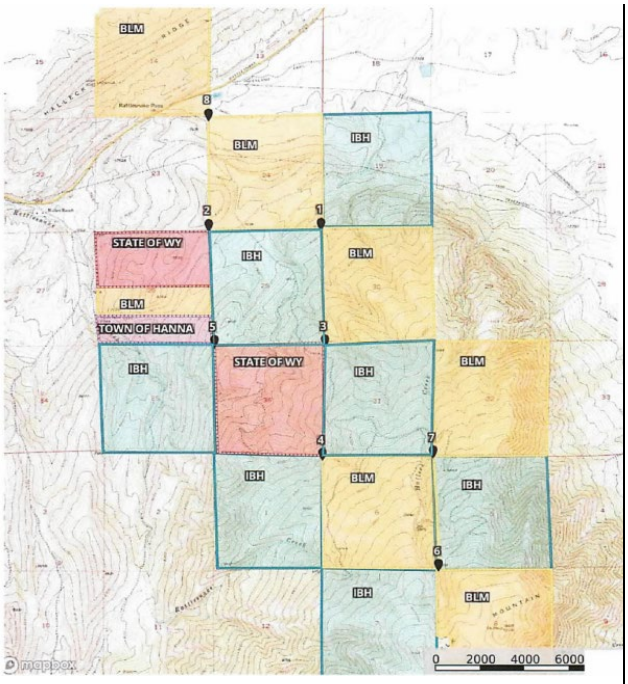
There is no evidence the three hunters physically touched the surface of Plaintiff's land when corner crossing or caused any damage to Plaintiff's private property in 2020. (Grende Depo. 22:12-24:20.)

2. <u>2021 Hunt and Corner Crossings</u>

The three hunters plus Defendant Slowensky returned to the same area in the fall of 2021 to hunt. This time, in an effort to not touch Plaintiff's steel posts when crossing from public Section 14 to public Section 24, they brought a steel A-frame ladder that Defendant Cape had constructed. (ECF 64-10; Cape Depo. 77:2-22; Smith Depo. 34:1-5; Yeomans Depo. 43:20-44:12.) As shown here in a cropped portion of Plaintiff's Ex. 9 (ECF 64-10), the ladder straddled over the lower "No Trespassing" sign, with two feet resting on Section 14 and the other two feet on Section 24. (ECF 66-15 p. 8.)



The now-four hunters crossed the same corners as the previous year plus *a* few more to access additional sections of public lands. Specifically, Defendants hunted on Sections 14, 24, 26, 30, 36, 32, 6, and 8, while crossing the corners denoted by Pin Drops 1-8 on the following map. (*See* ECF 64 pp. 6-7; ECF 68 p. 2.)



This map was adapted from Plaintiff's Exhibit 8 (ECF 64-9) to show the additional Sections of land that were hunted in 2021, and the Court again notes Plaintiff also owns Sections 13 and 23 though such is not denoted on the map. The hunters only used their ladder to cross from Section 14 to Section 24 because the other corners were unobstructed and they could simply step or jump over the survey marker/brass cap from public land to public land. (ECF 64 p. 8; ECF 68 p. 2.)

Defendants' 2021 hunting expedition did not go as smoothly as the prior year's. Plaintiff proved much more aggressive about expelling the hunters from the area and seeking their criminal prosecution for alleged trespassing in 2021. Mr. Grende and another Plaintiff employee confronted the hunters in person multiple times in attempts to get them to leave the public lands bordering Plaintiff's private lands. (Yeomans Depo. 82:7-83:1, 83:18-84:1.) Plaintiff's employees also interfered with Defendants' hunt by constantly watching them from nearby and by driving motorized vehicles on public parcels near Defendants while they hunted in an effort to scare away the game. (ECF 66 p. 12.) When the hunters refused to stop corner crossing and hunting on the public lands, Mr. Grende contacted the Wyoming Game and Fish Department, which said it would not take action against the hunters. (Grende Depo. 68:21-69:5.) Undeterred, he then contacted the local sheriff's office, which initially also refused to take action against the hunters. (*Id.* at 69:6-15.) He then contacted the local prosecuting attorney's office, which said it was willing to prosecute the corner crossings as criminal trespassing. (*Id.* at 69:21-70:5.) The prosecuting attorney's office directed the sheriff's office to write citations for criminal trespass to each Defendant, which were issued. (ECF 66 p. 14; ECF 66-21 p. 8.) In connection, the Wyoming Game and Fish Department also instructed Defendants to leave the area and not enter the subject public lands again. (ECF 66 p. 14.) Consequently, the hunters' 2021 hunting trip was cut short. Following a jury trial several months later, each Defendant was acquitted by the jury of the state criminal trespass charge. (ECF 66-24.)

There is no evidence the hunters made physical contact with Plaintiff's private land or caused any damage to Plaintiff's private property in 2021. (Grende Depo. 21:2-23:2, 28:1-13.)

3. <u>"Waypoint 6" from Defendant Smith</u>

During Defendants' 2020 hunting trip, Defendant Smith used a GPS mapping tool on his cellphone called "onX Hunt," which helps hunters find property lines and determine land ownership. (*See* Decl. Zachary Smith at ¶ 3-8, ECF 72-1 p. 3; Spitzer Depo. 10:19-12:18.) Plaintiff subpoenaed the raw metadata created by Defendant Smith's use of the onX Hunt application and found that Defendant Smith had designated a waypoint, "Waypoint 6," that was located on Plaintiff's private land and not near a corner. (ECF 67-3, 67-4.) Plaintiff contends Waypoint 6 establishes Defendant Smith, and maybe other Defendants, trespassed upon the surface of Plaintiff's private land in 2020. (ECF 67 p. 24.)

The onX Hunt metadata for Waypoint 6

shows it was created on September 30, 2020 (while Defendant Smith was hunting in Wyoming) and was deleted from the application on October 19, 2020. (ECF 67-3 p. 2.) Defendant Smith believes his onX Hunt raw data is accurate but says he does not recall creating Waypoint 6 and, in any event, it does not solely prove his physical presence at the location of the waypoint. (Decl. Zachary Smith at ¶¶ 7-12.) An onX Hunt user can "drop" (create) a waypoint to designate their current location, but they can also drop a waypoint that is nowhere near their current location, including from a different state. (Spitzer Depo. 25:2-12.)

ANALYSIS

The Court will focus its initial discussion on the issue of corner crossing and whether it, as it was performed by Defendants in this case, constitutes an actionable trespass.

1. Subject to Certain Restrictions, a Private Landowner Owns the Airspace Within a Reasonable Height of the Land and Enjoys a Right to Exclude Others from that Airspace

No person can reasonably doubt the fundamental importance of private property rights to the development and continuing validity of the United States. "The Founders recognized that the protection of private property is indispensable to the promotion of individual freedom. As John Adams tersely put it, '[p]roperty must be secured, or liberty cannot exist.' " *Cedar Point Nursery v. Hassid*, ___ U.S. ___, 141 S. Ct. 2063, 2071, 210 L.Ed.2d 369 (2021) (quoting Discourses on Davila, in 6 Works of John Adams 280 (C. Adams ed. 1851)). Indeed, the Fifth Amendment protects an individual's property against encroachment by the federal government and the Fourteenth Amendment protects that same property against encroachment by a state.

While the U.S. Constitution protects a person's property interests, *Jordan-Arapahoe, LLP v. Board of Cnty. Comm'rs of County of Arapahoe, Colo.*, 633 F.3d 1022, 1025 (10th Cir. 2011), the actual property interests themselves "are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits," *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

> We thus must turn to state law in understanding the scope of property rights in land ownership. This is not always a simple task. The modern understanding of the bundle of sticks of land ownership is overlain with myriad competing land use, zoning, and environmental regulations. A landowner faces numerous restrictions on the full use and alienability of land depending on the interplay of local, state, and federal law.

Jordan-Arapahoe, 633 F.3d at 1026; *see Garnett v. Brock*, 2 P.3d 558, 563 (Wyo. 2000) ("In order to be afforded constitutional status, property rights must have been initially recognized and protected by state law."), *overruled on other grounds by Brown v. City of Casper*, 248 P.3d 1136 (Wyo. 2011).

The property rights at issue in this case are two-pronged and intertwined: (1) Plaintiff's ownership of the airspace above its land, and (2) Plaintiff's right to exclude others from that airspace. Looking at the first prong, the Wyoming Statutes have stated since 1931:

> The ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the sur-

face beneath subject to the right of [aircraft] flight[4] ....

Wyo. Stat. § 10-4-302; *see Cheyenne Airport Board v. Rogers*, 707 P.2d 717, 722 (Wyo. 1985). The U.S. Supreme Court similarly stated:

> [I]t is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run. The principle is recognized when the law gives a remedy in case overhanging structures are erected on adjoining land. The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material.

United States v. Causby, 328 U.S. 256, 264, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946) (internal citation and footnote omitted); *see Griggs v. Allegheny County, Pa.*, 369 U.S. 84, 89, 82 S.Ct. 531, 7 L.Ed.2d 585 (1962) ("the use of land presupposes the use of some of the airspace above it").

Turning now to the latter prong, of course an owner of real property has a right to exclude others from their property. The Wyoming Supreme Court has explained, "Ownership of property implies the right of possession and control and includes the right to exclude others; that is, a true owner of land exercises full dominion and control over it and possesses the right to expel trespassers." *Sammons v. Am. Auto. Ass'n*, 912 P.2d 1103, 1105 (Wyo. 1996). The U.S. Supreme Court similarly said, "It is true that one of the essential sticks in the bundle of property rights is the right to exclude others." *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 82, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980).

Applying these ownership principles here, the law makes clear that Plaintiff is the lawful owner of "as much of the space above the ground" of its property as it could reasonably occupy or use in connection with the land. Additionally, Plaintiff has the right to exclude others from that airspace.

Taken together, this would appear dispositive of the matter. This is not the end of the analysis, though. As the Court noted, "A landowner faces numerous restrictions on the full use and alienability of land depending on the interplay of local, state, and federal law." *Jordan-Arapahoe*, 633 F.3d at 1026. The U.S. Supreme Court has recognized landowners take their land subject to certain express legal restrictions, such as zoning ordinances, as well as " 'background principles of nuisance and property law' [that] independently restrict the owner's intended use of the property." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005) (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1026-32, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992)). "And valid preexisting federal-law limitations on what otherwise would be state-law property rights are among the limitations that may inhere in title so as to limit compensable property rights." *McCutchen v. United States*, 14 F.4th 1355, 1365 (Fed. Cir. 2021), *cert. denied*, —— U.S. ——, 143 S. Ct. 422, 214 L.Ed.2d 233 (2022);

[4] The right of aircraft flight is immaterial to this case, which involves incursions into airspace only a few feet off the ground, but the Supreme Court case of *United States v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946), effectively "divided the airspace into two strata. The landowner owned the airspace within the 'immediate reaches' of the surface of his land, but the upper air was navigable airspace, in the public domain." *Pueblo of Sandia ex rel. Chaves v. Smith*, 497 F.2d 1043, 1045–46 (10th Cir. 1974).

see also Interstate Consol. St. Ry. Co. v. Commonwealth of Massachusetts, 207 U.S. 79, 87, 28 S.Ct. 26, 52 L.Ed. 111 (1907) ("the great constitutional provisions for the protection of property are not to be pushed to a logical extreme, but must be taken to permit the infliction of some fractional and relatively small losses without compensation, for some, at least, of the purposes of wholesome legislation").

2. Relevant Restrictions on the Ownership of Airspace and Right to Exclude Within the Checkerboard Pattern of Land Ownership

Thus, the next step of the examination is determining whether there are any relevant restrictions on the Plaintiff's ownership of the subject airspace or its right to exclude others from that airspace. The Court's examination reveals history, federal caselaw, federal statutory law, and recent Wyoming legislation demonstrate corner crossing in the manner done by Defendants in this case is just such a restriction on Plaintiff's property rights because Defendants, "in common with other persons [have] the right to the benefit of the public domain," *Mumford v. Rock Springs Grazing Ass'n*, 261 F. 842, 849 (8th Cir. 1919), which necessarily requires some limitation on the adjoining private landowner's right of exclusion within the checkerboard pattern of land ownership.

First, and most pertinent to the issues here, is the case of *Mackay v. Uinta Development Co.*, 219 F. 116 (8th Cir. 1914), which has many parallels to the instant lawsuit. In *Mackay*, the "Uinta Development Company sued Mackay for damages for trespass by trailing his sheep across and depasturing its lands in Wyoming." *Id.* at 117. Mackay was moving his sheep south across the Wyoming checkerboard to graze on federal lands for the winter. *Id.* at 117-18. Uinta Development Company warned Mackay not to cross its privately-owned lands on the way. *Id.* at 118. Mackay nevertheless started his sheep south, crossing portions of the company's private land as well as parcels of public land as he went, while his sheep grazed upon the land the entire way. *Id.* Mackay "drove his sheep, over the protest and prohibition of the [company], upon and along a strip of land three-fourths of a mile wide upon and across the entire length or width of some of the [company's] sections of land, and caused his sheep to consume nine-tenths of the grass thereon." *Id.* at 120-21 (Sanborn, J., dissenting). At the company's insistence, Mackay was arrested along the way, and the company also sued him for civil trespass. *Id.* After a bench trial, the district court rendered judgment for the company, holding Mackay liable for civil trespass damages. *Id.* at 117.

On appeal, the Eighth Circuit reversed the District of Wyoming's decision. *Id.* at 120. The Eighth Circuit held: "The question here, which we think should be answered in the affirmative, is whether Mackay was entitled to a reasonable way of passage over the unenclosed tract of land without being guilty of trespass." *Id.* at 120. In determining that Mackay should have a reasonable way of passage over the company's private lands to access the public lands, the appellate court said:

> The company admitted [Mackay's] right as to the public domain, but warned him not to go over any of its lands on penalty of prosecution for trespass.... If the position of the company were sustained, a barrier embracing many thousand acres of public lands would be raised, unsurmountable except upon terms prescribed by it. Not even a solitary horseman could pick his way across without trespassing. In such a situation the law fixes the relative rights and responsibilities of the parties. It does not leave them to the determination of either party. As long as the present policy of the government [concerning public lands] continues, all persons as its licensees have an equal right of use to the public domain, which cannot be denied by interlocking lands held in private ownership.
>
> ...
>
> This case illustrates the conflict between the

> rights of private property and the public welfare under exceptional conditions.... This large body of land, with the odd-numbered sections of the company and the even-numbered sections of the public domain located alternately like the squares of a checkerboard, remains open as nature left it. Its appearance is that of a common, and the company is so using the contained public portions. In such use it makes no distinction between them and its own holdings. It has not attempted physically to separate the latter for exclusive private use. It admits that Mackay had the right in common with the public to pass over the public lands. But the right admitted is a theoretical one, without utility, because practically it is denied except on terms it prescribes. Contrary to the prevailing rule of construction, it seeks to cast upon the government and its licensees all the disadvantages of the interlocking arrangement of the odd and even numbered sections because the grant in aid of the railroad took that peculiar form. It could have lawfully fenced its own without obstructing access to the public lands. That would have lessened the value of the entire tract as a great grazing pasture, but it cannot secure for itself that value, which includes as an element the exclusive use of the public lands, by warnings and actions in trespass.

Id. at 118-20.[5]

The many parallels between the circumstances in *Mackay* and those here are obvious. And significant to *Mackay's* decision that a member of the public was "entitled to a reasonable way of passage over the unenclosed tract of land without being guilty of trespass" were the "exceptional conditions" created by the unique checkerboard of land ownership that is at the center of this controversy. However, questions remain concerning whether *Mackay* is still valid law all these years later, and the Court turns to those questions now.

Mackay has never been expressly overruled, but whether it is binding on this Court appears unsettled. *Mackay* was decided by the Eighth Circuit Court of Appeals. In 1929, Congress divided the Eighth Circuit into two circuits. The Eighth Circuit retained Minnesota, Iowa, North Dakota, South Dakota, Nebraska, Missouri, and Arkansas. The new Tenth Circuit took Wyoming, Colorado, Utah, New Mexico, Kansas, and Oklahoma. Thus, at the time of *Mackay*, Wyoming was part of the Eighth Circuit. In the years since its formation, the Tenth Circuit has issued conflicting guidance on the binding nature of prior Eighth Circuit decisions. *Compare Boynton v. Moffat Tunnel Improvement Dist.*, 57 F.2d 772, 781 (10th Cir. 1932) ("decisions cited from the Supreme Court of the United States, from the Eighth Circuit Court of Appeals, and from this court, are binding upon us"), *with Estate of McMorris v. Comm'r*, 243 F.3d 1254, 1258 (10th Cir. 2001) ("we have never held that the decisions of our predecessor circuit are controlling in this court").

Because *Mackay* originated from the District of Wyoming and was decided by the appellate court then sitting over this Court, this Court can find no reasonable basis to believe it is not bound by *Mackay's* decision. Nonetheless, even if *Mackay* is somehow only persuasive authority, the Court finds it particularly persuasive due to the many factual parallels between *Mackay* and the instant case.

Additionally, Plaintiff in this case has argued *Mackay* was implicitly overruled by *Leo Sheep Co. v. United States*, 440 U.S. 668, 99 S.Ct.

[5] Judge Sanborn dissented in *Mackay*, but not concerning whether Mackay had the right to cross the company's private land to gain access to the public lands. Instead, Judge Sanborn opined, "The owner of land is not deprived of his right to recover the damages he sustains by the taking by another of his grass, growing grain, or timber from his land, or the mineral out of it, even if the taker has the right to cross his land[.]" *Mackay*, 219 F. at 121.

1403, 59 L.Ed.2d 677 (1979). The material differences between *Leo Sheep* and *Mackay* suggest such a claim to be exaggerated. In *Leo Sheep*, two companies (Leo Sheep Co. and Palm Livestock Co.) owned the odd-numbered sections in an area of the checkerboard lands in Wyoming that sat east and south of the Seminoe Reservoir. *Id.* at 677-78, 99 S.Ct. 1403. "Because of the checkerboard configuration, it is physically impossible to enter the Seminoe Reservoir sector from this direction without some minimum physical intrusion upon private land." *Id.* at 678, 99 S.Ct. 1403. The federal government intervened after receiving several complaints that the private landowners were denying the public access to the reservoir over the private lands or were demanding access fees. *Id.* Upon the theory that Congress reserved to the federal government an implied easement over the privately-owned checkerboard lands when they were originally conveyed, the federal government built a dirt road extending from a local county road to the reservoir that crossed both public and private lands and invited the public to access the reservoir using the new road. *Id.* The companies moved to quiet tide in the private lands against the federal government. *Id.* The District of Wyoming granted the petition and quieted title in the companies, but the Tenth Circuit reversed on direct appeal, concluding Congress implicitly reserved an easement to pass over the private odd-numbered sections of the checkerboard in order to reach the even-numbered public sections. *Id.* On permissive review, the U.S. Supreme Court reversed the Tenth Circuit. *Id.* at 688, 99 S.Ct. 1403. The Supreme Court found insufficient evidence existed to suggest Congress impliedly reserved an easement by necessity in favor of the government across the private lands. *Id.* at 681-82, 99 S.Ct. 1403.

The Court does not agree that *Leo Sheep* implicitly overruled *Mackay* for two reasons. First, several years after *Leo Sheep* was decided, the Tenth Circuit relied on *Mackay* in part in *U.S. ex rel. Bergen v. Lawrence*, 848 F.2d 1502, 1509 (10th Cir. 1988), and never noted or suggested *Mackay* was overruled or invalid in any manner.

Second, and more significantly, *Leo Sheep* and *Mackay* are too factually and legally different for the Court to conclude *Mackay* cannot coexist in a world with *Leo Sheep.* The primary intruder in *Leo Sheep* was the federal government, whereas in *Mackay* (as in the instant case) it was a private individual. This is a fundamental difference because the federal government holds the power of eminent domain (condemnation), but private individuals do not. Then Justice Rehnquist noted in *Leo Sheep*, "This Court has traditionally recognized the special need for certainty and predictability where land tides are concerned, and we are unwilling to upset settled expectations to accommodate some ill-defined power **to construct public thoroughfares without compensation**." *Id.* at 687-88, 99 S.Ct. 1403 (emphasis added). As this quote demonstrates, significant to the Supreme Court's consideration of the matter in *Leo Sheep* was the federal government's power of eminent domain (condemnation) under the Fifth Amendment, which allows the government to take private property without the owner's consent and convert it to public use (such as a public thoroughfare) in exchange for just and fair compensation.[6] The *Leo Sheep* opinion added: "Generations of land patents have issued without any express reservation of the right now claimed by the Government. Nor has a similar right been asserted before. When the Secretary of the Interior has discussed access rights, his discussion has been colored by the assumption **those rights had to be purchased**." *Id.* at 687, 99 S.Ct. 1403 (emphasis added). Essentially, the Supreme Court determined the federal government's argument for

[6] *See PennEast Pipeline Co., LLC v. New Jersey*, —— U.S. ——, 141 S. Ct. 2244, 2251-52, 2254-57, 210 L.Ed.2d 624 (2021), for a recent discussion of eminent domain.

an implied easement was an attempt to condemn a portion of private property to build a public thoroughfare without having to pay for it. That simply isn't the case or the issue in *Mackay* (or in the instant case).

The eminent domain distinction is substantial because *Leo Sheep* distinguished itself from a prior case that did not involve the federal government based in part on the availability of eminent domain. In *Buford v. Houtz*, 133 U.S. 320, 10 S.Ct. 305, 33 L.Ed. 618 (1890), a group of cattle ranchers owned some odd-numbered lots in the checkerboard pattern within the then-territory of Utah. *Id.* at 321-22, 10 S.Ct. 305. They sought an injunction against a group of sheep ranchers to prevent the sheep ranchers from moving their sheep across the odd-numbered parcels to reach even-numbered public lands for grazing. *Id.* at 322-24, 10 S.Ct. 305. The trial court dismissed the case, determining the cattle ranchers had failed to state a viable claim for equity to support its injunction request, and the supreme court of Utah affirmed the dismissal. *Id.* at 321, 10 S.Ct. 305. The U.S. Supreme Court agreed and also affirmed the dismissal, stating:

> The appellants [cattle ranchers] being stock-raisers, like the defendants [sheep ranchers], whose stock are raised and fattened on the unoccupied lands of the United States mainly, seek by the purchase and ownership of parts of these lands, detached through a large body of the public domain, to exclude the defendants from the use of this public domain as a grazing ground, while they themselves appropriate all of it to their own exclusive use.... If we look at the condition of the ownership of these lands on which the plaintiffs rely for relief, we are still more impressed with the injustice of this attempt.... Of this 921,000 acres of land, the plaintiffs only assert title to 350,000 acres; that is to say, being the owners of one-third of this entire body of land, which ownership attaches to different sections and quarter sections scattered through the whole body of it, they propose by excluding the defendants to obtain a monopoly of the whole tract, while two-thirds of it is public land belonging to the United States, in which the right of all parties to use it for grazing purposes, if any such right exists, is equal. The equity of this proceeding is something which we are not able to perceive.

0 *Id.* at 325-26, 10 S.Ct. 305. The Supreme Court distinguished the *Leo Sheep* decision from *Buford* by stating, "The Court [in *Buford*] also was influenced by the sheep ranchers' lack of any alternative." *Leo Sheep*, 440 U.S. at 687 n.24, 99 S.Ct. 1403. The federal government's power of condemnation, to take private land for public use in exchange for fair payment, is the important alternative that was available in *Leo Sheep* but not available in *Buford* or in *Mackay* (or in this case). In sum, the Court does not find *Leo Sheep* implicitly overruled *Mackay.*

The Court further finds *Leo Sheep* of limited applicability when examining the instant case. First, as already noted, *Leo Sheep* concerned the construction of a public thoroughfare (a dirt road) across portions of private property, whereas the undisputed evidence in this case shows no damage or alteration to Plaintiff's private property. In this case, the primary intrusion of Plaintiff's property takes the form of an incursion into a small portion of the airspace above the land that lasted a matter of seconds, not a permanent construction that altered Plaintiff's land. Second, like in *Mackay*, the power of eminent domain (condemnation) is not an alternative available to Defendants in this case. Thus, *Leo Sheep* is so materially different from the case at bar as to offer practically no persuasive value on the matter. The Court concludes *Mackay* remains valid and finds it is the authority most directly on point to the questions in this case.

In sum, *Mackay* is still valid authority that is at least very persuasive, if not outright binding,

on the instant matter. The many similarities cause the Court to conclude the core principle of *Mackay*, that private individuals possess "a reasonable way of passage over the unenclosed tract of land without being guilty of trespass" within the checkerboard applies to the circumstances of this lawsuit. Admittedly, though, the "way of passage" taken in *Mackay* was significantly more intrusive than the "way of passage" taken in this case, and the scope of the path taken in *Mackay* is not at issue in this case. Instead, the scope of the path taken by Defendants in 2020 and 2021 is at issue in this case, which is where the Court now turns.

3. Determining the Scope of the Relevant Restriction on the Ownership of Airspace and Right to Exclude Within the Checkerboard Pattern of Land Ownership

The Court's conclusion that the main principle of *Mackay* applies here to give Defendants "a reasonable way of passage over the unenclosed tract of land without being guilty of trespass" is both buttressed and limited in scope by two additional considerations. First, the Court finds the Tenth Circuit case of *Pueblo of Sandia ex rel. Chaves v. Smith*, 497 F.2d 1043 (10th Cir. 1974), offers persuasive guidance on the matter. That case concerned aircraft travel rather than pedestrian travel, but the discussion there runs parallel to the issues concerning Defendants' corner crossings in this case. Specifically, the Tenth Circuit there stated an incursion into only airspace requires some accompanying damage to or interference with the actual use of the landowner's property to constitute an actionable trespass. *Id.* at 1045.

> Appellant contends the allegation and proof of actual damages is unnecessary because violation of a landowner's possessory right constitutes a trespass for which at least nominal damages are presumed. This is ordinarily true when trespass to realty is concerned. But traversing the airspace above a plaintiff's land is not, of itself, a trespass. It is lawful unless done under circumstances which cause injury.

1 *Id.* Applying a similar principle to the present case, Defendants' temporary incursions into the airspace at the corners of Plaintiff's land does not constitute trespassing unless actual damages result therefrom, and there is no evidence that Defendants' airspace intrusions caused actual damage to or interfered with Plaintiff's use of its property. Neither does this Court believe Plaintiff can premise damages upon the loss of the right to exclude individuals from public lands, absent the use of an aircraft or human cannon shot, which Plaintiff never held.

Second, recalling that the scope of property rights is largely defined by state law, the Court considers the recently amended version of Wyoming Statute § 23-3-305(b), Senate File No. SF0056, which was passed overwhelmingly by the Wyoming Legislature earlier this year, signed into law by the Governor, and set to take effect July 1, 2023. The new version of that statute, with the recent amendments in bold, provides:

> (b) No person shall enter upon, **travel through or return across** the private property of any person to **take wildlife**, hunt, fish, collect antlers or horns, or trap without the permission of the owner or person in charge of the property. Violation of this subsection constitutes a low misdemeanor punishable as provided in W.S. 23-6-202(a)(v) [up to $1,000 fine and six months of imprisonment]. **For purposes of this subsection "travel through or return across" requires physically touching or driving on the surface of the private property.**

Wyo. Stat. § 23-3-305(b) (bold added) (to become effective July 1, 2023). The plain language of the recent amendments to this statute

applies to corner crossings as they occurred in this case, where Defendants did not touch the surface of Plaintiff's land. Moreover, the statutory changes plainly demonstrate the Wyoming Legislature's intent to ensure such corner crossing does not constitute a criminal act.

4. Corner Crossing on Foot in the Checkerboard Pattern of Land Ownership Without Physically Contacting Private Land and Without Causing Damage to Private Property Does Not Constitute an Unlawful Trespass

In sum, Plaintiff indeed possesses a property interest in the airspace above its land (up to a certain height that is not at issue in this case) and generally holds the right to exclude others from its property, but that right is not boundless. Defendants

> in common with other persons [have] the right to the benefit of the public domain, and the courts will not enforce any rule of property in the [Plaintiff] that will deny to the [Defendants] and those similarly situated a reasonable way of passage over the uninclosed tracts of land of the [Plaintiff].

Mumford, 261 F. at 849; *see Mackay*, 219 F. at 118 ("As long as the present policy of the government continues, all persons as its licensees have an equal right of use of the public domain, which cannot be denied by interlocking lands held in private ownership."). Plaintiff asserts, "Federal courts have recognized that Congress purposely created the checkerboard, and [Plaintiff] is not to blame for the problems arising from the pattern." (ECF 67 p. 25.) Plaintiff is correct that it is not to blame for the problems caused by the checkerboard pattern of land ownership, but "[i]n such a situation the law fixes the relative rights and responsibilities of the parties. It does not leave them to the determination of either party." *Mackay*, 219 F. at 118. Plaintiff may not "cast upon the government and its licensees all the disadvantages of the interlocking arrangement of the odd and even numbered sections because the grant in aid of the railroad took that peculiar form." *Id.* at 119-20.

2 It is only reasonable for the owner of the private sections and the public, as the owner of the alternating sections, to share in the solution. Synthesizing the law surveyed above, the Court finds that where a person corner crosses on foot within the checkerboard from public land to public land without touching the surface of private land and without damaging private property, there is no liability for trespass. In this way, the private landowner is entitled to protect privately-owned land from intrusion to the surface and privately-owned property from damage while the public is entitled its reasonable way of passage to access public land. The private landowner must suffer the temporary incursion into a minimal portion of its airspace while the corner crosser must take pains to avoid touching private land or otherwise disturbing private property. Similar restrictions imposed upon a landowner within the "exceptional conditions" created by the checkerboard, *Mackay*, 219 F. at 120, date back well over a century and are some of those "background principles of nuisance and property law [that] independently restrict the owner's intended use of the property," *Lingle*, 544 U.S. at 538, 125 S.Ct. 2074 (internal quotations omitted).

5. Defendants' Corner Crossings in this Case are Not Unlawful Trespasses

In applying this principle to the undisputed facts of this case, the Court considers first the corner crossings where Defendants did not make physical contact with Plaintiff's land or private property, including those where Defendants needed to only step over a survey marker/brass cap and where they used the A-frame ladder in 2021 to climb over Plaintiff's signs, lock, and chain without touching them. This covers every corner crossing in 2021 as well as all 2020 corner crossings except for the crossings between Section 14 and Section 24.

The undisputed evidence here is that Defendants performed these corner crossings without physically touching Plaintiff's private land and without otherwise damaging Plaintiff's private property. (Grende Depo. 11:14-12:12, 16:16-17:11, 21:2-22:11.) Consequently, a cause of action for civil trespass does not lie against Defendants as it concerns these corner crossings, and they are entitled to summary judgment in their favor as to these corner crossings.

The Court now considers the 2020 corner crossings between Sections 14 and 24, where Defendants Cape, Smith, and Yeomans admitted to holding onto Plaintiff's steel post to swing around the locked chain that connected the two steel posts. The Court again finds guidance in *Mackay.* The Unlawful Inclosures Act of 1885 (UIA), 43 U.S.C. §§ 1061-1066, was a consideration in *Mackay* but was not singularly controlling. *See Mackay*, 219 F. at 120. The Court similarly finds the UIA applicable but not singularly controlling regarding Defendants' 2020 corner crossings between Sections 14 and 24. The UIA states in relevant part:

> No person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct ... any person from peaceably entering upon ... any tract of public land subject to ... entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands[.]

43 U.S.C. § 1063.

It is undisputed that the locked chain that was installed between the steel posts by Plaintiff hung through the airspace over the adjoining public land of Sections 14 and 24. (Grende Depo. 39:5-14.) And the locked chain further presented a physical obstacle and obstruction to anyone attempting to step across the corner from Section 14 to Section 24. (Grende Depo. 42:19-23.) Thus, Plaintiff's lock and chain constituted an improper attempt to "prevent or obstruct ... any person from peaceably entering upon ... any tract of public land" in violation of the UIA.[7] The Eighth Circuit in *Mackay* said about the UIA, "We think, however, that a private litigant cannot recover from another for an invasion of an alleged right founded upon his own violation of the statute." *Mackay*, 219 F. at 120. Plaintiff's violation of the UIA forced Defendants to grab the steel posts, which were anchored on private property, to maneuver around the physical obstacle. Consistent with *Mackay*, Plaintiff may not recover for a trespass, if any, occurring due to Plaintiff's violation of the UIA.

3 Moreover, and apart from the UIA, the undisputed evidence again shows Defendants did not touch the surface of Plaintiff's land or damage its private property in connection with these corner crossings. (Grende Depo. 22:12-24:20, 27:3-28:13) Consequently, a cause of action for civil trespass does not lie against Defendants as it concerns these 2020 corner crossings, and they are entitled to summary judgment in their favor as to these 2020 corner crossings.

As it relates to the various corner crossings performed by Defendants in moving from public land to public land by foot in 2020 and 2021 within the checkerboard pattern of land ownership, they cannot be subject to liability for civil trespass. Defendants are therefore entitled to summary judgment in their favor concerning Plaintiff's cause of action for civil trespass related to all of Defendants' corner crossings.

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[7] In addition to precluding the use of physical barriers, § 1063 of the UIA also makes it unlawful to threaten or intimidate any person from peaceably entering upon any tract of land subject to entry under the public land laws of the United States, or preventing or obstructing free passage or transit over or through the public lands.

6. A Genuine Dispute of Material Fact Exists Concerning Whether "Waypoint 6" Constitutes Unlawful Trespassing

Recall that Waypoint 6 does not appear to involve an act of corner crossing but rather an alleged trespass upon the surface of Plaintiff's private land, Section 19, in an area away from a corner. (*See* ECF 67-4.) Waypoint 6 was created on September 30, 2020, on the onX Hunt application being used by Defendant Smith, and it was deleted (from the app but not from onX Hunt's metadata) about three weeks later. (*See* ECF 67-3 p. 2.) And a waypoint can be created without the user ever being at the designated location.

Many or most of the waypoints created by Defendant Smith indicated his current location or an area where he had been or intended to go. (*See* ECF 67-5.) On the other hand, all Defendants were adamant in their depositions that they never stepped foot on Plaintiff's private land. Defendant Smith also expressly asserted under penalty of perjury that his onX Hunt metadata is accurate, that he must have created Waypoint 6 without realizing it, but he never made physical contact with or traveled to Waypoint 6. (ECF 72-1.) Thus, evidence exists to support Plaintiff's claim of trespass as to Waypoint 6, specifically the conceded accuracy of the onX Hunt data and the other waypoints that depicted many of Defendants Smith, Cape, and Yeomans physical locations. Contrary evidence in the form of Defendants' depositions and declarations exists to counter Plaintiff's claim as to Waypoint 6. Therefore, the Court finds a genuine dispute of material fact exists regarding whether a Defendant trespassed upon Plaintiff's Section 19 in connection with Waypoint 6, and the question should be submitted to a jury for determination. Summary judgment is not appropriate on this issue.

On this claim, though, the undisputed evidence is that Plaintiff does not know of any damage and has not repaired any damage caused by Defendants to its property in 2020. (Grende Depo. 24:11-20, 27:8-12.) Accordingly, only nominal damages in the maximum amount of $100.00 are at issue for Defendants' alleged trespass in 2020 concerning Waypoint 6.[8] *See Goforth v. Fifield*, 352 P.3d 242, 250 (Wyo. 2015) (noting that when no actual damages are shown, Wyoming allows the recovery of nominal damages for an actionable trespass, and the Wyoming Supreme Court interprets nominal damages to max out at $100.00 based on Wyo. Stat. § 1-14-125).

CONCLUSION

The conflict inherent in the checkerboard pattern of landownership, which pits a landowner's right to exclude others from private property against the public's right to access public lands, has been around for well over a century and has visited this Court multiple times over the years. In determining the present lawsuit, the Court primarily relies on the opinion from *Mackay v. Uinta Development Co.*, 219 F. 116 (8th Cir. 1914), which originated in this Court and was issued by the appellate court for this Court. *Mackay* explained that for "exceptional conditions," including the conflict borne of the checkerboard, "the law fixes the relative rights and responsibilities of the parties. It does not leave them to the determination of either party." *Id.* at 118. And the Court's survey of the law revealed that where a person corner crosses on foot in the checkerboard from public land to public land without touching the surface of private land and without otherwise damaging private property, there is no liability for trespass. *See id.* at 120 ("The question here, which we think should be answered in the affirmative, is whether Mackay was entitled to a reasonable way of passage over the unenclosed tract of

[8] Defendant Slowensky was not present for the 2020 hunting trip and therefore cannot be liable for any such trespass.

land without being guilty of trespass."). This determination, though, is necessarily unique to and limited in application to the "peculiar" "interlocking arrangement of odd and even numbered sections," *id.* at 119-20, making up the checkerboard pattern of land ownership created by Congress in the mid-1800s.

4 When this law is applied to the undisputed evidence in this case, no reasonable jury could find Defendants liable for civil trespass for their corner crossing activities. However, the facts and circumstances surrounding Waypoint 6 are in genuine dispute, and this claim of trespass must be submitted to a jury for a decision, albeit limited to nominal damages.

The Court addresses one final matter. While this lawsuit has been pending, and with greater frequency in recent weeks, the Court has received various attempts, whether by email or phone call, from members of the public to offer their opinions as to how this Court should resolve this controversy. These submissions have come from people who are not parties to this case and who, unlike the amici parties, have not been given permission by the Court to tender a submission that can be viewed and responded to by all parties. The Court's staff has screened these improper submissions, and the Court has not reviewed or considered these submissions as part of examining the issues in this case, nor will the Court review or consider them or any other improper ex parte submissions in the future. Attempts by a person or entity not a party to a lawsuit to influence or persuade a court of law's decision are improper. "Whereas the fundamental function of a legislature in a democratic society assumes accessibility to [public] opinion, the judiciary does not decide cases by reference to popular opinion." *Hodge v. Talkin*, 799 F.3d 1145, 1159 (D.C. Cir. 2015) (quotations omitted) (alteration in original). The founders of the United States sought to insulate the Judicial branch of government from public opinion so judges could apply and be influenced only by the law, not by popular opinion or public polling. This Court's sworn obligation is to uphold and apply the law. The Court has done its utmost to decipher the applicable law and apply it to the facts of this and every case. To the extent this Court's determination of the law is believed to be erroneous, the remedy is for a party to take an appeal.

ORDER

In conformity with the findings of fact and conclusions of law determined herein,

IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment (ECF 65) is **GRANTED IN PART AND DENIED IN PART**. Defendants are entitled to judgment as a matter of law as to all claims of trespassing involving Defendants' corner crossings in 2020 and 2021. Defendants' request for summary judgment is denied as to the claim of trespassing involving Waypoint 6 (which does not involve corner crossing) due to the existence of a genuine dispute of material fact, but any recovery by Plaintiff on such claim shall be limited to nominal damages.

IT IS FURTHER ORDERED that Plaintiff's Motion for Partial Summary Judgment (ECF 63) is **DENIED**. Plaintiff is not entitled to judgment as a matter of law concerning Defendants' corner crossings in 2020 and 2021, and a genuine dispute of material fact exists to preclude summary judgment concerning the alleged Waypoint 6 trespassing (which docs not involve corner crossing).

ORDERED: May 26th, 2023.

Fla. Stat. §§ 381.008-381.00897
TITLE XXIX PUBLIC HEALTH
CHAPTER 381 PUBLIC HEALTH; GENERAL PROVISIONS

381.008 Definitions of terms used in ss. 381.008-381.00897.

381.0081 Permit required to operate a migrant labor camp or residential migrant housing; penalties for unlawful establishment or operation; allocation of proceeds.

381.0082 Application for permit to operate migrant labor camp or residential migrant housing.

381.0083 Permit for migrant labor camp or residential migrant housing.

381.0084 Application fees for migrant labor camps and residential migrant housing.

381.0085 Revocation of permit to operate migrant labor camp or residential migrant housing.

381.0086 Rules; variances; penalties.

381.0087 Enforcement; citations.

381.0088 Right of entry.

381.00893 Complaints by aggrieved parties.

381.00895 Prohibited acts; application.

381.00896 Nondiscrimination.

381.00897 Access to migrant labor camps and residential migrant housing.

Fla. Stat. § 381.008. Definitions of terms used in §§ 381.008-381.00897

As used in §§ 381.008-381.00897, the following words and phrases mean:

(1) "Common areas"--That portion of a migrant labor camp or residential migrant housing not included within private living quarters and where migrant labor camp or residential migrant housing residents generally congregate.

(2) "Department"--The Department of Health and its representative county health departments.

(3) "Invited guest"--Any person who is invited by a resident to a migrant labor camp or residential migrant housing to visit that resident.

(4) "Migrant farmworker"--A person who is or has been employed in hand labor operations in planting, cultivating, or harvesting agricultural crops within the last 12 months and who has changed residence for purposes of employment in agriculture within the last 12 months.

(5) "Migrant labor camp"--One or more buildings, structures, barracks, or dormitories, and the land appertaining thereto, constructed, established, operated, or furnished as an incident of employment as living quarters for seasonal or migrant farmworkers whether or not rent is paid or reserved in connection with the use or occupancy of such premises. The term does not include a single-family residence that is occupied by a single family.

(6) "Other authorized visitors"--Any person, other than an invited guest, who is:

(a) A federal, state, or county government official;

(b) A physician or other health care provider whose sole purpose is to provide medical care or medical information;

(c) A representative of a bona fide religious organization who, during the visit, is engaged in the vocation or occupation of a religious professional or worker such as a minister, priest, or nun;

(d) A representative of a nonprofit legal services organization, who must comply with the Code of Professional Conduct of The Florida Bar; or

(e) Any other person who provides services for farmworkers which are funded in whole or in part by local, state, or federal funds but who does not conduct or attempt to conduct solicitations.

(7) "Private living quarters"--A building or portion of a building, dormitory, or barracks, including its bathroom facilities, or a similar type of sleeping and bathroom area, which is a home, residence, or sleeping place for a resident of a migrant labor camp. The term includes residential migrant housing.

(8) "Residential migrant housing"--A building, structure, mobile home, barracks, or dormitory, and any combination thereof on adjacent property which is under the same ownership, management, or control, and the land appertaining thereto, that is rented or reserved for occupancy by five or more seasonal or migrant farmworkers, except:

(a) Housing furnished as an incident of employment.

(b) A single-family residence or mobile home dwelling unit that is occupied only by a single family and that is not under the same ownership, management, or control as other farmworker housing to which it is adjacent or contiguous.

(c) A hotel or motel as described in chapter 509, that is furnished for transient occupancy.

(d) Any housing owned or operated by a public housing authority except for housing which is specifically provided for persons whose principal income is derived from agriculture.

(9) "Personal hygiene facilities"--Adequate facilities for providing hot water at a minimum of 110 degrees Fahrenheit for bathing and dishwashing purposes, and an adequate and convenient approved supply of potable water available at all times in each migrant labor camp and residential migrant housing for drinking, culinary, bathing, dishwashing, and laundry purposes.

(10) "Lighting"--At least one ceiling-type light fixture capable of providing 20 foot-candles of light at a point 30 inches from the floor, and at least one separate double electric wall outlet in each habitable room in a migrant labor camp or residential migrant housing.

(11) "Sewage disposal"--Approved facilities for satisfactory disposal and treatment of human excreta and liquid waste.

(12) "Garbage disposal"--Watertight receptacles of impervious material which are provided with tight-fitting covers suitable to protect the contents from flies, insects, rodents, and other animals.

§ 381.0081. Permit required to operate a migrant labor camp or residential migrant housing; penalties for unlawful establishment or operation; allocation of proceeds

(1) MIGRANT LABOR CAMP; PERMIT REQUIREMENT.--A person who establishes, maintains, or operates a migrant labor camp in this state without first having obtained a permit from the department and who fails to post such permit and keep such permit posted in the camp to which it applies at all times during maintenance or operation of the camp commits a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083.

(2) RESIDENTIAL MIGRANT HOUSING; PERMIT REQUIREMENT.--A person who establishes, maintains, or operates any residential migrant housing in this state without first having obtained a permit from the department commits a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083.

(3) RESIDENTIAL MIGRANT HOUSING; HEALTH AND SANITATION.--A person who establishes, maintains, or operates any residential migrant housing or migrant labor camp in this state without providing adequate personal hygiene facilities, lighting, sewage disposal, and

garbage disposal, and without first having obtained the required permit from the department, commits a felony of the third degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

(4) FINE.--The department may impose a fine of up to $1,000 for each violation of this section. If the owner of land on which a violation of this section occurs is other than the person committing the violation and the owner knew or should have known upon reasonable inquiry that this section was being violated on the land, the fine may be applied against such owner. In determining the amount of the fine to be imposed, the department shall consider any corrective actions taken by the violator and any previous violations.

(5) SEIZURE.--

(a) In addition to other penalties provided by this section, the buildings, personal property, and land used in connection with a felony violation of this section may be seized and forfeited pursuant to the Contraband Forfeiture Act.

(b) After satisfying any liens on the property, the remaining proceeds from the sale of the property seized under this section shall be allocated as follows if the department participated in the inspection or investigation leading to seizure and forfeiture under this section:

1. One-third of the proceeds shall be allocated to the law enforcement agency involved in the seizure, to be used as provided in § 932.7055.

2. One-third of the proceeds shall be allocated to the department, to be used for purposes of enforcing the provisions of this section.

3. One-third of the proceeds shall be deposited in the State Apartment Incentive Loan Fund, to be used for the purpose of providing funds to sponsors who provide housing for farmworkers.

(c) After satisfying any liens on the property, the remaining proceeds from the sale of the property seized under this section shall be allocated equally between the law enforcement agency involved in the seizure and the State Apartment Incentive Loan Fund if the department did not participate in the inspection or investigation leading to seizure and forfeiture.

§ 381.0082. Application for permit to operate migrant labor camp or residential migrant housing

Application for a permit to establish, operate, or maintain a migrant labor camp or residential migrant housing must be made to the department in writing on a form and under rules prescribed by the department. The application must state the location of the existing or proposed migrant labor camp or residential migrant housing; the approximate number of persons to be accommodated; the probable duration of use, and any other information the department requires.

§ 381.0083. Permit for migrant labor camp or residential migrant housing

Any person who is planning to construct, enlarge, remodel, use, or occupy a migrant labor camp or residential migrant housing or convert property for use as a migrant labor camp or residential migrant housing must give written notice to the department of the intent to do so at least 45 days before beginning such construction, enlargement, or renovation. If the department is satisfied, after causing an inspection to be made, that the camp or the residential migrant housing meets the minimum standards of construction, sanitation, equipment, and operation required by rules issued under § 381.0086 and that the applicant has paid the application fees required by § 381.0084, it shall issue in the name of the department the necessary permit in writing on a form to be prescribed by the department. The permit, unless sooner revoked, shall expire on September 30 next after the date of issuance, and

it shall not be transferable. An application for a permit shall be filed with the department 30 days prior to operation. When there is a change in ownership of a currently permitted migrant labor camp or residential migrant housing, the new owner must file an application with the department at least 15 days before the change. In the case of a facility owned or operated by a public housing authority, an annual satisfactory sanitation inspection of the living units by the Farmers Home Administration or the Department of Housing and Urban Development shall substitute for the pre-permitting inspection required by the department.

§ 381.0084. Application fees for migrant labor camps and residential migrant housing

(1) Each migrant labor camp operator or owner of residential migrant housing who is subject to § 381.0081 shall pay to the department the following annual application fees:

(a) Camps or residential migrant housing that have capacity for 5 to 50 occupants: $125.

(b) Camps or residential migrant housing that have capacity for 51 to 100 occupants: $225.

(c) Camps or residential migrant housing that have capacity for 101 or more occupants: $500.

(2) The department shall deposit fees collected under this section in the County Health Department Trust Fund for use in the migrant labor camp program and shall use those fees solely for actual costs incurred in enforcing §§ 381.008-381.00895.

(3) Any existing migrant labor camp or residential migrant housing that is substantially renovated or newly constructed is exempt from the annual application fee described in this section for the next annual permit after the renovations or construction occurred.

(4) Any existing migrant labor camp or residential migrant housing that, during any permit year, has no major deficiencies cited by the department, no uncorrected deficiencies, and no administrative action taken against it is exempt from the annual application fee described in this section for the next annual permit period.

§ 381.0085. Revocation of permit to operate migrant labor camp or residential migrant housing

The department may revoke a permit authorizing the operation of a migrant labor camp or residential migrant housing if it finds the holder has failed to comply with any provision of this law or any rule adopted hereunder. To reinstate a permit for migrant labor camp or residential migrant housing from which a permit has been revoked, the operator shall submit another application with the appropriate fee and satisfy the department that he or she is in compliance with all applicable rules.

§ 381.0086. Rules; variances; penalties

(1) The department shall adopt rules necessary to protect the health and safety of migrant farmworkers and other migrant labor camp or residential migrant housing occupants, including rules governing field sanitation facilities. These rules must include definitions of terms, a process for plan review of the construction of new, expanded, or remodeled camps or residential migrant housing, sites, buildings and structures, and standards for personal hygiene facilities, lighting, sewage disposal, safety, minimum living space per occupant, bedding, food equipment, food storage and preparation, insect and rodent control, garbage, heating equipment, water supply, maintenance and operation of the camp, housing, or roads, and such other matters as the department finds to be appropriate or necessary to protect the life and health of the occupants. Housing operated by a public housing authority is exempt from the provisions of any administrative rule that conflicts with or is more stringent than the federal standards applicable to the housing.

(2) Except when prohibited as specified in subsection (6), an owner or operator may apply for a permanent structural variance from the department's rules by filing a written application and paying a fee set by the department, not to exceed $100. This application must:

(a) Clearly specify the standard from which the variance is desired.

(b) Provide adequate justification that the variance is necessary to obtain a beneficial use of an existing facility and to prevent a practical difficulty or unnecessary hardship.

(c) Clearly set forth the specific alternative measures that the owner or operator has taken to protect the health and safety of occupants and adequately show that the alternative measures have achieved the same result as the standard from which the variance is sought.

(3) Any variance granted by the department must be in writing, must state the standard involved, and must state as conditions of the variance the specific alternative measures taken to protect the health and safety of the occupants. In denying the request, the department must provide written notice under §§ 120.569 and 120.57 of the applicant's right to an administrative hearing to contest the denial within 21 days after the date of receipt of the notice.

(4) A person who violates any provision of §§ 381.008-381.00895 or rules adopted under such sections is subject either to the penalties provided in §§ 381.0012, 381.0025, and 381.0061 or to the penalties provided in § 381.0087.

(5) Notwithstanding any other provision of this chapter, any housing that is furnished as a condition of employment so as to subject it to the requirements of the Occupational Health and Safety Act of 1970, 29 U.S.C. § 655, shall only be inspected under the temporary labor camp standards at 42 C.F.R. § 1910.142.

(6) For the purposes of filing an interstate clearance order with the Department of Economic Opportunity, if the housing is covered by 20 C.F.R. part 654, subpart E, no permanent structural variance referred to in subsection (2) is allowed.

§ 381.0087. Enforcement; citations

(1) Department personnel may issue citations that contain an order of correction or an order to pay a fine, or both, for violations of §§ 381.008-381.00895 or the field sanitation facility rules adopted by the department when a violation of those sections or rules is enforceable by an administrative or civil remedy, or when a violation of those sections or rules is a misdemeanor of the second degree. A citation issued under this section constitutes a notice of proposed agency action. The recipient of a citation for a major deficiency, as defined by rule of the department, will be given a maximum of 48 hours to make satisfactory correction or demonstrate that provisions for correction are satisfactory.

(2) Citations must be in writing and must describe the particular nature of the violation, including specific reference to the provision of statute or rule allegedly violated. Continual or repeat violations of the same requirement will result in the issuance of a citation.

(3) The fines imposed by a citation issued by the department may not exceed $500 for each violation. Each day the violation exists constitutes a separate violation for which a citation may be issued.

(4) The citing official shall inform the recipient, by written notice pursuant to §§ 120.569 and 120.57, of the right to an administrative hearing to contest the citation of the agency within 21 days after the date of receipt of the citation. The citation must contain a conspicuous statement that if the citation recipient fails to pay the fine

within the time allowed, or fails to appear to contest the citation after having requested a hearing, the recipient is deemed to have waived the right to contest the citation and must pay an amount up to the maximum fine or penalty.

(5) The department may reduce or waive the fine imposed by the citation. In determining whether to reduce or waive the fine, the department must give due consideration to such factors as the gravity of the violation, the good faith of the person who has allegedly committed the violation, and the person's history of previous violations, including violations for which enforcement actions were taken under this section or other provisions of state law.

(6) Any person who willfully refuses to sign and accept a citation issued by the department commits a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083.

(7) The department shall deposit all fines collected under §§ 381.008-381.00895 in the County Health Department Trust Fund for use of the migrant labor camp inspection program and shall use such fines to improve migrant labor camp and residential migrant housing as described in § 381.0086.

(8) The provisions of this section are an alternative means of enforcing §§ 381.008-381.00895 and the field sanitation facility rules. This section does not prohibit the department from enforcing those sections or rules by any other means. However, the agency shall elect to use only the procedure for enforcement under this section or another method of civil or administrative enforcement for a single violation.

(9) When the department suspects that a law has been violated, it shall notify the entity that enforces the law.

§ 381.0088. Right of entry

The department or its inspectors may enter and inspect migrant labor camps or residential migrant housing at reasonable hours and investigate such facts, conditions, and practices or matters, as are necessary or appropriate to determine whether any person has violated any provisions of applicable statutes or rules adopted pursuant thereto by the department. The right of entry extends to any premises that the department has reason to believe is being established, maintained, or operated as a migrant labor camp or residential migrant housing without a permit, but such entry may not be made without the permission of the owner, person in charge, or resident thereof, unless an inspection warrant is first obtained from the circuit court authorizing the entry. Any application for a permit made under § 381.0082 constitutes permission for, and complete acquiescence in, any entry or inspection of the premises for which the permit is sought, to verify the information submitted on or in connection with the application; to discover, investigate, and determine the existence of any violation of §§ 381.008-381.00895 or rules adopted thereunder; or to elicit, receive, respond to, and resolve complaints. Any current valid permit constitutes unconditional permission for, and complete acquiescence in, any entry or inspection of the premises by authorized personnel. The department may from time to time publish the reports of such inspections.

§ 381.00893. Complaints by aggrieved parties

Any person who believes that the housing violates any provision of §§ 381.008-381.00895 or rules adopted thereunder may file a complaint with the department. Upon receipt of the complaint, if the department finds there are reasonable grounds to believe that a violation exists and that the nature of the alleged violation could pose a serious and immediate threat to public health, the department shall conduct an inspection as soon as practicable. In all other cases where the department finds there are reasonable grounds to believe that a violation exists, the department shall notify the owner and the operator of the

housing that a complaint has been received and the nature of the complaint. The department shall also advise the owner and the operator that the alleged violation must be remedied within 3 business days. The department shall conduct an inspection as soon as practicable following such 3- day period. The department shall notify the owner or the operator of the housing and the complainant in writing of the results of the inspection and the action taken. Upon request of the complainant, the department shall conduct the inspection so as to protect the confidentiality of the complainant. The department shall adopt rules by January 1, 1994, to implement this section.

§ 381.00895. Prohibited acts; application

(1) An owner or operator of housing subject to the provisions of §§ 381.008-381.00897 may not, for the purpose of retaliating against a resident of that housing, discriminatorily terminate or discriminatorily modify a tenancy by increasing the resident's rent; decreasing services to the resident; bringing or threatening to bring against the resident an action for eviction or possession or another civil action; refusing to renew the resident's tenancy; or intimidating, threatening, restraining, coercing, blacklisting, or discharging the resident. Examples of conduct for which the owner or operator may not retaliate include, but are not limited to, situations in which:

(a) The resident has complained in good faith, orally or in writing, to the owner or operator of the housing, the employer, or any government agency charged with the responsibility of enforcing the provisions of §§ 381.008-381.00897.

(b) The resident has exercised any legal right provided in this chapter with respect to the housing.

(2) A resident who brings an action for or raises a defense of retaliatory conduct must have acted in good faith.

(3) This section does not apply if the owner or operator of housing proves that the eviction or other action is for good cause, including, without limitation, a good faith action for nonpayment of rent, a violation of the resident's rental or employment agreement, a violation of reasonable rules of the owner or operator of the housing or of the employer, or a violation of this chapter or the Florida Residential Landlord and Tenant Act.

§ 381.00896. Nondiscrimination

(1) The Legislature declares that it is the policy of this state that each county and municipality must permit and encourage the development and use of a sufficient number and sufficient types of farmworker housing facilities to meet local needs. The Legislature further finds that discriminatory practices that inhibit the development of farmworker housing are a matter of state concern.

(2) Any owner or developer of farmworker housing which has qualified for a permit to operate, or who would qualify for a permit based upon plans submitted to the department, or the residents or intended residents of such housing may invoke the provisions of this section.

(3) A municipality or county may not enact or administer local land use ordinances to prohibit or discriminate against the development and use of farmworker housing facilities because of the occupation, race, sex, color, religion, national origin, or income of the intended residents.

(4) This section does not prohibit the imposition of local property taxes, water service and garbage collection fees, normal inspection fees, local bond assessments, or other fees, charges, or assessments to which other dwellings of the same type in the same zone are subject.

(5) This section does not prohibit a municipality or county from extending preferential treatment to farmworker housing, including, without limi-

tation, fee reductions or waivers or changes in architectural requirements, site development or property line requirements, or vehicle parking requirements that reduce the development costs of farmworker housing.

§ 381.00897. Access to migrant labor camps and residential migrant housing

(1) RIGHT OF ACCESS OF INVITED GUEST.--A resident of a migrant labor camp or residential migrant housing may decide who may visit him or her in the resident's private living quarters. A person may not prohibit or attempt to prohibit an invited guest access to or egress from the private living quarters of the resident who invited the guest by the erection or maintenance of any physical barrier, by physical force or violence, by threat of force or violence, or by any verbal order or notice given in any manner. Any invited guest must leave the private living quarters upon the reasonable request of a resident residing within the same private living quarters.

(2) RIGHT OF ACCESS OF OTHERS.--Other authorized visitors have a right of access to or egress from the common areas of a migrant labor camp or residential migrant housing as provided in this subsection. A person may not prohibit or attempt to prohibit other visitors access to or egress from the common areas of a migrant labor camp or residential migrant housing by the erection or maintenance of any physical barrier, by physical force or violence, by threat of force or violence, or by any verbal order or notice given in any manner, except as provided in this section. Owners or operators of migrant labor camps or residential migrant housing may adopt reasonable rules regulating hours of access to housing, if such rules permit at least 4 hours of access each day during nonworking hours Monday through Saturday and between the hours of 12 noon and 8 p.m. on Sunday. Any other authorized visitor must leave the private living quarters upon the reasonable request of a person who resides in the same private living quarters.

(3) CIVIL ACTION.--Any person prevented from exercising rights guaranteed by this section may bring an action in the appropriate court of the county in which the alleged infringement occurred; and, upon favorable adjudication, the court shall enjoin the enforcement of any rule, practice, or conduct that operates to deprive the person of such rights.

(4) CIVIL LIABILITY.--Other visitors are licensees, not guests or invitees, for purposes of any premises liability.

(5) OTHER RULES.--The housing owner or operator may require invited guests and other visitors to check in before entry and to present picture identification. Migrant labor camp and residential migrant housing owners or operators may adopt other rules regulating access to a camp only if the rules are reasonably related to the purpose of promoting the safety, welfare, or security of residents, visitors, farmworkers, or the owner's or operator's business.

(6) POSTING REQUIRED.--Rules relating to access are unenforceable unless they have been conspicuously posted in the migrant labor camp or migrant residential housing and a copy has been furnished to the department.

(7) LIMITATIONS.--This section does not create a general right of solicitation in migrant labor camps or residential migrant housing. This section does not prohibit the erection or maintenance of a fence around a migrant labor camp or residential migrant housing if one or more unlocked gates or gateways in the fence are provided; nor does this section prohibit posting the land adjacent to a migrant labor camp or residential migrant housing if access to the camp is clearly marked; nor does this section restrict migrant workers residing within the same living quarters from imposing reasonable restrictions on their fellow residents to accommodate reasonable privacy and other concerns of the residents.

Tapscott v. Lessee of Cobbs, 52 Va. (11 Gratt.) 172 (1854)

This was an action of ejectment in the Circuit court of Buckingham county, brought in February 1846, by the lessee of Elizabeth A. Cobbs [who was an heir of Sarah Lewis] and others against William H. Tapscott. Upon the trial the defendant demurred to the evidence. It appears that Thomas Anderson died in 1800, having made a will, by which he appointed several persons his executor, of whom John Harris, Robert Rives and Nathaniel Anderson qualified as such. By his will his executors were authorized to sell his real estate.

At the time of Thomas Anderson's death the land in controversy had been surveyed for him, and in 1802 a patent was issued therefor to Harris, Rives and N. Anderson as executors. Some time between the years 1820 and 1825, the executors sold the land at public auction, when it was knocked off to Robert Rives; though it appears from a contract between Rives and Sarah Lewis, dated in September 1825, that the land had, prior to that date, been sold by the executors to Mrs. Lewis for three hundred and sixty-seven dollars and fifty cents. This contract was for the sale by Mrs. Lewis to Rives of her dower interest in another tract of land, for which Rives was to pay to the executors of Thomas Anderson the sum of two hundred and seventeen dollars and fifty cents in part of her purchase. In a short time after her purchase she moved upon the land, built upon and improved it, and continued in possession until 1835, when she died. In 1825 the executor Harris was dead, and Nathaniel Anderson died in 1831, leaving Rives surviving him. And it appears that in an account settled by a commissioner in a suit by the devisees and legatees of Thomas Anderson against the executors of Robert Rives, there was an item under date of the 28th of August 1826, charging Rives with the whole amount of the purchase money, in which it is said, "The whole not yet collected, but Robert Rives assumes the liability."

There is no evidence that the heirs of Mrs. Lewis were in possession of the land after her death, except as it may be inferred from the fact that she had been living upon the land from the time of her purchase until her death, and that she died upon it.

The proof was that . . . [Tapscott] took possession of the land about the year 1842, without, so far as appears, any pretense of title. He made an entry with the surveyor of the county in December 1844, with a view to obtain a patent for it.

The court gave a judgment upon the demurrer for the plaintiffs, and Tapscott thereupon applied to this court for a supersedeas, which was allowed.

Daniel, J. It is no doubt true, as a general rule, that the right of a plaintiff in ejectment to recover, rests on the strength of his own title, and is not established by the exhibition of defects in the title of the defendant, and that the defendant may maintain his defense by simply showing that the title is not in the plaintiff, but in some one else. And the rule is usually thus broadly stated by the authorities, without qualification. There are, however, exceptions to the rule as thus announced, as well established as the rule itself. As when the defendant has entered under the title of the plaintiff he cannot set up a title in a third person in contradiction to that under which he entered. Other instances might be cited in which it is equally as well settled that the defendant would be estopped from showing defects in the title of the plaintiff. In such cases, the plaintiff may, and often does recover, not by the exhibition of a title good in itself, but by showing that the relations between himself and the defendant are such that the latter

cannot question it. The relation between the parties stands in the place of title; and though the title of the plaintiff is tainted with vices or defects that would prove fatal to his recovery in a controversy with any other defendant in peaceable possession, it is yet all sufficient in a litigation with one who entered into the possession under it, or otherwise stands so related to it that the law will not allow him to plead its defects in his defense.

Whether the case of an intrusion by a stranger without title, on a peaceable possession, is not one to meet the exigencies of which the courts will recognize a still further qualification or explanation of the rule requiring the plaintiff to recover only on the strength of his own title, is a question which, I believe, has not as yet been decided by this court. And it is somewhat remarkable that there are but few cases to be found in the English reporters in which the precise question has been decided or considered by the courts.

The cases of Read & Morpeth v. Erington, Croke Eliz. 321; Bateman v. Allen, Ibid. 437; and Allen v. Rivington, 2 Saund. R. 111, were each decided on special verdicts, in which the facts with respect to the title were stated. In each case it was shown that the plaintiff was in possession, and that the defendant entered without title or authority; and the court held that it was not necessary to decide upon the title of the plaintiff, and gave judgment for him. In the report of Bateman v. Allen, it is said that Williams Sergeant moved, "that for as much as in all the verdict it is not found that the defendant had the primer possession, nor that he entered in the right or by the command of any who had title, but that he entered on the possession of the plaintiff without title, his entry is not lawful;" and so the court held.

And in Read & Morpeth v. Erington, it was insisted that for a portion of the premises the judgment ought to be for the defendant, in as much as it appeared from the verdict that the title to such portion was outstanding in a third party; but the court said it did not matter, as it was shown that the plaintiff had entered, and the defendant had entered on him.

I have seen no case overruling these decisions. It is true that in Haldane v. Harvey, 4 Burr. R. 2484, the general doctrine is announced that the plaintiff must recover on the strength of his own title; and that the "possession gives the defendant a right against every man who cannot show a good title." But in that case the circumstances under which the defendant entered, and the nature of the claim by which he held, do not appear; and the case, therefore, cannot properly be regarded as declaring more than the general rule.

The same remark will apply to other cases that might be cited, in which the general rule is propounded in terms equally broad and comprehensive.

In 2 T.R. 749, we have nothing more than the syllabus of the case of Crisp v. Barber, in which it is said that a lease of a rectory-house, &c., by a rector, becomes void by 13th Eliz. ch. 20, by his nonresidence for eighty days, and that a stranger may take advantage of it. And that the lessee cannot maintain ejectment against a stranger who enters without any title whatever.

And in Graham v. Peat, 1 East's R. 244, in which, upon a like state of facts, arising under the same statute, the plaintiff brought trespass instead of ejectment, it was held that his possession was sufficient to maintain trespass against a wrong-doer, the chief justice, Lord Kenyon, remarking, that "if ejectment could not have been maintained, it was because that is a fictitious remedy founded upon title."

These two cases as reported may, perhaps, when taken in connection, be fairly regarded as holding that mere possession by the plaintiff will justify the action of trespass against an intruder, but is not sufficient to

maintain ejectment. If so, they are in conflict with the earlier decisions before cited. It is to be observed, however, of the first of these cases, that we have no statement of the grounds on which it was decided; and of the last, that it does not directly present the question whether ejectment could or could not have been maintained. And I do not think it would be just to allow them to outweigh decisions in which the precise question was fairly presented, met and adjudicated: The more especially, as the doctrine of the earlier cases is reasserted by Lord Tenterden in the case of Hughes v. Dyball, 14 Eng. C.L.R. 481. In that case, proof that the plaintiff let the locus in quo to a tenant who held peaceable possession for about a year, was held sufficient evidence of title to maintain ejectment against a party who came in the night and forcibly turned the tenant out of possession. In Archibold's Nisi Prius, vol. 2, p. 395, the case is cited with approbation, and the law stated in accordance with it. In this country the cases are numerous, and to some extent conflicting, yet I think that the larger number will be found to be in accordance with the earlier English decisions. I have found no case in which the question seems to have been more fully examined or maturely considered than in Sowden, &c. v. McMillan's heirs, 4 Dana's R. 456. The views of the learned judge (Marshall) who delivered the opinion in which the whole court concurred, are rested on the authority of several cases in Kentucky, previously decided, on a series of decisions made by the Supreme court of New York, and on the three British cases of Bateman v. Allen, Allen v. Rivington, and Read & Morpeth v. Erington, before mentioned.

> "These three cases (he says) establish unquestionably the right of the plaintiff to recover when it appears that he was in possession, and that the defendant entered upon and ousted his possession, without title or authority to enter; and prove that when the possession of the plaintiff and an entry upon it by the defendant are shown, the right of recovery cannot be resisted by showing that there is or may be an outstanding title in another; but only by showing that the defendant himself either has title or authority to enter under the title."
>
> "It is a natural principle of justice, that he who is in possession has the right to maintain it, and if wrongfully expelled, to regain it by entry on the wrong-doer. When titles are acknowledged as separate and distinct from the possession, this right of maintaining and regaining the possession is, of course, subject to the exception that it cannot be exercised against the real owner, in competition with whose title it wholly fails. But surely it is not accordant with the principles of justice, that he who ousts a previous possession, should be permitted to defend his wrongful possession against the claim of restitution merely by showing that a stranger, and not the previous possessor whom he has ousted, was entitled to the possession. The law protects a peaceable possession against all except him who has the actual right to the possession, and no other can rightfully disturb or intrude upon it. While the peaceable possession continues, it is protected against a claimant in the action of ejectment, by permitting the defendant to show that a third person and not the claimant has the right. But if the claimant, instead of resorting to his action, attempt to gain the possession by entering upon and ousting the existing peaceable possession, he does not thereby acquire a rightful or a peaceable possession. The law does not protect him against the prior possessor. Neither does it indulge any presumption in his favor, nor permit him to gain any advantage by his own wrongful act."

In Adams v. Tiernan, 5 Dana's R. 394, the

same doctrine is held; it being there again announced that a peaceable possession wrongfully divested, ought to be restored, and is sufficient to maintain the action; and that no mere outstanding superior right of entry in a stranger, can be used availably as a shield by the trespasser in such action. It has also been repeatedly reaffirmed in later decisions of the Supreme court of New York; and may therefore be regarded as the well settled law of that state and of Kentucky.

To the same effect are the decisions in New Jersey, Connecticut, Vermont and Ohio. Penton's lessee v. Sinnickson, 4 Halst. R. 149; Law v. Wilson, 2 Root's R. 102; Ellithorp v. Dewing, 1 Chipm. R. 141; Warner v. Page, 4 Verm. R. 294; Ludlow's heirs v. McBride, 3 Ohio R. 240; Newnam's lessee v. The City of Cincinnati, 18 Ohio 323. In the case of Ellithorp v. Dewing, 1 Chipm. R. 141, the rule is thus stated:

> "Actual seizin is sufficient to recover as well as to defend against a stranger to the title. He who is first seized may recover or defend against any one except him who has a paramount title. If disseized by a stranger, he may maintain an action of ejectment against the disseizor, and in like manner the disseizor may maintain an action against all persons except his disseizee, or some one having a paramount title."

In Delaware, North Carolina, South Carolina, Indiana, and perhaps in other states of the Union, the opposite doctrine has been held.

In this state of the law, untrammeled as we are by any decisions of our own courts, I feel free to adopt that rule which seems to me best calculated to attain the ends of justice. The explanation of the law (as usually announced) given by Judge Marshall in the portions of his opinion which I have cited, seems to me to be founded on just and correct reasoning; and I am disposed to follow those decisions which uphold a peaceable possession for the protection as well of a plaintiff as of a defendant in ejectment, rather than those which invite disorderly scrambles for the possession, and clothe a mere trespasser with the means of maintaining his wrong, by showing defects, however slight, in the title of him on whose peaceable possession he has intruded without shadow of authority or title.

The authorities in support of the maintenance of ejectment upon the force of a mere prior possession, however, hold it essential that the prior possession must have been removed by the entry or intrusion of the defendant; and that the entry under which the defendant holds the possession must have been a trespass upon the prior possession. Sowden v. McMillan's heirs, 4 Dana's R. 456. And it is also said that constructive possession is not sufficient to maintain trespass to real property; that actual possession is required, and hence that where the injury is done to an heir or devisee by an abator, before he has entered, he cannot maintain trespass until his reentry. 2 Tucker's Comm. 191. An apparent difficulty, therefore, in the way of a recovery by the plaintiffs, arises from the absence of positive proof of their possession at the time of the defendant's entry. It is to be observed, however, that there is no proof to the contrary. Mrs. Lewis died in possession of the premises, and there is no proof that they were vacant at the time of the defendant's entry. And in Gilbert's Tenures 37, (in note,) it is stated, as the law, that as the heir has the right to the hereditaments descending, the law presumes that he has the possession also. The presumption may indeed, like all other presumptions, be rebutted: but if the possession be not shown to be in another, the law concludes it to be in the heir.

The presumption is but a fair and reasonable one; and does, I think, arise here; and as the only evidence tending to show that the defendant sets up any pretense of right to the

land, is the certificate of the surveyor of Buckingham, of an entry by the defendant, for the same, in his office, in December 1844; and his possession of the land must, according to the evidence, have commenced at least as early as some time in the year 1842; it seems to me that he must be regarded as standing in the attitude of a mere intruder on the possession of the plaintiffs.

Whether we might not in this case presume the whole of the purchase money to be paid, and regard the plaintiffs as having a perfect equitable title to the premises, and in that view as entitled to recover by force of such title; or whether we might not resort to the still further presumption in their favor, of a conveyance of the legal title, are questions which I have not thought it necessary to consider; the view, which I have already taken of the case, being sufficient, in my opinion, to justify us in affirming the judgment.

ALLEN, MONCURE, and SAMUELS, Js., concurred in the opinion of Daniel, J.

LEE, J., dissented.

Judgment affirmed.

Hypotheticals on the Relativity of Title

Hermine and Leah are the daughters of the late Cindy, who owned a home in Coral Gables. Leah had resided with her mother in the home until Cindy's death in June 2024. In 2008, Cindy had written a will leaving the house to Hermine. In 2021, however, Cindy had executed a new will revoking the old one and leaving the house to Leah. Hermine claims that Cindy had been insane since 2017. (The significance of her claim is that a will is not valid if the testator was insane when she signed it; if a will is invalid, the previous valid will governs. That means that if Cindy was not legally competent to execute a will in 2021 on account of insanity, her 2008 will -- which you may assume was valid at the time -- would govern.)

In answering the following questions, look to Tapscott *for guidance, and be prepared to cite specific language from the opinion.*

1. After Cindy dies in June 2024, Cindy's brother Nigel sues to eject Leah, asserting that the 2021 will giving Leah title to the house is invalid because Cindy went insane in 2017. Who should win? Why?

2. Suppose instead that shortly after Cindy's death in June 2024, Leah leaves for two weeks for rest and recuperation in The Faroe Islands. Upon her return, she finds that her uncle Nigel has moved into the home, changed the locks, and refuses to leave. Leah brings suit seeking to eject Nigel and he defends on the ground that Leah lacks title. Who should win? Why? Is *Tapscott* exactly on point? Is it distinguishable? What if Leah had left for a long time, boarded the place up, and sometime after that Nigel moved in?

3. Suppose instead that shortly after Cindy's death in June 2024, Leah leaves for two weeks for rest and recuperation in The Faroe Islands. Upon her return, Hermine has moved into the home and refuses to leave. Leah brings suit seeking to eject Hermine and Hermine defends on the ground that Leah lacks title. Who should win? Why?

4. Suppose that Leah wins the lawsuit mentioned in 3. Then Hermine just throws Leah out. Shortly thereafter, Hermine goes on vacation, and uncle Nigel moves in, changes the locks, and refuses to leave when Hermine returns. Hermine sues to eject Nigel. Who should win? Why? How might Nigel try to distinguish *Tapscott*?

Vacation Leads to Home Makeover by Squatter, AP, Oct. 22, 2004

DOUGLASVILLE, Ga. - A woman came home from vacation to find a stranger living there, wearing her clothes, changing utilities into her name and even ripping out carpet and repainting a room she didn't like, authorities said.

Douglas County authorities say they can't explain why Beverly Valentine, 54, broke into an empty home and started acting like it was her own.

During the 2½ weeks the owner, Beverly Mitchell, was on vacation in Greece, Valentine allegedly redecorated the ranch home, ripping up carpet and taking down the owner's pictures and replacing them with her own.

Mitchell was a complete unknown to Valentine, said Chief Sheriff's Deputy Stan Copeland. He said he had no idea how Valentine knew Mitchell was gone.

"In 28 years, I've never seen something this strange," Copeland said.

Valentine was being held in Douglas County Jail on a $25,000 bond, Copeland said. If convicted, she could face one to 20 years in prison. Copeland said Friday that he believed Valentine did not have a lawyer.

The case came to light when Mitchell, who lived alone, returned home Oct. 4 to find the lights on and a strange car parked in the driveway. Mitchell called police, who went in and found Valentine, who at first pretended she was renting the home.

Later, Copeland said, she admitted she broke into the house with a shovel and was squatting there. She was charged with burglary.

Authorities found a gun and $23,000 worth of Mitchell's jewelry in Valentine's car.

Valentine had the electricity switched over to her name and moved in a washer and dryer and her dog.

Copeland said she was even wearing some of Mitchell's clothes.

"There's a lot of people saying, 'What?'" Copeland said.

Valentine was asked what to do with the washer and dryer she moved in, and Valentine said she didn't care, so police will leave it up to Mitchell what to do with them, Copeland said.

Patrick McGeehan, *Pfizer to Leave City That Won Land-Use Case*, N.Y. Times, 11/13/09

From the edge of the Thames River in New London, Conn., Michael Cristofaro surveyed the empty acres where his parents' neighborhood had stood, before it became the crux of an epic battle over eminent domain.

Susette Kelo's house, a landmark of sorts, was moved from the Fort Trumbull neighborhood that was seized by New London. Ms. Kelo was the losing plaintiff in a 5-to-4 Supreme Court decision.

"Look what they did," Mr. Cristofaro said on Thursday. "They stole our home for economic development. It was all for Pfizer, and now they get up and walk away."

That sentiment has been echoing around New London since Monday, when Pfizer, the giant drug company, announced it would leave the city just eight years after its arrival led to a debate about urban redevelopment that rumbled through the United States Supreme Court, and reset the boundaries for governments to seize private land for commercial use.

Pfizer said it would pull 1,400 jobs out of New London within two years and move most of them a few miles away to a campus it owns in Groton, Conn., as a cost-cutting measure. It would leave behind the city's biggest office complex and an adjacent swath of barren land that was cleared of dozens of homes to make room for a hotel, stores and condominiums that were never built.

The announcement stirred up resentment and bitterness among some local residents. They see Pfizer as a corporate carpetbagger that took public money, in the form of big tax breaks, and now wants to run.

"I'm not surprised that they're gone," said Susette Kelo, who moved to Groton from New London after the city took her home near Pfizer's property. "They didn't get what they wanted: their development, their big plan."

Ms. Kelo lived in a small pink house in the Fort Trumbull section that was square in the sights of city and state officials who wanted to revitalize the area. The city had created the New London Development Corporation to buy up the nine-acre neighborhood and find a developer to replace it with an "urban village" that would draw shoppers and tourists to the area.

Economic development officials in Connecticut used that plan — and a package of financial incentives — to lure Pfizer to build a headquarters for its research division on 26 acres nearby. With an agreement that it would pay just one-fifth of its property taxes for the first 10 years, Pfizer spent $294 million on a 750,000-square-foot complex that opened in 2001.

By then, Ms. Kelo, the Cristofaros and several neighbors had sued the city to stop it from using its power of eminent domain to take their

property. The lawsuit, Kelo v. New London, wound up at the Supreme Court in 2005 as one of the most scrutinized property-rights cases in years.

In a 5-to-4 decision, the high court ruled that it was permissible to take private property and turn it over to developers as part of a plan to bolster the local economy. Conservative justices, including Clarence Thomas, dissented. Justice Thomas called New London's plan "a costly urban-renewal project whose stated purpose is a vague promise of new jobs and increased tax revenue, but which is also suspiciously agreeable to the Pfizer Corporation."

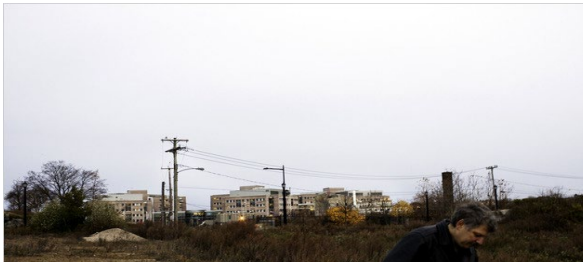
The decision was widely criticized, and spurred lawmakers across the country to adopt statutes to prevent similar uses of eminent domain. Scott G. Bullock, senior attorney at the Institute for Justice, a libertarian group in Arlington, Va., said that 43 states had moved to protect private-property rights since the Kelo decision. New York and New Jersey are among the seven that have not, he said.

Mr. Bullock, who represented the landowners in New London, said Pfizer's announcement "really shows the folly of these plans that use massive corporate welfare and abuse eminent domain for private development."

"They oftentimes fail to live up to expectations," he added.

For its part, Pfizer said it had no stake in the outcome of the Kelo case nor any interest in the development of the land that was acquired by eminent domain, according to a statement provided by a spokeswoman, Liz Power.

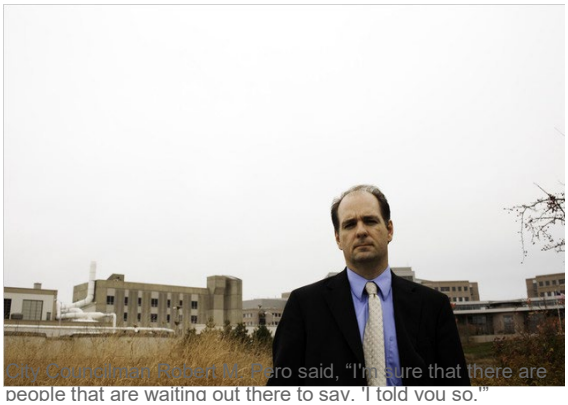
After Pfizer completed its $67 billion acquisition of Wyeth, another drug giant, in October,



Michael Cristofaro in the field in New London, Conn., where his parents lived. The city seized the land for a private "urban village" that was never built. Pfizer's complex is in the background.

Ms. Power said, "We had a lot of real estate that we had to make strategic decisions about." She said Pfizer would try to sell or lease its buildings in New London and would "continue to pay our taxes to the city as scheduled."

The complex is currently assessed at $220 million, said Robert M. Pero, a city councilman



City Councilman Robert M. Pero said, "I'm sure that there are people that are waiting out there to say, 'I told you so.'"

who is scheduled to become mayor next month. The company pays tax on 20 percent of that value and the state pays an additional 40 percent, Mr. Pero said. That arrangement is scheduled to end in 2011, around the time Pfizer, which is currently the city's biggest taxpayer, expects to complete its withdrawal.

"Basically, our economy lost a thousand jobs, but we still have a building," Mr. Pero said. Then again, he added, "I don't know who's going to be looking for a building like that in this economy."

Some residents said they expected Pfizer to seek a revaluation of its buildings if they wind up vacant in two years; Ms. Power declined to comment.

Mr. Pero said that he was offended that Pfizer did not notify city officials about the decision before Monday or give them a chance to argue against it or even fully understand it. But he said he did not regret the decisions he and other elected officials had made to bring Pfizer to New London for what they had hoped would be a long and fruitful stay.

"I'm sure that there are people that are waiting out there to say, 'I told you so,' " Mr. Pero said. "I don't know that even today you can say, 'I told you so.' "

But Mr. Cristofaro and Ms. Kelo both said just that.

Ms. Kelo, a nurse who works in New London and Norwich, Conn., said she was still bitter about the loss of her house, which she sold for $1 to Avner Gregory, a preservationist. Mr. Gregory dismantled the house and moved it across town. It now stands as a bright-pink symbol of the divisive dispute that drew so much attention to New London.

"In all honesty, I'm not happy about what happened to me," Ms. Kelo said. But, she added, "With 43 states changing their laws, in that sense I feel we did some good for people across the country."

Steven Slosberg, Fort Trumbull Eminent Domain Plaintiff Hopes Recipients of Cards Will 'Rot in Hell,' THE DAY (Connecticut), Dec. 20, 2006

New London — Fort Trumbull diehard Susette Kelo has sent out a heartfelt holiday greeting card to some 30 or so current and former members of the City Council and New London Devel- opment Corp., among others, wishing them, in essence, hell on Earth for the rest of their lives.

The text, accompanying a sparkling, snowy image of Kelo's iconic pink house in the Fort Trum- bull neighborhood, reads, in its entirety:

Here's my house that you did take
From me to you, this spell I make.

Your houses, your homes,
Your family, your friends
May they live in misery
That never ends.

I curse you all,
May you rot in hell
To each of you
I send this spell.

For the rest of your lives,
I wish you ill
I send this now
By the power of will

Yours Truly,
Susette Kelo

The cards — conceived and produced by Kathleen Mitchell, a friend of Kelo and city gadfly, and bearing Kelo's name — were received Tuesday by NLDC members David Goebel (the agency's former executive director), George Milne and Reid Burdick, and by Alan Mayer and his wife, Gail Schwenker-Mayer, supporters of the Fort Trumbull development project and one-time assis- tants to Claire Gaudiani, former president of both the NLDC and Connecticut College. State Sen. Andrea Stillman, D-Waterford, also got one.

Kelo said this week that she mailed two cards to Gaudiani.

Kelo confirmed others on her list for the Christmas curse, including Mayor Peg Curtin and Beth Sabilia, Ernie Hewitt, Ron Nossek, Jane Glover, Kevin Cavanaugh, Rob Pero, Tim West, all cur- rent or former city councilors involved with Fort Trumbull. NLDC President Michael Joplin and members John Johnson, Carl Stoner, Steve Percy, Karl Sternlof, John Brooks and Pam Akins also are to receive the cards.

Kelo said she was considering sending the cards to the five U.S. Supreme Court justices who, in2005, sided, as a majority, with the city and NLDC against the Fort Trumbull homeowners who fought the city's right to take the properties by eminent domain.

Kelo, among six Fort Trumbull property owners who contested the city's and agency's right to seize their homes and businesses, was the lead plaintiff in the case. She ultimately accepted a set- tlement offer from the city totaling $442,155 for her house at 8 East St., more than $319,000 above the appraised value in 2000.

"It's amazing anyone could be so vindictive when they've made so much money," said Schwen- ker-Mayer on Tuesday, after receiving her card.

Milne, a former top executive at Pfizer Inc. here, called the card "immensely childish."

"It's sort of sad she elected to do this," said Milne. "We were trying to do things for the city. It was nothing personal."

Burdick said he put the card on his mantel with all his other Christmas greetings. "I think the poor woman has gone around the bend," he said. "I haven't gotten any mail

from her in years. I still feel bad for Susette. The sorry part of this is that the things she's angry about were not done to be mean-spirited toward her personally."

To Glover, a former mayor, the card's rendering of the Kelo house was cute. But the curse didn't cut it. "Being a Christian, I don't believe in curses," she said. "It was really childish. I didn't think Susette Kelo believed in curses and black magic. If she did, she would have tried it on the Supreme Court."

Goebel, the former NLDC executive director, said, "Children will be children." But Goebel was the only recipient, thus far, to suggest that the card might not be from Kelo.

"You shouldn't take the signature at the bottom as that of the one who sent it," Goebel said. "It's not something Susette would have done, in my view. It's unfortunate children have to do this."

He did not speculate on who else might have been behind the mailing.

Kelo said the card was her idea. "I'm very upset with what these people did to me," said Kelo, who works for the City of New London as a nurse dealing with lead paint and lead poisoning cases.

"This all could have been solved and ended many years ago," she said. "They didn't have to do what they did to us, and I will never forget. These people can think what they want of me. I will never, ever forget what they did."

Nadege Green, *FDOT will bulldoze lifelong Overtown resident's home for highway*, Miami Herald, May 2, 2014

At times, the two-story white house with bright blue shutters and columns that seem to reach for the sky was mistaken for a church in Miami's Overtown neighborhood.

But for 80-year-old Benjamin Brown, the property that had been in his family since 1917 always meant just one thing: home.

Now it's empty, bought up by the Florida Department of Transportation to make room for an expansion of the highway that, for years, has rumbled with traffic a few feet from his backyard. One day soon, the shell of the house will crumble under the assault of heavy machinery, and the hard-earned legacy of Brown's Bahamian immigrant mother will be erased forever.

"She would often say to us growing up, I'm going to leave this property to you, to the family," Brown said. "And it's the family's responsibility to keep the property."

Inside the house, faded outlines remain on the turquoise walls where vintage family photos and awards once hung. The navy blue carpeted living room where four generations gathered after hearty Sunday dinners is silent. The narrow backyard, previously the domain of the family's four "crazy" dogs, is barren and still.

The state paid Brown and his wife $300,000 to move by April 28. He isn't alone: FDOT bought or is acquiring 85 other properties nearby to make way for wider lanes on Interstate 395, which leads to the Adrienne Arsht Center for the Performing Arts, Pérez Art Museum Miami and downtown.

And though Brown purchased a four-bedroom home in Liberty City, it isn't what he wanted.

"Why should I move? I've been here all my life. Why should I move? I'm happy here," he said. "Everything I have is here, so, why should I move?"

The move didn't seem real until Monday, his final day in the house. Stacks of carefully labeled cardboard boxes dominated each room. The walls were stripped bare. Only the grandfather clock that chimed every hour looked untouched, ready to be hand-carried out the door. Watching the movers, Brown, a usually unflappable retired elementary school teacher, placed his hand over his mouth in disbelief and mourning.

This is where he was born. This front yard is where he played marbles on the front steps and hide-and-go-switch — a rowdy version of hide-and-go-seek. And this is where he and his wife, Linda, raised five children and later hosted sleepovers for grandchildren.

"I didn't want to leave," Brown said, peering through his square-framed glasses as he took a last look around .

It's a story that Overtown knows too well, the displacement of families for highways. It happened before, nearly 50 years ago, on a larger scale. In the 1960s, construction of Interstate 95 and its connector, I-395, displaced thousands of residents, leaving a once-thriving community blighted.

Today's Overtown continues to struggle in the shadows of elevated expressways that loom overhead. But the overhaul of I-395 is being billed by state and local officials as one that will be beneficial to the neighborhood, a do-over to right the wrongs that fractured a community almost five decades earlier.

"You can leave it the way it is and the wrong will be there forever," Miami Commissioner Marc Sarnoff said. "Or we can do what government can do ... taking a fractured community and making it whole again."

Construction isn't set to begin until 2018. When it does, acres of Overtown land that now languish under the existing I-395 would be

freed for parks or development instead of remaining dark and littered spaces where the homeless often camp. And the Overtown neighborhood, cut off from the burgeoning downtown district, would be better connected to the urban street grid.

FDOT spokesman Brian Rick said in an email that the new roadway will be higher than it is now, "allowing light to penetrate underneath. The higher structure allows us to reconnect Northwest Second Avenue and improve local street connectivity in Overtown."

Two designs are being considered to add architectural detail to the sleek elevated "signature bridge," one a lotus shape, the other a wishbone-inspired structure. The estimated cost for the 1.2-mile project is $600 million.

Of the 86 properties FDOT says it needs for the work, the majority are vacant lots. Officials say they weigh numerous options before settling on a plan with the least amount of impact on a community.

But with any major highway projects in an urban area, there are human costs.

Sarnoff, who said he wasn't aware of residents being displaced, said the toll is inevitable.

"A few make sacrifices for the greater good, but are they compensated, yes," he said. "You are also doing your social part in being part of the greater good."

On his last day in his house, Brown packed a few remaining items forgotten under a bed frame: two pairs of brown shoes, dusty black boots, an electronic neck massager and blue garden gloves.

He taped the box shut and walked into his living room, where he could see the FDOT-paid movers hauling his life's belongings onto a truck.

The ceiling-high bookshelf once overloaded with family photos was cleared, the black-and-white portrait of his mother and father dispatched to the truck along with a childhood photo of Brown and most of his 15 siblings and more than a dozen framed shots of his smiling children and grandchildren.

His treasured clock, purchased in 1974 in a downtown shop, chimed once more shortly before movers gently lifted it onto their truck.

Brown's face creased into a frown. His granddaughter, Letricia Brown, who had stopped by to check on him, asked several times, "Are you OK?"

He couldn't put up much of a front. "This is terrible," he said.

Brown lived through the previous highway construction projects that sliced through the heart of his neighborhood and took with them a thriving commercial and arts district known as "Little Broadway." Roughly half of the 40,000 people who called the area home were displaced.

Families relocated to areas like Liberty City and Richmond Heights. Many of the area's businesses closed. Acclaimed theaters where Lena Horne, Sam Cooke and Aretha Franklin headlined shut down, most never to open again.

Brown remembers the bulldozers lining up along Northwest Sixth Avenue to tear down his friends' homes in the '60s. The neighborhood kids nicknamed the bulldozers "big chief" for the picture of an Indian that was plastered on the side.

"We used to make fun, 'You don't want big chief coming to your house,' " Brown said.

Brown's home survived "big chief" that time. The state only took a portion of his backyard as right of way for I-395.

"My mother was living at the time; she didn't want them to take any of her backyard. But there was nothing she could do about it, so they took part of the backyard," he said.

Critics of the project say Overtown, like other inner city communities, historically ends up on the losing end of highway projects.

"I understand there has to be economic development, but the black community had to give up its heart. The pain fell in Overtown before and it continues to fall in Overtown," said Marvin Dunn, historian and author of *Black Miami in the Twentieth Century*.

Dunn said he is skeptical that the elevated bridge will have any significant positive effect on the community. The decades of damage from the previous highway projects can't easily be erased, he said.

"Overtown will never be what it used to be," he said. "The dream of the Overtown of the 1920s and '30s — that dream is gone. It's just a slow death of a very important community."

Renters are also being displaced in this latest round. Among the properties seized by FDOT is a multi-unit apartment on Northwest 13th Street and First Place where Edythe Murphy, 57, has lived for seven years. She said she was drawn to Overtown's history and the small-town feel of a community where her neighbors always said good morning.

"We don't own the property, [but] none of us wanted to go. We were forced to," she said.

Murphy said FDOT representatives were kind and provided financial incentives to herself and other tenants; she wouldn't specify the amount.

"I know people talk bad about Overtown, but I stayed there for seven years and I liked where I was staying," she said. "I would have liked to stay."

Another multi-unit building — that one right next door to Brown's house at Northwest 14 Terrace and Third Avenue — was pancaked by a demolition crew in April.

Brown watched the demolition crew hack through one side of the building, leaving half the structure and a flight of stairs intact. He saw the remainder of the building succumb to the machinery's blows knowing that this was the plan for his place.

In the last days before he had to move out, Brown said he could hardly sleep. At night, he replayed scenes from his childhood. He wondered whether he could fight eminent domain, a law that says his property would serve a greater public benefit if it belonged to the state. Just as sleep would come, he would try to imagine living somewhere else.

But he couldn't. "I would imagine when I get in my car, instead of going to the new house I'm driving here, coming here — because I've done it so many times."

Edwin Rios, Could the US Highways that Split Communities on Racial Lines Finally Fall?, The Guardian, July 29, 2022

Amy Stelly can see the on-ramp for the Claiborne Expressway from the second-floor porch of her childhood home, a block and a half away from the highway. She lives in Treme, a historic Black neighborhood in New Orleans. For decades, the highway has devastated her neighborhood. Stelly is an urban designer and co-founder of the Claiborne Avenue Alliance, which is advocating for its removal.

"Claiborne has not been maintained at all," she says of the highway on the brink of disrepair. "Not only do we have the dire economics, we have the actual physical atrocity. It's dirty. It's loud. It's polluted."

So, when the US transportation department recently announced a $1bn five-year pilot program to aid communities racially segregated by US government-sponsored highway projects, Stelly responded with a mix of optimism and tempered expectations. Joe Biden singled out the Claiborne Expressway when the program, known as Reconnecting Communities, was first announced.

Experts and advocates question whether the initial investment is enough to reverse the devastation in Black neighborhoods in the name of connection. The amount unveiled by the transportation department is a far cry from the original $20bn proposed. But advocates agree that it's an unprecedented and welcome step in pursuit of highway reparations.

"It's the beginning, not the end, of the process," Stelly told the Guardian.

Under the department's program, announced in late June, cities, states, non-profits, tribal governments and city planning organizations can seek grants to conduct traffic studies, encourage public input on highway plans and pursue other planning activities "in advance of a project to remove, retrofit, or mitigate an existing eligible facility to restore community connectivity". Communities can apply for $195m in grants in the first year, $50m for planning studies, the remainder for capital construction.

"[W]e can't ignore the basic truth that some of the planners and politicians behind those projects built them directly through the heart of vibrant, populated, communities – sometimes in an effort to reinforce segregation," the transportation secretary, Pete Buttigieg, said during a speech announcing the program in Birmingham, Alabama. "While the burden is often greatest for communities of color, Americans today of every background are paying the price of these choices."

The wreckage wrought by America's highways began after the second world war, when President Franklin D Roosevelt approved the construction of 40,000 miles of interstate highways. By the time President Dwight Eisenhower took office, in 1953, just over 6,000 miles had been built. That accelerated after Eisenhower signed the Federal Aid Highway Act of 1956, which authorized $25bn to construct a "modern, interstate highway system".

Deborah Archer, co-faculty director of New York University's Center on Race, Inequality, and the Law, says that the federal program "destroyed vibrant Black communities" and "cut the heart and soul out of many Black communities by taking their homes, churches and schools".

Back then, the US government provided little assistance to displaced communities, forcing people farther away from economic opportunity and toward already segregated and financially disenfranchised communities. "Our highway system was a physical realization of the racialized norms and values in our country. So much of that was really intentional," says Archer, who wrote a paper on the historical damage highways have done to Black communities.

By the time the Claiborne Expressway opened in 1968, more than 500 houses had been

cleared, according to the Congress for the New Urbanism, which supports "people-centered places". The oak trees that lined Claiborne Avenue were replaced with concrete.

"It's only right that the federal government seeks to correct the mistake that it made decades ago. So I applaud them for doing it. But we have to follow through," Stelly says. "The key is to continue funding the efforts once this $1bn is exhausted, because we all know that it's not going to get us to the final goal."

The Freeway Fighters Network, a coalition supported by the Congress for the New Urbanism (CNU), estimated that more than 70 projects are under way to remove or revamp highways and prevent expansions throughout the US. The group started in 2019 when activists lobbied lawmakers in Washington to support infrastructure legislation. It has since grown to an informal network that meets regularly on Zoom to discuss their projects and share strategies.

Ben Crowther, who led CNU's advocacy for the reconnecting communities program, says it will take years of sustained funding to see how these highway removal campaigns play out. He says the funding is "not going to solve the inequities or the problems that we've created with the highway system in one fell swoop". Transportation department officials have estimated that the money could only support from three to 15 projects involving demolition and construction.

What's unique about the new federal program, says Crowther, now advocacy manager of AmericaWalks, is that it gives non-profit organizations the chance to pursue funding to study what highway removal means for the surrounding community, which state transportation officials typically don't consider. He said it often takes public pressure to inspire change, like what happened during "freeway revolts" in the 1960s and 1970s when communities blocked proposed highway projects.

It's ultimately up to state lawmakers and governors to approve project funding, a prospect that often leads to even further delays, leading state transportation agencies to pursue this new pot of funding.

In St Paul, Minnesota, the group ReConnect Rondo has advocated for turning a stretch of Interstate 94, which cuts through the historically Black neighborhood of Rondo, into a 21-acre land bridge over the freeway.

Keith Baker, the group's executive director, described the Rondo neighborhood, where his family often visited, as "a small town". But like freeways across the country, Interstate 94, built between 1956 and 1968, "tore out the social, economic, environmental and cultural fabric of the community", he says. More than 300 businesses closed and more than 700 houses were demolished, according to the group. Baker estimates that those houses represented at least $157m in lost wealth. "That equity never got realized for people who own those homes," he says. "Before the freeway came through, Rondo was the enterprise district of the African American community. The freeway ultimately destroyed them."

Baker says his group plans to pursue grant funding to conduct a study on what their proposal would mean for the surrounding areas. The land bridge, he says, can bring houses and businesses back to the neighborhood, cultivating a green gathering space for the surrounding neighborhoods. A feasibility study released in June 2020 shows that the effort, which could cost an estimated $458m, could attract 1,800 jobs.

Deborah Archer, who also serves as president of the American Civil Liberties Union, cautions that the transportation department funds, though unprecedented in scope and intent, would not fully rectify the damage in Black communities caused by the loss of wealth. Future removal projects need to ensure that anti-displacement protections are in place to guard families living by highways and ensure they are not replaced in the name of economic investment.

"The conditions that the highways created have been built over decades," Archer says. "It's not going to be easy to weave back communities that were torn apart by these highways. The funding recognizes that rebuilding is not just about the absence of these physical dividers. It's even more about creating the conditions for a community to flourish."

For Stelly, the funding would give the Claiborne Coalition the opportunity to conduct an updated study to see how a highway removal project would affect the surrounding community. It offers a chance to gather community input on what the future could hold, to examine ways to ensure people are not displaced by future highway projects and to forecast the economic impact of removing the highway.

Stelly reflected on what the community her family has called home for decades lost: the convenience stores, the small family businesses, the neighbors. A funeral home is one of the few businesses that survived the aftermath of the highway's construction.

"When my family bought this property almost 70 years ago, this neighborhood was very different. It was beautiful. It was tree-lined. It had a host of professional services and had places to buy fresh food. It was clean," Stelly says. "I would like to receive reparations for what my family has lost because when they made this initial investment, they didn't do it thinking that it was going to be derailed."

Jess Bidgood, *Memorializing 100 Who Perished in Nightclub Blaze*, N.Y. Times, 9/30/12

WEST WARWICK, R.I. — There is a striking, if scrappy, shrine here, where dozens of homemade crosses rise behind a corroded parking lot, set back from a thin state highway ridged with strip malls and myriad power lines.

This is where the Station nightclub used to stand — the site of a fire in 2003 that killed 100 people. For nearly 10 years, this stretch of grass has been a reliquary for these mementos. But the landowners retained ownership, preventing a formally constructed memorial from taking shape here, and leaving it up to families to mark and maintain this space on their own.

"My family's been pretty much mowing and raking and keeping it up, trying to make it look good," said Shawn Corbett, a plasterer whose brother Edward died in the fire. He and his parents have come here over the years to tend to the property. "It's been frustrating trying to actually get the land and get the memorial built," he said.

That is about to change. On Friday, the Station Fire Memorial Foundation announced that the owner, Raymond Villanova, had donated the land to the group — which is run mostly by survivors of the blaze — opening a new chapter after nearly 10 years of waiting. "It means the world," Mr. Corbett said quietly.

"This is the last place where they had fun," said Paula McLaughlin, whose younger brother, Michael Hoogasian, and his wife, Sandy, died on that February night. "People who have lost children need a place to go."

The Hoogasians and more than 400 others had come to the 4,400-square-foot club to see the band Great White perform on the night of Feb. 20, 2003. Shortly after 11 o'clock, the band's tour manager lit a pyrotechnic display, which ignited foam insulation near the back of the stage. The fire engulfed the building in just six minutes, sending a crush of people to the front entrance. Many of the 100 died from smoke inhalation, while more than 200 others were injured — trampled and burned. Among the dead was the band's guitarist, Ty Longley.

A permanent memorial will be built at the Station nightclub fire site in West Warwick, R.I.

The event, one of the worst American nightclub fires in memory, left a deep impression on this city, a working-class community of about 30,000, and it rippled across this tiny state.

"Everyone was affected, in one way or another," said Linda Fischer, 43, whose face and hands are scarred by burns from that night.

Over the years, some victims' family members and others have expressed frustration that more legal action was not taken. The band's tour manager, Daniel Biechele, served less than two years in prison after pleading guilty to 100 counts of involuntary manslaughter.

The owners of the Station, the brothers Jeffery and Michael Derderian, pleaded no contest to the same charges; Michael Derderian served 27 months in prison, and his brother was sentenced to community service and probation. The fire marshal who failed to notice the flammable foam insulation during an inspection, Denis Larocque, was shielded by state law.

"The people who were in the club were the disenfranchised, on the whole," said Dave Kane, whose 18-year-old son, Nicholas O'Neill, was killed in the fire. "It's about a whole disregard for an entire section of our society who isn't connected."

Mr. Kane has been an outspoken critic of the proceedings in the aftermath of the fire, dismayed over the inability to give victims' families control of the land so a permanent memorial could be built.

As an informal memorial took shape at the site, with families carving out space on the grass for tiny altars for their loved ones, the process stretched out, stymied by legal issues and perhaps also by divisions among the grieving relatives.

"We thought we were doing something good in the beginning, and then we realized people had their own agendas and we were divided," said Claire Bruyere, whose daughter, Bonnie Hamelin, 27, died in the fire. "It just got ugly, and we were in so much pain."

Meanwhile, the land just sat accumulating weeds and homemade tributes.

"It's overgrown and yucky and moldy," said Ms. McLaughlin, who lost her brother and sister-in-law. "I still can't get over the bush that just grew there," she added, indicating the vegetation that had sprung up near their crosses.

Ms. Bruyere said, "Just looking at everything is sad."

Mr. Villanova, the owner of the land, has rarely spoken publicly about his decision to hold on to the plot. But about two weeks ago, things began to change.

As workers prepared to break ground for a different memorial for the fire victims, in neighboring Warwick — where 10 of those who died in the fire had lived — Gov. Lincoln Chafee and Gordon D. Fox, the speaker of the Rhode Island House, told the news media that they would look into whether they could use eminent domain to seize the land. That seemed promising to some survivors and family members, like Mr. Kane, who hoped it might spur the Villanova family to reconsider.

Others, however, thought that would be too aggressive. Gina Russo, the president of the Station Fire Memorial Foundation and a survivor whose fiancé died in the fire, called a local radio station to explain that. It turned out that Mr. Villanova was listening.

"I couldn't do that to this man," Ms. Russo said in an interview. "He didn't do anything wrong." Like many survivors and victim's relatives, she was simply grateful that the land had not been fenced off or sold. "We, the board, wanted to welcome the Villanova family, we wanted to have them embrace us and trust us and do the right thing by the land," she said.

Mr. Villanova requested a meeting with Ms. Russo and some of the other foundation members. Last week, he signed the land over to the foundation.

"The deed is officially ours, and it's in my hand," Ms. Russo said Friday, standing at the site of the fire. "It will be, for me, the final phase of this tragedy, of making something beautiful out of something so ugly."

In the next few weeks, foundation members expect to meet with designers and begin raising money for the project. Their goal is $5 million, so they can establish a trust fund for the memorial's maintenance.

And the group hopes to enshrine the relics of the last 10 years at the new memorial, burying them in a time capsule, said Victoria Eagan, another survivor of the fire. "Even the 9 ½-year-old moldy teddy bears have a place," she said. "They meant something to someone when they left it here."

Missouri couple's $680,000 Florida beach house is built on the wrong lot, FoxNews.com, October 15, 2014

A dream beach house in Florida has turned into a nightmare for a Missouri couple.

Six months after the custom house was built along the Atlantic Ocean near Palm Coast, Mark and Brenda Voss learned it's on the wrong lot in the gated Ocean Hammock community.

Mark Voss tells the Daytona Beach News Journal they're in "total disbelief." The couple own 18 other residential lots in the community. They bought the lot in 2012 and hired Keystone Homes to build a three-story, 5,000-square-foot vacation rental for $680,000.

The Missouri family bought the lot in 2012 and hired Keystone Homes to build a three-story, 5,000-square-foot vacation rental for $680,000. (The Daytona Beach News-Journal)

"We may have moved (to Ocean Hammock) someday. But, with this headache and grief, we're not so sure. The Midwest is looking pretty good right now," he told the paper.

Keystone vice president Robbie Richmond says the company is trying to negotiate a settlement.

"The buck stops with the builder. We know that. We are in the process of trying to schedule a conference call and find a fair resolution without the lawyers," Richmond told the paper.

The couple hired a lawyer.

Keystone and Voss say the error can be traced to a 2013 survey. The mistake was uncovered in September after the house had been rented frequently.

The house comes with five bedrooms, a game room and a screened-in pool, the report said.

The Associated Press contributed to this report.

California woman left stunned after a $500K Hawaii house is mistakenly built on a dream plot of land she'd bought to launch new business - and now the developers are suing HER, DailyMail.com, March 28, 2024

A woman who purchased a plot of land to set-up a dream business was shocked to discover a $500,000 house was mistakenly built on her lot.

Annaleine 'Anne' Reynolds purchased a one-acre lot in Hawaii's Paradise Park for around $22,500 in 2018.

Reynolds described the land she purchased as 'sacred' and said that she chose to buy it because that specific property had 'all the right qualities.'

Reynolds fell in love with the vacant space and was excited to transform it into the oasis for her business of hosting women's meditative healing resorts.

While she was spending time in California during the pandemic, waiting for the right moment to launch her business venture, Reynolds got a shocking phone call from a real estate broker.

The broker told Reynolds that he had sold a half-a-million dollar house that was mistakenly built on her plot of land.

A local developer, Keaau Development Partnership, bought the land and hired PJ's Construction to build about a dozen homes on the site - but the company built one on Reynolds's lot.

Reynolds, along with the construction company, the architect and others, are now being sued by the developer.

'There's a lot of fingers being pointed between the developer and the contractor and some subs,' Reynolds' attorney James DiPasquale said.

Reynolds described the land she purchased as 'sacred' and said that she chose to buy it because that specific property had 'all the right qualities.'

She rejected the developer's offer for a neighboring lot of equal size and value, according to court documents.

Now Reynolds's attorney says she shouldn't be forced to pay.

'It would set a dangerous precedent, if you could go on to someone else's land, build anything you want, and then sue that individual for the value of it,' DiPasquale said.

Most of the lots in the Hawaiian Paradise Park are identical, Peter Olson, an attorney representing the developer claimed.

'My client believes she's trying to exploit PJ Construction's mistake in order to get money

The empty house has attracted squatters, according to neighbors who said the brand new vacant home is the perfect target for squatters.

from my client and the other parties,' Olson, acknowledging an error, told The Associated Press Wednesday of her rejecting an offer for an identical lot.

She has filed a counterclaim against the developer, saying she was unaware of the 'unauthorized construction.'

An attorney for PJ's Construction told Hawaii News Now the developer didn't want to hire surveyors.

The empty house has attracted squatters, according to neighbors who said the brand new vacant home is the perfect target for squatters.

'Before they put the fence on the property there were people coming, looking inside,' a neighbor said.

Reynolds, who repeatedly described the situation as 'awful,' said there has even been feces found inside the house. 'It was so disgusting,' she told Fox19.

Reynolds has had to pay for fencing to surround the empty new house, but that isn't the only expense she is covering. She is also paying several thousand dollars in property taxes.

The developer has pulled everyone involved into the lawsuit so that a judge can decide who is ultimately responsible for the drastic mistake.

She rejected the developer's offer for a neighboring lot of equal size and value, according to court documents.

Children's Magical Garden, Inc. v. Norfolk Street Development, LLC, 164 A.D.3d 73, 82 N.Y.S. 3d 354 (2018)

TOM, J. This appeal involves what must be an extremely rare occurrence in Manhattan, to wit, a claim of adverse possession of prime real estate located in the Lower East Side neighborhood of Manhattan. Specifically, we are presented with a dispute over a vacant corner lot located at 157 Norfolk Street at its intersection with Stanton Street, one block south of East Houston Street in lower Manhattan. Plaintiff Children's Magical Garden (the Garden), a not-for-profit corporation incorporated in 2012, is a community garden founded by its members in 1985 on Lots 16, 18, and 19 in Block 154. The Garden was founded by activists outraged by the accumulation of garbage and used needles on the lots located across the street from an elementary school.

Defendants Norfolk Street Development, LLC, S & H Equities (N.Y.), Inc., and Serge Hoyda are alleged to have been the record owners of Lot 19 during the prescriptive period. Defendant 157, LLC is alleged to have purchased the property from Norfolk Street Development on or about January 6, 2014.

The central issue presented by this appeal is whether plaintiff stated a claim for adverse possession of Lot 19 by sufficiently pleading the continuous possession element. We find that the complaint sufficiently pleaded a cause of action for adverse possession.

The complaint alleges that more than 30 years ago, in 1985, the Garden was founded by community activists who sought to improve their neighborhood. Because crime plagued the neighborhood at that time, and used needles and piles of garbage littered the abandoned corner lot in question—across the street from elementary school P.S. 20—these neighborhood activists decided to build what plaintiff describes is now a "neighborhood icon." Plaintiff also states that defendants and their predecessors abandoned Lot 19 as a "shameful eyesore" and that plaintiff and its members took possession and "by their tremendous efforts transformed the Premises into a vibrant community garden where generations of children have thrived."

Among other things, Garden members, starting in 1985, cleared garbage and debris, pulled weeds, and erected a chain-link fence to enclose the premises. They planted fruit, vegetables, plants, bushes and trees, including an apple tree and a dogwood tree, built a seesaw and other playground equipment, and added a stage used for concerts and to display art. Over the years, neighborhood children have used the stage to put on performances. At some point, members also built a fish pond and pathways throughout the Garden.

Plaintiff also alleged that the Garden has never been open to the general public, and that the premises can only be accessed by first unlocking the gate with a special key secured only by members. Members keep the gates locked at night and any other time the Garden is not in use under the supervision of a member.

In addition, over many years the Garden hosted various schools, afterschool and camp programs for science, math, culinary arts, and community service activities. Each year, the Garden hosted local youth for the planting of a "pizza garden" and in the fall held a pizza-making party on the premises where children enjoyed the harvest of vegetables.

Plaintiff maintains that throughout all these years the Garden's members protected the Garden's claim of right, including against defendants. As an example, plaintiff alleges that in August 1999, defendants Hoyda, Norfolk, and S & H Equities or their agents cut through the Garden's exterior fence and entered the premises. They claim that a tree planted more than a

decade earlier was chopped down and a children's clubhouse was damaged. A makeshift interior fence was also erected. However, Garden members immediately tore down the fence and removed it. Members also repaired the other damage.

According to plaintiff, in May 2013, a group of men with power tools and construction equipment accompanied by private security guards arrived at the Garden, and signaled their intention to breach the exterior fence. A standoff took place with Garden members blocking the gate. Ultimately, police officers ordered the group of men to be given access to the premises. Plaintiff alleged the men were defendants or their agents and that among them was an attorney purporting to represent defendant Hoyda.

The men "trampled, destroyed, and dug up plants, shrubs, trees" and erected a metal fence inside the Garden purporting to barricade Lot 19 from the remainder of the other two lots. Defendants also employed a private security firm to guard the premises.

Plaintiff states that despite requests from various public officials to remove the fence, the fence still cuts across the premises rendering certain vegetable beds, trees and a meditation area inaccessible.

In July 2013, the other lots that make up the Garden—16 and 18—were preserved under New York City's GreenThumb program after Manhattan Community Board 3 passed a resolution declaring that it "very strongly favors a proposal to the extent possible to preserve the whole community garden." Under that program, the New York City Department of Parks and Recreation enters into licensing agreements with community groups which create and maintain gardens on city-owned vacant property.

According to the record evidence, on or about December 15, 1998, defendant Serge Hodya, through 28 Properties, Inc. (28 Properties), entered into a contract of sale to purchase 157 Norfolk Street, Lot 19, from 88 Holding Corp. In the contract, 88 Holding warranted that it would deliver Lot 19 "vacant and free of any occupancy and any claim of right of occupancy." In or about November 1999, 28 Properties brought an action against 88 Holding for specific performance and a declaration that it must satisfy the vacancy condition of the contract. 28 Properties' complaint alleged that "a portion of the Premises, has been, and remains, *occupied by third parties claiming a right to use and occupy a portion of the Premises* (emphasis added)."

In an affidavit filed in that action, after 88 Holding took no "action to remove the unlawful occupants," defendant Serge Hodya admitted that 88 Holding "claimed that such occupancy was illegal and unauthorized." Despite the foregoing, Hodya "waive[d] the condition in the contract that the premises be delivered vacant. Accordingly, by order entered May 30, 2003, the court granted 28 Properties' motion for summary judgment.

On or about August 27, 2003, defendant Norfolk Street Development LLC (Norfolk, d/b/a 28 Properties), in which Hodya is a member, and an affiliate of defendant S & H Equities (N.Y.), Inc., became the record owner of Lot 19. By deed, dated January 9, 2014, Norfolk conveyed Lot 19 to defendant 157, LLC, allegedly for $3,350,000 and other consideration.

Plaintiff commenced this action in 2014, alleging that defendants had filed an application to construct a six-story, 70–foot–tall residential building on Lot 19. The complaint asserts six causes of action, including one for declaratory judgment that plaintiff is the sole and exclusive legal and equitable owner of Lot 19, via adverse possession. With regard to that cause of action, plaintiff alleged that the Garden was surrounded by a fence and has been cultivated and improved and accessed by a locked gate since 1985. Plaintiff also alleged that it had

possessed Lot 19 continuously under a claim of right for not less than 10 consecutive years, and had possessed it in a hostile, actual, open and obvious manner which was exclusive and continuous for that time period.

Defendants each moved to dismiss the complaint for failure to state a cause of action, claiming that since the Garden did not exist until December 2012, it could not have occupied the property for the requisite period. They also asserted that the complaint fails to allege any occupancy by plaintiff was done under a claim of right.

In opposition, Kate Temple–West, the president and director of the Garden, stated that when she moved to 153 Norfolk Street in 1997, she observed that the Garden, which was enclosed by a fence, had various trees and bushes planted in it and structures that were regularly maintained. Temple–West also observed children playing in the Garden, which was managed by members, who controlled access with a key and supervised visitors. Temple–West became involved with the Garden soon after moving to the neighborhood and has since helped others to excavate and demolish the burned-down remains of a building that once stood on Lot 19, using shovels, pick-axes, and wheelbarrows. Beginning in or about 2000, Temple–West hired trucks to haul away rubble and debris from the Garden and has since hired dumpsters and/or trucks approximately once per year for maintenance.

Since Temple–West's arrival in 1997, she and other members have installed chicken wire on the perimeter chain-link fence to keep rats and garbage out. They have laid down soil and compost, planted various types of trees and shrubs, constructed brick paths that run through the garden, built a swing set, and observed and/or overseen the installation of a second seesaw, concrete art sculptures, a traditional medicine plant bed, a youth meditation area, and a rain garden. In 2003, Temple–West became the Garden's co-director. She later became the director. In December 2012, the Garden incorporated and took title to Lot 19. Temple–West became the Garden's president and director. David Currence and Eve Berkson are the two other board members.

Temple–West noted the Garden's role in the community since her arrival, including hosting various student groups, the Cub Scouts, pizza-making parties, concerts, poetry readings, and movie nights, and noted recent events, including the installation of a chicken coop in 2012. As of the time of submission of Temple–West's opposition to defendants' motion to dismiss, the Garden had over 20 active adult members and 30 children who used the Garden each week, and events hosted at the Garden are attended by hundreds of community members.

In his affidavit, Barden Prisant explained he was a member of the Garden from about 1985 until 1991, during which time he, Carmen Rubio, and Alfredo Feliciano cultivated, improved, and maintained the Garden. In 1985, the Garden was filled with piles of garbage, discarded metal, and other debris. Prisant, Rubio, Feliciano, and others cleaned up the Garden, planted trees and bushes, and oversaw the installation of structures, including a seesaw, pond, and wooden stage. Prisant remained a member of the Garden until 1991, when he moved away. During his time as a member, Prisant, who contributed financially to the Garden, observed that no one was permitted access unless either he, Feliciano, or Rubio had opened the gates and was present, and that the Garden was enclosed by a chain-link fence, which was accessible by gates at Stanton and Norfolk Streets.

During Prisant's involvement with the Garden, members put on various programs, including a May Day festival at which a Maypole was erected in the Garden. At Christmas time each year, children would decorate a pine tree which he and Feliciano had planted. The wooden stage was used for painting and acting classes

as well as for musical performances.

Prisant averred that since 1985 the Garden has been enclosed by a chain-link fence. After Prisant moved in 1991, he converted his wife's studio apartment at 151 Norfolk Street into his office and passed the Garden daily, on his way to and from work. For approximately eight years thereafter, on a daily basis he observed that the Garden, which had a steady growth of trees and plantings, remained enclosed by a chain-link fence, with gates that were kept locked unless the Garden was under supervised use. He also observed during that time period that Rubio, Feliciano and others he understood to be members continued the care and maintenance of the Garden.

Supreme Court denied the motions to dismiss. In so doing, the court found that no allegations in the complaint and no documentary evidence showed that plaintiff overtly acknowledged defendants' ownership of the property or defeated plaintiff's assertion that it occupied the property under a claim of right. Thus, the court found that for pleading purposes the complaint adequately asserted a claim of right. The court also rejected defendants' contention "that the plaintiff's occupancy was not continuous for the statutory period," finding that plaintiff's recent date of incorporation was inconsequential and that plaintiff adequately pleaded an unbroken chain of privity between the members of the Garden for the statutory period. We now affirm.

On a motion to dismiss pursuant to CPLR 3211, we afford the "pleading ... a liberal construction," accept the facts as alleged in the complaint as true, "accord plaintiffs the benefit of every possible favorable inference," and thus "determine only whether the facts as alleged fit within any cognizable legal theory".

In order to establish a claim of adverse possession, a plaintiff must prove that the possession was: (1) hostile and under a claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous throughout the 10–year statutory period. In addition, where, as here, the claim of right is not founded upon a written instrument, the party asserting title by adverse possession must establish that the land was "usually cultivated or improved" or that the land "has been protected by a substantial enclosure." The only elements in dispute here are the "claim of right" and "continuous" elements.

Defendants argue that plaintiff failed to plead sufficient facts evidencing continuous possession by its predecessor members for the statutory period, through an unbroken chain of privity, by tacking periods between anonymous possessors who are not alleged to have intended to transfer title to the incorporating members. This argument is based on the fact that plaintiff was incorporated in 2012 and defendants' contention that there is no allegation that plaintiff had the necessary privity with Garden members prior to incorporation. This argument fails, particularly at the pleading stage of this litigation.

It is well settled that an unincorporated association may adversely possess property and later incorporate and take title to it because "[a]lthough the unincorporated society could not acquire title by adverse possession, its officers could for its benefit, and when the corporation is duly organized *the prior possession may be tacked to its own to establish its title under the statute of limitations.*"

In *Reformed Church of Gallupville,* the Court of Appeals recognized that a formerly unincorporated society "composed of the same individuals or persons claiming in succession under the same title and in the same right" for 25 years, "who managed its affairs and actually controlled and possessed its property ... "could at any time have taken a grant for the benefit of the society, and could acquire title by adverse possession for the benefit of the society."

Here, the complaint sufficiently alleges possession by the Garden members for nearly 30 years before the Garden was incorporated. As

set forth above, the allegations include significant work by the members to clean the abandoned lot and transform it into a treasured community resource containing a fish pond, playground equipment, trees, plants, and a stage, all of which has been fenced-off with access restricted by members. Such allegations, if proven, would establish adverse possession by the members for the statutory period.

Further, to the extent that the complaint alleges and the record evidence shows that there has been a succession of different individual Garden members, "[a]ll that is necessary in order to make an adverse possession effectual for the statutory period by successive persons is that such possession be continued by an unbroken chain of privity between the adverse possessors."

Since it is alleged that the Garden members had adversely possessed the lot for the statutory period long before the Garden was incorporated, the question of tacking is not at issue here (*compare Keena v. Hudmor Corp.* (issue of fact presented as to whether predecessors entered parcel under a claim of right, whether they intended to convey the parcel to plaintiffs, and thus whether plaintiffs could tack prior owners possession onto their ownership to meet the statutory period)). Indeed, based on the allegations in the complaint, the members possessed the lot for more than 10 years and could transfer their interest in the lot to the corporation in 2012.

Defendant 157 LLC contends that the complaint does not satisfy the standards set forth in *Reformed Church of Gallupville* since the complaint refers only to "anonymous 'Members' " and "fails to allege that any Members have continuously been a Member of the Unincorporated Garden and [CMGI] for the entire 30 year period." However, 157 LLC places too high a burden on plaintiff at the pleading stage. While *Reformed Church of Gallupville* does note that the society in question was "composed of the same individuals or persons claiming in succession under the same title, and in the same right," the complaint here, as supplemented by affidavits, satisfies that standard.

In particular, Prisant stated that he was a member of the Garden from 1985 to 1991 during which time he, Carmen Rubio, and Alfredo Feliciano cultivated, improved, and maintained the Garden. However, he also explained that from 1991 to 1999 he worked near and passed by the Garden daily and observed Rubio and Feliciano and other members continue to maintain and possess the Garden, and that it remained enclosed by a fence and locked gates. In addition, Temple–West also stated that from 1997 to 2013 she and other members continued to possess the Garden and keep it enclosed by the fence and locked gates. These statements, along with the complaint, adequately allege continuous possession of Lot 19 for more than the statutory period by the same individuals and members of the Garden.

157 LLC's reliance on cases involving transients seeking to adversely possess separate units in residential apartment buildings is unavailing. For example, in *East 13th St. Homesteaders' Coalition v. Lower E. Side Coalition Hous. Dev.,* (1996), we denied a coalition of homesteaders who sought adverse possession of an apartment building a preliminary injunction (a different standard of review), finding that there was no evidence of privity between successive occupants of the apartments, or evidence of any intended transfers, with some apartments having remained vacant for extended periods, "such that the vacating occupant and the new occupant apparently had no contact at all." Unlike *East 13th St.,* here, the allegations are that the same individual members of the Garden worked together, enclosed the property by a chain-link fence, limited access by locked gates, and improved the property.

In stark contrast to the allegations in this case, in *Rainbow Coop v. City of New York City* (2009), relied on by defendants, also involving

a claim of adverse possession over an apartment building, the trial court rejected the plaintiff association's claim, as it was supported only by the testimony of one tenant who could not speak for the other tenants' occupancy of their individual apartments.

Nor are defendants aided by referencing the 1999 effort allegedly by the Hodya defendants to retake possession of the premises. The allegations in the complaint are that the statutory period had been met by 1995, and, in any event, the 1999 intrusion did not cause any disruption in the Garden's exclusive possession, as the members took swift action to repair the damage caused by the unidentified intruders. We also reject 157 LLC's contention that the post–2008 version of RPAPL 501, which requires the adverse possessor to have a "reasonable basis for the belief that the property belongs to the adverse possessor," has any bearing on this matter since there are no adverse possession claims alleged to have ripened after 2008.

Defendants also argue that plaintiff has not sufficiently pleaded the mandatory element of a claim of right under *Walling v. Przybylo*. Specifically, defendants maintain that plaintiff must plead an initial claim in the land rooted in expectations that have an "objective basis in fact." This claim is without merit.

The "hostile and under a claim of right" element under *Walling* contains "two parts ... [that] have been viewed as virtually synonymous. Both parts require that the possession be truly adverse to the rights of the party holding record title" In *Humbert v. Trinity Church* (1840), the Court for the Correction of Errors, the predecessor to the Court of Appeals, held that ownership can be obtained by adverse possession even where the possessor claims title wrongfully, fraudulently and "with whatever degree of knowledge that he has no right." The present day Court of Appeals has cited *Humbert* approvingly, noting that "the fact that adverse possession will defeat a deed even if the adverse possessor has knowledge of the deed is not new."

In *Estate of Becker*, the Court of Appeals further explained that the element of hostility is "satisfied where an individual asserts a right to the property that is 'adverse to the title owner and also in opposition to the rights of the true owner' " Further, the *Estate of Becker* court noted that "[a] rebuttable presumption of hostility arises from possession accompanied by the usual acts of ownership, and this presumption continues until the possession is shown to be subservient to the title of another"; *see also Monnot v. Murphy* [1913] ["The ultimate element in the rise of a title through adverse possession is the acquiescence of the real owner in the exercise of an obvious adverse or hostile ownership through the statutory period"]).

In *Walling,* the Court of Appeals noted that "an adverse possessor's actual knowledge of the true owner is not fatal to an adverse possession claim," absent an overt acknowledgment by the claimant during the prescription period (*Walling v. Przybylo,* citing *Van Valkenburgh v. Lutz,* [1952]). "The issue is 'actual occupation,' not subjective knowledge. Stated another way, "[c]onduct will prevail over knowledge, particularly when the true owners have acquiesced in the exercise of ownership rights by the adverse possessors." A presumption of hostility will not apply, however, where the use of disputed land is permissive.

Here, the complaint sufficiently alleges that plaintiff's predecessor members continuously occupied Lot 19, improved the land, restricted entry and kept out intruders, and thus actually occupied the land in a manner adverse to the true owner. Therefore, the complaint satisfies the "hostile and under a claim of right" element. Moreover, as neither plaintiff nor the predecessor members have overtly acknowledged any of defendants' rights to Lot 19, and there is no indication that the use was permissive, Supreme Court properly found that the claim of right element had been sufficiently asserted.

Defendants, relying on this Court's holding in

Joseph v. Whitcombe, [2001], seek to limit the "claim of right" element to those situations in which "the adverse possessor is title owner of the adjacent parcel, whose original boundaries extended to the disputed parcel ... or whose use of the disputed structure [or land] derived from prior ownership." However, as the foregoing controlling decisions from the Court of Appeals make clear, valid adverse possession claims are not limited to such circumstances. Indeed, "[r]educed to its essentials, [the elements of adverse possession] mean[ ] nothing more than that there must be possession in fact of a type that would give the owner a cause of action in ejectment against the occupier throughout the prescriptive period." In any event, in *Joseph* the defendant overtly acknowledged the record owner's ownership of the disputed property and that he was a squatter. Finally, *Joseph* concerned a motion for summary judgment, a very different standard of review than this appeal.

Moreover, unlike this case, in *All the Way E. Fourth St. Block Assn. v. Ryan–Nena Community Health Ctr.* [2005], which also involved a community garden, the Block Association sought and received a month to month tenancy under Operation Greenthumb for the disputed parcel and from 1981 through 1994 when the Association erected its fence, the Association sought to determine the true ownership of the lot so that it might receive the consent of the owner for the erection of the fence. No such allegations which demonstrate overt acknowledgement of the true owner's ownership are present in this case.

Since we conclude that plaintiff has adequately pleaded a cause of action for adverse possession, we also find that Supreme Court properly declined to dismiss the remaining causes of action at this juncture.

Accordingly, the orders of the Supreme Court, New York County (Debra A. James, J.), entered November 23, 2015 and July 5, 2016, which denied defendants' motions to dismiss the complaint, should be affirmed, without costs.

All concur except Friedman, J.P. who concurs in a separate Opinion.

FRIEDMAN, J.P. (concurring)

I concur in affirming the denial of the motion to dismiss on the ground that the affidavit of Kate Temple–West sufficiently alleges, for purposes of pleading an adverse possession claim, that the corporate plaintiff's alleged predecessor-in-interest, an alleged unincorporated association (Unincorporated CMG), continuously occupied the subject parcel for at least ten years (*see* RPAPL 501[2]; CPLR 212[a]) before July 7, 2008. On that date, a statutory amendment took effect that made "a reasonable basis for the belief that the property belongs to the adverse possessor" (RPAPL 501[3]) a necessary element of an adverse possession claim.[9] Temple–West alleges that she became a member of Unincorporated CMG in 1997 and remained so until the corporate plaintiff (of which she is now president) was organized in 2012 and succeeded to Unincorporated CMG's interest. Thus, based on the allegations of the complaint as supplemented by Temple–West's affidavit, plaintiff may be able to prove that its claim to ownership of the subject parcel through adverse possession ripened before the amendment to the RPAPL became effective. Whether Unincorporated CMG's occupation of the parcel was interrupted by the attempt to oust it in 1999 (an incident alleged in the complaint) cannot be determined as a matter of law on a pleading motion.

I disagree with the majority to the extent it

[9] Plaintiff does not allege that Unincorporated CMG had a reasonable basis for believing (or that it actually believed) that the parcel belonged to it before the adverse possession claim ripened. Under *Walling v. Przybylo,* 7 N.Y.3d 228, 818 N.Y.S.2d 816, 851 N.E.2d 1167 [2006], this was not a bar to an adverse possession claim before the aforementioned amendment of RPAPL 501.

holds that the complaint, as supplemented by the affidavit of Barden Prisant, sufficiently alleges that Unincorporated CMG continuously occupied the parcel from 1985 to 1997. Prisant alleges that he was a member of Unincorporated CMG from 1985 to 1991, when he moved out of the neighborhood. Plaintiff has not identified any person who was a member of Unincorporated CMG, or any persons who were members of it, from 1991 to 1997.[10] Plaintiff cannot predicate its adverse possession claim on an occupation by an unincorporated association without identifying particular individuals who were members of the association for the entire period relied upon (*cf. Reformed Church of Gallupville v. Schoolcraft,* 65 N.Y. 134, 145 [1875] [permitting a claim of adverse possession based, in part, on an occupation by an unincorporated association composed of identified members and officers]). However, if plaintiff believes that it is able to identify particular individuals who were members of Unincorporated CMG from 1991 to 1997, it may seek leave to amend the complaint to add such allegations.

[10] Prisant's affidavit states that he continued to "pass by the garden [on the parcel] daily on my way to and from work" for "approximately eight years" after his membership ceased in 1991, and that during such walks he observed that the garden established by Unincorporated CMG was still maintained on the property. However, Prisant's statement that, at unspecified times during this eight-year period, he saw two people who had been members of Unincorporated CMG at the same time he was (Carmen Rubio and Alfredo Feliciano) engaged in "care and maintenance of the garden" does not constitute an allegation that Rubio (who apparently is now deceased) and Feliciano remained members of Unincorporated CGM during the entire period in question. Rubio and Feliciano are not even mentioned in Temple–West's affidavit

95.12 Real property actions.—No action to recover real property or its possession shall be maintained unless the person seeking recovery or the person's ancestor, predecessor, or grantor was seized or possessed of the property within 7 years before the commencement of the action.

History.—s. 2, ch. 1869, 1872; RS 1287; GS 1718; RGS 2932; CGL 4652; s. 8, ch. 74-382; s. 521, ch. 95-147.

95.13 Real property actions; possession by legal owner presumed.—In every action to recover real property or its possession, the person establishing legal title to the property shall be presumed to have been possessed of it within the time prescribed by law. The occupation of the property by any other person shall be in subordination to the legal title unless the property was possessed adversely to the legal title for 7 years before the commencement of the action.

History.—s. 4, ch. 1869, 1872; RS 1289; GS 1720; RGS 2934; CGL 4654; s. 9, ch. 74-382.

95.14 Real property actions; limitation upon action founded upon title.—No cause of action or defense to an action founded on the title to real property, or to rents or service from it, shall be maintained unless:

(1) The person prosecuting the action or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor, or grantor of the person, was seized or possessed of the real property within 7 years before commencement of the action; or

(2) Title to the real property was derived from the United States or the state within 7 years before commencement of the action. The time under this subsection shall not begin to run until the conveyance of the title from the state or the United States.

History.—s. 3, ch. 1869, 1872; RS 1288; GS 1719; RGS 2933; CGL 4653; s. 10, ch. 74-382.

95.16 Real property actions; adverse possession under color of title.—

(1) When the occupant, or those under whom the occupant claims, entered into possession of real property under a claim of title exclusive of any other right, founding the claim on a written instrument as being a conveyance of the property, or on a decree or judgment, and has for 7 years been in continued possession of the property included in the instrument, decree, or judgment, the property is held adversely. If the property is divided into lots, the possession of one lot shall not be deemed a possession of any other lot of the same tract. Adverse possession commencing after December 31, 1945, shall not be deemed adverse possession under color of title until the instrument upon which the claim of title is founded is recorded in the office of the clerk of the circuit court of the county where the property is located.

(2) For the purpose of this section, property is deemed possessed in any of the following cases:

(a) When it has been usually cultivated or improved.

(b) When it has been protected by a substantial enclosure. All land protected by the enclosure must be included within the description of the property in the written instrument, judgment, or decree. If only a portion of the land protected by the enclosure is included within the description of the property in the written instrument, judgment, or decree, only that portion is deemed possessed.

(c) When, although not enclosed, it has been used for the supply of fuel or fencing timber for husbandry or for the ordinary use of the occupant.

(d) When a known lot or single farm has been partly improved, the part that has not been cleared or enclosed according to the usual custom of the county is to be considered as occupied for the same length of time as the part improved or cultivated.

History.—s. 5, ch. 1869, 1872; RS 1290; GS 1721; RGS 2935; CGL 4655; s. 1, ch. 19253, 1939; s. 1, ch. 22897, 1945;

ss. 11, 12, ch. 74-382; s. 1, ch. 77-174; s. 1, ch. 87-194; s. 522, ch. 95-147.

95.18 Real property actions; adverse possession without color of title.—

(1) When the possessor has been in actual continued possession of real property for 7 years under a claim of title exclusive of any other right, but not founded on a written instrument, judgment, or decree, or when those under whom the possessor claims meet these criteria, the property actually possessed is held adversely if the person claiming adverse possession:

(a) Paid, subject to s. 197.3335, all outstanding taxes and matured installments of special improvement liens levied against the property by the state, county, and municipality within 1 year after entering into possession;

(b) Made a return, as required under subsection (3), of the property by proper legal description to the property appraiser of the county where it is located within 30 days after complying with paragraph (a); and

(c) Has subsequently paid, subject to s. 197.3335, all taxes and matured installments of special improvement liens levied against the property by the state, county, and municipality for all remaining years necessary to establish a claim of adverse possession.

(2) For the purpose of this section, property is deemed to be possessed if the property has been:

(a) Protected by substantial enclosure; or

(b) Cultivated, maintained, or improved in a usual manner.

(3) A person claiming adverse possession under this section must make a return of the property by providing to the property appraiser a uniform return on a form provided by the Department of Revenue. The return must include all of the following:

(a) The name and address of the person claiming adverse possession.

(b) The date that the person claiming adverse possession entered into possession of the property.

(c) A full and complete legal description of the property that is subject to the adverse possession claim.

(d) A notarized attestation clause that states:

> UNDER PENALTY OF PERJURY, I DECLARE THAT I HAVE READ THE FOREGOING RETURN AND THAT THE FACTS STATED IN IT ARE TRUE AND CORRECT. I FURTHER ACKNOWLEDGE THAT THE RETURN DOES NOT CREATE ANY INTEREST ENFORCEABLE BY LAW IN THE DESCRIBED PROPERTY.

(e) A description of the use of the property by the person claiming adverse possession.

(f) A receipt to be completed by the property appraiser.

(g) Dates of payment by the possessor of all outstanding taxes and matured installments of special improvement liens levied against the property by the state, county, or municipality under paragraph (1)(a).

(h) The following notice provision at the top of the first page, printed in at least 12-point uppercase and boldfaced type:

> THIS RETURN DOES NOT CREATE ANY INTEREST ENFORCEABLE BY LAW IN THE DESCRIBED PROPERTY.

The property appraiser shall refuse to accept a return if it does not comply with this subsection. The executive director of the Department of Revenue is authorized, and all conditions are deemed met, to adopt emergency rules under ss. 120.536(1) and 120.54(4) for the purpose of implementing this subsection. The emergency rules shall remain in effect for 6 months after adoption and may be renewed during the pendency of procedures to adopt rules addressing the subject of the emergency rules.

(4) Upon the submission of a return, the property appraiser shall:

(a) Send, via regular mail, a copy of the return to the owner of record of the property that is subject to the adverse possession claim, as identified by the property appraiser's records.

(b) Inform the owner of record that, under s. 197.3335, any tax payment made by the owner of record before April 1 following the year in which the tax is assessed will have priority over any tax payment made by an adverse possessor.

(c) Add a notation at the beginning of the first line of the legal description on the tax roll that an adverse possession claim has been submitted.

(d) Maintain the return in the property appraiser's records.

(5)(a) If a person makes a claim of adverse possession under this section against a portion of a parcel of property identified by a unique parcel identification number in the property appraiser's records:

1. The person claiming adverse possession shall include in the return submitted under subsection (3) a full and complete legal description of the property sufficient to enable the property appraiser to identify the portion of the property subject to the adverse possession claim.

2. The property appraiser may refuse to accept the return if the portion of the property subject to the claim cannot be identified by the legal description provided in the return, and the person claiming adverse possession must obtain a survey of the portion of the property subject to the claim in order to submit the return.

(b) Upon submission of the return, the property appraiser shall follow the procedures under subsection (4), and may not create a unique parcel identification number for the portion of property subject to the claim.

(c) The property appraiser shall assign a fair and just value to the portion of the property, as provided in s. 193.011, and provide this value to the tax collector to facilitate tax payment under s. 197.3335(3).

(6)(a) If a person makes a claim of adverse possession under this section against property to which the property appraiser has not assigned a parcel identification number:

1. The person claiming adverse possession must include in the return submitted under subsection (3) a full and complete legal description of the property which is sufficient to enable the property appraiser to identify the property subject to the adverse possession claim.

2. The property appraiser may refuse to accept a return if the property subject to the claim cannot be identified by the legal description provided in the return, and the person claiming adverse possession must obtain a survey of the property subject to the claim in order to submit the return.

(b) Upon submission of the return, the property appraiser shall:

1. Assign a parcel identification number to the property and assign a fair and just value to the property as provided in s. 193.011;

2. Add a notation at the beginning of the first line of the legal description on the tax roll that an adverse possession claim has been submitted; and

3. Maintain the return in the property appraiser's records.

(7) A property appraiser must remove the notation to the legal description on the tax roll that an adverse possession claim has been submitted and shall remove the return from the property appraiser's records if:

(a) The person claiming adverse possession notifies the property appraiser in writing that the adverse possession claim is withdrawn;

(b) The owner of record provides a certified copy of a court order, entered after the date the return was submitted to the property appraiser, establishing title in the owner of record;

(c) The property appraiser receives a certified copy of a recorded deed, filed after the date of the submission of the return, from the person claiming adverse possession to the owner of record transferring title of property along with a legal description describing the same property subject to the adverse possession claim; or

(d) The owner of record or the tax collector provides to the property appraiser a receipt demonstrating that the owner of record has paid the annual tax assessment for the property subject to the adverse possession claim during the period that the person is claiming adverse possession.

(8) The property appraiser shall include a clear and obvious notation in the legal description of the parcel information of any public searchable property database maintained by the property appraiser that an adverse possession return has been submitted to the property appraiser for a particular parcel.

(9) A person who occupies or attempts to occupy a residential structure solely by claim of adverse possession under this section prior to making a return as required under subsection (3), commits trespass under s. 810.08.

(10) A person who occupies or attempts to occupy a residential structure solely by claim of adverse possession under this section and offers the property for lease to another commits theft under s. 812.014.

History.—s. 7, ch. 1869, 1872; s. 6, ch. 4055, 1891; RS 1291; GS 1722; RGS 2936; CGL 4656; s. 1, ch. 19254, 1939; ss. 13, 14, ch. 74-382; s. 1, ch. 77-102; s. 523, ch. 95-147; s. 1, ch. 2011-107; s. 1, ch. 2013-246; s. 98, ch. 2019-167.

95.191 Limitations when tax deed holder in possession.—When the holder of a tax deed goes into actual possession of the real property described in the tax deed, no action to recover possession of the property shall be maintained by a former owner or other adverse claimant unless the action commenced is begun within 4 years after the holder of the tax deed has gone into actual possession. When the real property is adversely possessed by any person, no action shall be brought by the tax deed holder unless the action is begun within 4 years from the date of the deed.

History.—s. 64, ch. 4322, 1895; GS 591; s. 61, ch. 5596, 1907; RGS 794; s. 2, ch. 12409, 1927; CGL 1020; ss. 1, 2, ch. 69-55; s. 1, ch. 72-268; s. 28, ch. 73-332; s. 1, ch. 77-174.

Note.—Former ss. 196.06, 197.725, 197.286.

95.192 Limitation upon acting against tax deeds.—

(1) When a tax deed has been issued to any person under s. 197.552 for 4 years, no action shall be brought by the former owner of the property or any claimant under the former owner.

(2) When a tax deed is issued conveying or attempting to convey real property before a patent has been issued thereon by the United States, or before a conveyance by the state, and thereafter a patent by the United States or a conveyance by the state is issued to the person to whom the property was assessed or a claimant under him or her, and the tax deed grantee or a claimant under the tax deed grantee has paid the taxes for 4 successive years at any time after the issuance of the patent or conveyance, the patentee, or grantee, and any claimant under the patentee or grantee shall be presumed to have abandoned the property and any right, title, and interest in it. Upon such abandonment, the tax deed grantee and any claimant under the tax deed grantee is the legal owner of the property described by the tax deed.

(3) This statute applies whether the tax deed grantee or any claimant under the tax deed grantee has been in actual possession of the property described in the tax deed or not. If a tax deed has been issued to property in the actual possession of the legal owner and the legal owner or any claimant under him or her continues in actual possession 1 year after issuance of the tax deed and before an action to eject him or her is begun, subsections (1) and (2) shall not apply.

History.—s. 27, ch. 73-332; s. 201, ch. 85-342; s. 524, ch. 95-147.

95.21 Adverse possession against lands purchased at sales made by executors.—The title of any purchaser, or the purchaser's assigns, who has held possession for 3 years of any real or personal property purchased at a sale made by an executor, administrator, or guardian shall not be questioned because of any irregularity in the conveyance or any insufficiency or irregularity in the court proceedings authorizing the sale, whether jurisdictional or not, nor shall it be questioned because the sale

is made without court approval or confirmation or under a will or codicil. The title shall not be questioned at any time by anyone who has received the money to which he or she was entitled from the sale. This section shall not bar an action for fraud or an action against the executor, administrator, or guardian for personal liability to any heir, distributee, or ward.

History.—s. 1, ch. 3134, 1879; RS 1293; GS 1724; RGS 2938; CGL 4658; s. 1, ch. 20954, 1941; s. 3, ch. 22897, 1945; s. 15, ch. 74-382; s. 1, ch. 77-174; s. 525, ch. 95-147.

95.22 Limitation upon claims by remaining heirs, when deed made by one or more.—

(1) When any person owning real property or any interest in it dies and a conveyance is made by one or more of the person's heirs or devisees, purporting to convey, either singly or in the aggregate, the entire interest of the decedent in the property or any part of it, then no person shall claim or recover the property conveyed after 7 years from the date of recording the conveyance in the county where the property is located.

(2) This section shall not apply to persons whose names appear of record as devisees under the will or as the heirs in proceedings brought to determine their identity in the office of the judge administering the estate of decedent.

History.—s. 1, ch. 10168, 1925; CGL 4659; s. 14, ch. 20954, 1941; s. 15, ch. 73-334; s. 16, ch. 74-382; s. 526, ch. 95-147.

95.231 Limitations where deed or will on record.—

(1) Five years after the recording of an instrument required to be executed in accordance with s. 689.01; 5 years after the recording of a power of attorney accompanying and used for an instrument required to be executed in accordance with s. 689.01; or 5 years after the probate of a will purporting to convey real property, from which it appears that the person owning the property attempted to convey, affect, or devise it, the instrument, power of attorney, or will shall be held to have its purported effect to convey, affect, or devise, the title to the real property of the person signing the instrument, as if there had been no lack of seal or seals, witness or witnesses, defect in, failure of, or absence of acknowledgment or relinquishment of dower, in the absence of fraud, adverse possession, or pending litigation. The instrument is admissible in evidence. A power of attorney validated under this subsection shall be valid only for the purpose of effectuating the instrument with which it was recorded.

(2) After 20 years from the recording of a deed or the probate of a will purporting to convey real property, no person shall assert any claim to the property against the claimants under the deed or will or their successors in title.

(3) This law is cumulative to all laws on the subject matter.

History.—ss. 1, 2, ch. 10171, 1925; CGL 4660, 4661; ss. 1-4, ch. 21790, 1943; s. 35, ch. 69-216; s. 17, ch. 74-382; s. 1, ch. 2013-234; s. 20, ch. 2019-71.

Note.—Former ss. 95.23, 95.26.

Return of Real Property in Attempt to Establish Adverse Possession without Color of Title

FLORIDA DEPARTMENT OF REVENUE

RETURN OF REAL PROPERTY IN ATTEMPT TO ESTABLISH ADVERSE POSSESSION WITHOUT COLOR OF TITLE

Section 95.18, Florida Statutes

DR-452
R. 07/13
Provisional
Effective 01/14

THIS RETURN DOES NOT CREATE ANY INTEREST ENFORCEABLE BY LAW IN THE DESCRIBED PROPERTY

For residential structures, a person who occupies or attempts to occupy a residential structure solely by claim of adverse possession prior to making a return, commits trespass under s. 810.08, F.S. A person who occupies or attempts to occupy a residential structure solely by claim of adverse possession and offers the property for lease to another commits theft under s. 812.014, F.S.

COMPLETED BY ADVERSE POSSESSION CLAIMANT

The person claiming adverse possession (claimant) must file this return with the property appraiser in the county where the property is located as required in s. 95.18(1), F.S.

Name of claimant(s)			
Mailing address		Phone	
		Parcel ID, if available	
		☐ the property claimed is only a portion of this parcel ID	
Date of filing		Date claimant entered into possession of property	

Legal description of property claimed — Fields will expand online, or you may add pages.
Must be full and complete. If the property appraiser cannot identify the property from the legal description, you may be required to obtain a survey.

This property has been: (Check all that apply.)	☐ protected by substantial enclosure	☐ cultivated, maintained, or improved in a usual manner

Describe your use of the property, in detail below.

Dates of payments of any outstanding taxes or liens levied by the state, county or municipality:

Under penalty of perjury, I declare that I have read the foregoing return and that the facts stated in it are true and correct. I further acknowledge that the return does not create any interest enforceable by law in the described property.

Signature of claimant(s) _____

_____

State of Florida
County of _____

This instrument was sworn to and subscribed before me on _____ by _____,
personally known to me or who produced _____ as identification.

_____
Signature and seal, notary public

COMPLETED BY PROPERTY APPRAISER

Received in the office of the property appraiser of _____ County, Florida, on _____.
A signed copy of this return has been delivered to the claimant(s). A copy will be sent to the owner of record.

_____ _____
Signature, property appraiser or deputy — Date

TO THE OWNER OF RECORD

A tax payment made by the owner of record before April 1 the year after the taxes were assessed will have priority over a payment made by the claimant. An adverse possession claim will be removed if the owner of record or tax collector furnishes a receipt to the property appraiser showing payment of taxes by the owner of record during the period of the claim. (S. 95.18, F.S.)

This return is a public record and may be inspected by any person under s. 119.01, F.S.

Note on the Florida Adverse Possession Statute

Statutes are often ambiguous and poorly drafted, and therefore difficult to apply. The purpose of this note is to give you some sense of how one would parse the Florida adverse possession statute, so that you can get an idea of the difficulties one encounters in attempting to interpret a statute. A full exposition of the statute would require a lengthy treatment; this note touches only on some of the basic points.

I. *Relation to Common Law Elements of Adverse Possession*

The Florida statute must be read against the background of the elements of adverse possession under the common law. To establish adverse possession, the plaintiff must show possession that was (a) actual and exclusive, (b) continuous and uninterrupted, (c) open and notorious, and (d) hostile (*i.e*., without permission), for the prescriptive period. In most jurisdictions, state of mind is not relevant — *i.e*., it doesn't matter whether the adverse possessor thought the land was really his, or, on the contrary, knew the land wasn't his and intended to take it.

Some of these elements are embodied in fairly explicit language in the Florida statute. *See* ch. 95.16 and 95.18:

> (a) possession: "When the occupant . . . entered into *possession* of real property . . ." ch. 95.16(1), 95.18(1); *see also id*. ch. 95.16(2), 95.18(2) (defining possession).
>
> (b) continuous and uninterrupted: "has for 7 years been in *continued* possession of the property . . ."
>
> (c) hostile and exclusive: "under a claim of title *exclusive of any other right*." That is, the occupant did not enter the land with the permission of the owner (as in the case of a tenancy), but claiming it as his own.

As you can see, the words "open and notorious" do not appear in the statute. But a court would likely refuse to find that activities that were *not* "open and notorious" could constitute "possession" under the statute.

The statute reflects another element of the common law requirements for adverse possession: a distinction between cases in which the claimant enters the land under a deed ("founding the claim on a written instrument as being a conveyance of the property, or on a decree or judgment," ch. 95.16(1)) and cases in which there is no deed, ch. 95.18. In color of title cases, the statute tells you the extent of the property the claimant will be awarded if adverse possession is established. *See*, *e.g*., ch. 95.16(1) ("If the property is divided into lots, the possession of one lot shall not be deemed a possession of any other lot of the same tract."); ch. 95.16(2)(b).[11] In addition, the statute adds a requirement that is not part of the common law. Where the claim is under color of title, the deed must have been recorded; where the claim is not under color of title, the adverse possessor must have paid the taxes on the land. What might be the purpose of these requirements?

In interpreting a statute, you should also be aware of what is *not* included in it. Under the common law, the running of the statute of limitations will be tolled for a title holder who is under a disability of some sort. (See p. 106 of your casebook for details.) There is no such provision in the Florida statute, though. In fact, Florida repealed its disabilities provision in 1974. (In that respect, it is very much in the minority of states, perhaps the only one to have done so.)

[11] More on this question below.

What is the purpose of the other sections? Section 95.12 sets the basic limitations period. In effect, it tells us that an action "to recover real property or its possession" must be brought within 7 years of the time the adverse possessor entered. That is, if the adverse possessor entered the land and took exclusive possession of it 10 years ago, the owner would not be able to show that she was "seized or possessed of the property within 7 years before the commencement of the action."[12] What else does it say? Suppose A lives on Blackacre, and B wrongfully throws her out in year 1. In year 3, A conveys all her "right, title and interest" to C. In year 6, C sues B for possession of Blackacre. B, who has been living on the property in the meantime, interposes the defense that C has *never* been in possession of the land, and certainly not "within 7 years before the commencement of the action." Can you see why that defense would fail?

Section 95.13 helps the one who holds the title by establishing a presumption that the title holder is in possession of the property and that anyone else occupying the land does so with the title holder's permission (except where adverse possession has been shown).

Section 95.14 applies the same statute of limitations to claims founded on a title. Suppose A holds title to Blackacre. In year 1, B enters the land and claims it as his own. A decides in year 10 that she wants Blackacre back. Fearing that it's too late now to bring an action for recovery of real property or its possession (she cannot show under Section 95.12 that she was possessed of Blackacre within the past 7 years), she instead brings an action to quiet title, *i.e.*, to establish that she and no one else holds the title to Blackacre. Under Section 95.14, her action would still be barred.

II. *Particular Issues*

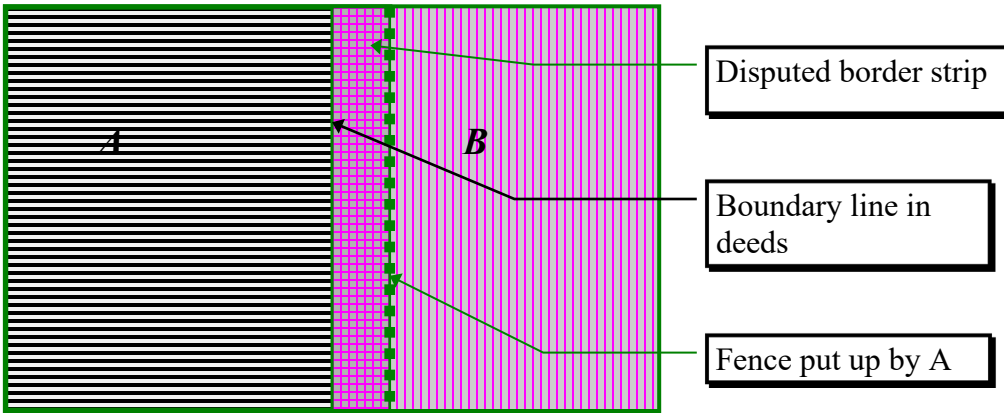
Even with a general sense of what the statute means, you will always encounter ambiguities when you try to apply it to particular facts.

1. Suppose A, wishing to claim some land by adverse possession, but without having to pay taxes, has a friend execute a "deed" to the land. A knows that the deed is false because his friend does not own the land. A then records the deed. Can A later claim adverse possession *under color of title*? Nothing in the statute explicitly requires a good faith belief in the validity of the deed. Moreover, by recording the deed, A could argue that he complied with the statutory requirement, and gave public notice to the true title holder. On the other hand, could you argue that A's claim to the property could not have been "founded" (ch. 95.16(1)) on a deed he knew to be false? Even apart from that, might the courts impose a requirement that a deed in such a case be believed in good faith to give title?

2. Suppose one enters under a deed to a 100 acre tract and clears and cultivates the northwest quarter of the tract. If all the elements of adverse possession are established, does the adverse possessor get the entire 100 acre tract? What if there is a fence around the entire tract? *See* ch. 95.16(2)(b). What if there is no fence, but the custom is to clear only a part of a farm tract and the adverse possessor has followed that custom? *See* ch. 95.16(2)(d).

Suppose none of those sections apply; the adverse possessor would get only the quarter he "usually cultivated or improved." Satisfaction of the adverse possession set out

[12] Don't worry about what it means to be "seized" of property.



in the section for claims made without color of title would have given him the same property, would it not? See ch. (2)(b). [Note: why do you think 95.16(2)(a) says "when it has been usually cultivated or improved," whereas 96.18(2)(b) says "Cultivated, maintained, or improved in a usual manner"? There is no good reason. The legislature modified 95.18 in 2013 for other reasons and apparently decided to modernize the language ("in a usual manner" for "usually") and expound on it a little, but made no parallel change to 95.16.] So what difference might it make whether or not there is a deed?

3. How does the statute apply to border disputes? Consider the following hypothetical. A and B live next to each other. Both have title to their respective properties. Relying on an inaccurate survey, A puts a fence around his lot and encloses a strip of land that really belongs to B. Over the next 10 years, A treats it as his own and satisfies all the common law elements of adverse possession. A pays taxes only on the land described in his deed. B, sleeping on her rights, does nothing about the fence. In year 10, A discovers the survey was wrong and brings an action to quiet title, claiming the disputed strip.

Is this an action for adverse possession under color of title? A clearly has title to his own property and thought that the strip was part of it. On the other hand, it is equally clear that the property description in A's title does not include the disputed strip. Perhaps actions under "color of title" include only actions for land that is actually described in the title. Indeed, one might argue that that conclusion follows directly from the title recording requirement in Section 95.16(1). After all, A's recorded title gave B no notice whatsoever that A was claiming a portion of her land.

But if that is the correct interpretation, why is Section 95.16(2)(b) needed at all? That is, if adverse possession under color of title creates rights only in the land described in the title, why was there any need for the legislature to provide that where A fences some land, only the portion of the land actually described in the title is deemed to be possessed under color of title? It seems redundant. Suppose further that A did not fence the land, but did "usually cultivate or improve" (ch. 95.16(2)(a)) the disputed strip. Consider the fact that there is no similar qualification in subsection (2)(a) — *i.e.*, there is no provision in (2)(a) stating that "If only a portion of the land usually cultivated or improved is included within the description of the property in the written instrument, only that portion is deemed possessed." Did the legislature intend to draw a distinction between the two types of cases? Would there be any reason for doing so?

Finally, consider the practical impact of this section. If A cannot claim the strip by adverse possession under color of title, he must instead show adverse possession without color of title. Yet A did not pay taxes on the strip, and in general it is unlikely that anyone in A's position would do so. Did the legislature mean in effect to eliminate adverse possession in border dispute cases? Perhaps the legislature intended to provide that no claim of adverse possession would ever succeed unless there is some kind of written public record — a recorded title, or a tax record — giving notice to the owner that the particular piece of property is being claimed adversely. The legislature might have been attempting to be particularly solicitous toward title holders. On the other hand, is there any indication that the legislature intended to undertake such a marked departure from the common law? If there is no legislative history — no records of hearings in the state legislature, committee reports, or floor debates — what sorts of factors would you expect to influence the court?

4. If you have difficulty applying the statute to disputed boundary strips, you're in good company. In construing a statute — particularly state statutes, where there often is no legislative history — you may need to look to the history of the statute and the courts' attempts to construe it:

a. *Adverse Possession Statute in 1973*:

> "For the purpose of constituting an adverse possession [under color of title] . . . land shall be deemed to have been possessed and occupied . . .
>
> "(2) Where it has been protected by a substantial enclosure. All contiguous land protected by such substantial enclosure shall be deemed to be premises included within the [title] within the purview of Sec. 95.16." Fla. Stat. 95.17(2)(1973).[13]

The Florida Supreme Court had occasion to construe this provision in *Meyer v. Law*, 287 So. 2d 37 (1973), under facts like those described in the A-B border dispute hypothetical set out at the beginning of Note 3 above. Four of the seven justices rejected A's claim: "persons who claim land adversely under a paper title relating to a certain area, and who fence in or cultivate an area beyond that which is described in the paper title, but who do not pay any taxes on the additional area, can secure good title by adverse possession only to the portion of land described by the deed, decree, or other written instrument of record." 287 So. 2d at 40. In general, the majority held, *no* claim of adverse possession can ever succeed unless either (a) there is public notice by way of recording the title [color of title], or (b) there is public notice by way of tax records [without color of title].

In effect, this made it impossible for anyone to gain adverse possession of a strip of land along a border, beyond the land described in their title, except in the unlikely instance that a person in A's position paid taxes on a strip of land belonging to their neighbor. This result suited the majority, which indicated a strong belief that the doctrine of adverse possession is "an ancient and, perhaps, somewhat outdated one." *Id*. at 41.

Taking the opposite position, 3 of the 7 justices argued that the language of Section 95.17(2) indicated that the legislature enacted that section to *enlarge* the scope of adverse possession under color of title and permit people in situations like A's to take adverse

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[13] Fla. Stat. ch. 95.17(2) was the predecessor to the current ch. 95.16(2)(b). Then-Fla. Stat. ch. 95.16 was the predecessor to the current Fla. Stat. ch. 95.16(1).

possession of a strip of land contiguous to the tract described in their own deed where they enclose that strip and treat it as their own. According to the dissent, the legislature enacted the statutory language quoted above in order to overturn earlier decisions following a rule like that set out by the majority in *Meyer*. Thus, according to the dissent, the majority effectively held the opposite of what the legislature intended.

b. *1974 Amendment to Adverse Possession Statute*

Immediately after *Meyer*, the legislature amended ch. 95.17(2) (renumbered 95.16(2)(b)) to read:

> "For the purpose of this section [*i.e*., for the purpose of constituting an adverse possession under color of title] property is deemed possessed . . .
>
> "(2) When it has been protected by a substantial enclosure. All contiguous land protected by the enclosure shall be property included within the written instrument, judgment, or decree, within the purview of this section." Fla. Stat. 95.16(2)(b)(1975).

In *Seddon v. Harpster*, 403 So. 2d 409 (Fla. 1981), the Supreme Court stated that the new language "clearly states that one does *not* have to have paper title correctly describing the disputed property as long as that area is contiguous to the described land and `protected by a substantial enclosure.'" 403 So. 2d at 411 (emphasis in original). This meant that A would be allowed to claim the disputed strip under color of title, even though the strip was not within the property described in his title. *See also*, *e.g*., *Elizabethan Development, Inc. v. Magwood*, 479 So. 2d 251 (Fla. 2d DCA 1985).

The dissent argued, in contrast, that "[t]here is nothing in the changes to indicate that the legislature intended to overrule the holding of *Meyer*," and concluded that the new statute made changes of style rather than substance. 403 So. 2d at 412. Under the new language of the statute, the dissent argued, A should not recover, just as he would not recover under the prior statute construed in *Meyer*.

c. *1987 Amendment to Ch. 95.16(2)(b)*

In 1987, the legislature amended the statute to read:

> "For the purpose of this section [*i.e*., for the purpose of constituting an adverse possession under color of title] property is deemed possessed . . .
>
> "(b) When it has been protected by a substantial enclosure. All land protected by the enclosure must be included within the description of the property in the written instrument . . . . If only a portion of the land protected by the enclosure is included within the description of the property in the written instrument . . . only that portion is deemed possessed." Fla. Stat. ch. 95.16(2)(b)(1987).

d. *Seton v. Swann*, 650 So. 2d 35 (Fla. 1995).

The Supreme Court revisited the issue most recently in *Seton v. Swann*. Read the case and consider:

i. Does the Court's holding in *Seton* rest on section 95.16(2)(b)?

ii. Consider the following hypothetical: A has a house next to a vacant lot. B obtains a deed to the vacant lot; the deed, for reasons that need not concern us, is invalid. B records the deed to the vacant lot. After building a

house on the lot, B puts a fence up, but mistakenly places it inward of the boundary between lots A and B. A mows the lawn on the strip and plants some shrubs there. Ten years later, B discovers the error in the location of the fence. She now seeks to eject A from the strip that A has been occupying, and to move the fence out to reflect the boundary line in the deeds. Can you see why B would lose? Does that mean that A would win? Who else might have a claim?

iii. Note that in *Seton*, it was Ms. Swann herself who put up a fence in a location she knew to be incorrect. It is as if, in the illustration above (at Supp. 86), the fence had been put in by B, not A. Nevertheless, she prevailed. Do you agree or disagree with that result as a matter of policy? Why?

***

As noted earlier (Supp. 86), the Florida legislature modified 95.18 in 2011, adding subsection (3). What might be inferred from this addition about the legislature's attitude towards adverse possession?

Read through HB 621, enacted in 2024. You can find the bill at Supp. 93-102. The Florida House Judiciary Committee provided this summary:

> Property owners have noted increased incidences of squatters taking over homes, and staying after discovery due to inadequate legal remedies. The bill creates an optional new procedure for a property owner to request that a sheriff's officer remove an unauthorized person from residential real property. The property owner must contact the sheriff and file a complaint under penalty of perjury listing the relevant facts that show eligibility for relief. The complaint form is in the bill. If the complaint shows that the owner is eligible for relief and the sheriff can verify ownership of the property, the sheriff must remove the unauthorized person. The property owner must pay the sheriff the civil eviction fee plus an hourly rate if a deputy must stand by and keep the peace while the unauthorized person is removed.
>
> A person wrongfully removed pursuant to this procedure has a cause of action against the owner for three times the fair market rent, damages, costs, and attorney fees. The bill also creates three new crimes relating to unlawfully occupying a dwelling or fraudulently advertising property for sale or lease.
>
> If approved by the Governor, or allowed to become law without the Governor's signature, these provisions take effect July 1, 2024.

Read through the articles about instances of squatting (Supp. 103-106), and the commentary on the phenomenon and HB 621 (Supp. 107-**Error! Bookmark not defined.**). What arguments were made for HB 621? What arguments were made against it? Is HB 621 an adverse possession bill? Does it effectively eliminate adverse possession? What broader effects might it have?

HARDING, J. We review Swann v. Seton, 629 So. 2d 935 (Fla. 5th DCA 1993), because of conflict with Seddon v. Harpster, 403 So. 2d 409 (Fla. 1981), and Turner v. Valentine, 570 So. 2d 1327 (Fla. 2d DCA 1990), review denied, 576 So. 2d 294 (Fla. 1991). We have jurisdiction based on article V, section 3(b)(3) of the Florida Constitution.

This case concerns the interpretation of section 95.16, Florida Statutes (1991). We approve the district court's opinion because we find that the Setons did not establish adverse possession by color of title under this statute. Under section 95.16, the title to property possessed but not described in a recorded instrument cannot be used to show color of title.

In 1964, Eula Swann and her late husband acquired Lot 25 in a platted subdivision in Kissimmee. In 1982, William and G. Jewel Seton acquired the adjoining Lot 24 which was described in their deed as: "Lot 24, Block A, CANTERBURY TERRACE, according to the plat thereof, as recorded in plat book 1, page 305, of the public records of Osceola County, Florida." Surveys conducted in 1959, 1972, 1976, and 1984 erroneously showed the location of the boundary line between the lots.

The Setons made improvements in 1984 in reliance on the most recent erroneous survey. Swann protested about improvements on a strip of land that she says is hers. Sometime after the Setons purchased their lot, Swann built a fence along the boundary line shown in the erroneous surveys. She testified in the trial court that she knew her fence was built inward of her property line.

A boundary problem arose again in 1992 when erosion caused Swann's seawall to collapse. The district court said the boundary issue presumably came up because Swann wanted the new seawall to run at the correct boundary line. Swann, 629 So. 2d at 936. A survey conducted in 1992 showed that the earlier surveys were incorrect. The parties stipulated that the 1992 survey, and a 1951 survey that was rediscovered, were "accurate and conformed to the subdivision plat." Id. The subdivision plat clearly reflects that the disputed property is part of Lot 25—Swann's property.

Swann sued the Setons in ejectment in 1992, seeking a court order compelling the Setons to remove all the permanent improvements they had made to the disputed strip of land. The trial court ruled for the Setons, finding that they had adversely possessed the disputed land for the seven-year period required by section 95.16.

The district court reversed. The court found that a party must meet two requirements to acquire title through adverse possession by color of title under section 95.16: First, the property must be described in a written instrument recorded in official county records, and, second, the property must be possessed continuously for seven years.[14] Id. at 937, 938. The court found that while the deed conveying property to the Setons described their lot, it did not describe any part of Swann's lot. Id. at 938. Because the Setons

[14] Section 95.16(1), Florida Statutes (1991), says in relevant part that:

> Adverse possession commencing after December 31, 1945 shall not be deemed adverse possession under color of title until the instrument upon which the claim of title is founded is recorded in the office of the clerk of the circuit court of the county where the property is located.

Subsection (2) then describes different ways in which property can be deemed possessed.

did not meet the first requirement, the court found no need to decide whether the Setons had possession. Id. at 937.

In reaching its conclusion, the district court reviewed the history of section 95.16. In Meyer v. Law, 287 So. 2d 37 (Fla. 1973), this Court considered adverse possession under section 95.17(2), Florida Statutes (1971),[15] which says that land shall be deemed possessed

> [W]here it has been protected by a substantial enclosure. All contiguous land protected by such substantial enclosure shall be deemed to be premises included in the written instrument, judgment, or decree within the purview of section 95.16 . . . .

The Court read section 95.17 in pari materia with three other adverse possession statutes and held:

> Where one has color of title to a larger area than is fenced or cultivated, and he pays no taxes on any of the land described in the title, he may acquire title by adverse possession only to that portion of land shown on the paper title which he actually fences or cultivates.

Meyer, 287 So. 2d at 40. Thus, the Court held that color of title was limited to property shown in the public record. Id.

In 1974, after Meyer, the Legislature amended adverse possession statutes by combining and rewording sections 95.16 and 95.17. The amendment took effect on January 1, 1975. In Seddon this Court, answering a certified question, held that the statute could not be applied retroactively. 403 So. 2d at 411. The Court also said that:

> By combining sections [95.16 and 95.17] the new statute clearly states that one does not have to have paper title describing the disputed property as long as that area is contiguous to the described land and "protected by a substantial enclosure."

Id. (emphasis added).[16] This represented a departure from Meyer, where this Court had held that color of title was limited to property shown in the record. While Swann characterizes this interpretation as dicta, it was subsequently cited as controlling law by at least one district court. See Elizabethan Dev., Inc. v. Magwood, 479 So. 2d 251 (Fla. 2d DCA 1985); Revels v. Sico, Inc., 468 So. 2d 481 (Fla. 2d DCA 1985). The Setons argue that Seddon controls their case. But as the district court pointed out, the statute analyzed in Seddon was subsequently amended. See ch. 87-194, § 1, at 1255, Laws of Fla. The amended statute, which applies to the Swann-Seton dispute, says:

> If only a portion of the land protected by the enclosure is included within the description of the property in the written instrument, judgment, or decree, only that portion is deemed possessed.

§ 95.16(2)(b), Fla. Stat. (1991). The district court correctly determined that the 1987 amendment indicated a legislative intent to supersede the Seddon holding that enclosed lands contiguous to land described in the written instrument could be acquired by adverse possession without payment of taxes on the lands. See Swann, 629 So. 2d at 937-38. We agree with the district court that the 1987

[15] This statute was a predecessor to section 95.16(2), Florida Statutes (1991), which is at issue in the instant case.

[16] We note, parenthetically, that the Setons did not "enclose" the disputed property. Rather, the Setons asserted possession by "ordinary use." See § 95.16(2)(c), Fla. Stat. (1991).

amendment embodies the result of the predecessor statutes analyzed in Meyer.

We approve the district court's decision in Swann and hold that section 95.16(1) requires, as a first step, that the instrument upon which the claim of title is founded must be recorded in the official county records and describe the disputed property. Only then can a court consider under section 95.16(2) whether a party adversely possessed certain property. Because the Setons' title does not describe any of Swann's property, the Setons cannot meet the first requirement and cannot claim adverse possession by color of title.

Accordingly, while Seddon might have dictated a contrary result in this case, Seddon is no longer applicable because of the Legislature's 1987 amendment. We also disapprove Turner and Bailey v. Hagler, 575 So. 2d 679 (Fla. 1st DCA 1991), review denied, 587 So. 2d 1327 (Fla. 1991), because they were decided on the basis of Seddon, but after the Legislature's 1987 amendment to section 95.16. Seddon was no longer valid when Turner and Bailey were decided.

It is so ordered.

GRIMES, C.J., and OVERTON, SHAW, KOGAN, WELLS and ANSTEAD, JJ., concur.

An act relating to property rights; creating s. 82.036, F.S.; providing legislative findings; authorizing property owners or their authorized agents to request assistance from the sheriff from where the property is located for the immediate removal of unauthorized occupants from a residential dwelling under certain conditions; requiring such owners or agents to submit a specified completed and verified complaint; specifying requirements for the complaint; providing requirements for the sheriff; authorizing a sheriff to arrest an unauthorized occupant for legal cause; providing that sheriffs are entitled to a specified fee for service of such notice; authorizing the owner or agent to request that the sheriff stand by while the owner or agent takes possession of the property; authorizing the sheriff to charge a reasonable hourly rate; providing that the sheriff is not liable to any party for loss, destruction, or damage; providing that the property owner or agent is not liable to any party for the loss or destruction of, or damage to, personal property unless it was wrongfully removed; providing civil remedies; providing construction; amending s. 806.13, F.S.; prohibiting unlawfully detaining, or occupying or

trespassing upon, a residential dwelling intentionally and causing a specified amount of damage; providing criminal penalties; amending s. 817.03, F.S.; providing criminal penalties for any person who knowingly and willfully presents a false document purporting to be a valid lease agreement, deed, or other instrument conveying real property rights; creating s. 817.0311, F.S.; prohibiting listing or advertising for sale, or renting or leasing, residential real property under certain circumstances; providing criminal penalties; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 82.036, Florida Statutes, is created to read:

82.036 Limited alternative remedy to remove unauthorized persons from residential real property.—

(1) The Legislature finds that the right to exclude others from entering, and the right to direct others to immediately vacate, residential real property are the most important real property rights. The Legislature further finds that existing remedies regarding unauthorized persons who unlawfully remain on residential real property fail to adequately protect the rights

of the property owner and fail to adequately discourage theft and vandalism. The intent of this section is to quickly restore possession of residential real property to the lawful owner of the property when the property is being unlawfully occupied and to thereby preserve property rights while limiting the opportunity for criminal activity.

(2) A property owner or his or her authorized agent may request from the sheriff of the county in which the property is located the immediate removal of a person or persons unlawfully occupying a residential dwelling pursuant to this section if all of the following conditions are met:

(a) The requesting person is the property owner or authorized agent of the property owner.

(b) The real property that is being occupied includes a residential dwelling.

(c) An unauthorized person or persons have unlawfully entered and remain or continue to reside on the property owner's property.

(d) The real property was not open to members of the public at the time the unauthorized person or persons entered.

(e) The property owner has directed the unauthorized person to leave the property.

(f) The unauthorized person or persons are not current or former tenants pursuant to a written or oral rental agreement authorized by the property owner.

(g) The unauthorized person or persons are not immediate family members of the property owner.

(h) There is no pending litigation related to the real property between the property owner and any known unauthorized person.

(3) To request the immediate removal of an unlawful occupant of a residential dwelling, the property owner or his or her authorized agent must submit a complaint by presenting a completed and verified Complaint to Remove Persons Unlawfully Occupying Residential Real Property to the sheriff of the county in which the real property is located. The submitted complaint must be in substantially the following form:

COMPLAINT TO REMOVE PERSONS UNLAWFULLY OCCUPYING RESIDENTIAL REAL PROPERTY

I, the owner or authorized agent of the owner of the real property located at ... ..., declare under the penalty of perjury that (initial each box):

1. .... I am the owner of the real property or the authorized agent of the owner of the real property.

2. .... I purchased the property on .....

3. .... The real property is a residential dwelling.

4. .... An unauthorized person or persons have unlawfully entered and are remaining or residing unlawfully on the real

property.

5. .... The real property was not open to members of the public at the time the unauthorized person or persons entered.

6. .... I have directed the unauthorized person or persons to leave the real property, but they have not done so.

7. .... The person or persons are not current or former tenants pursuant to any valid lease authorized by the property owner, and any lease that may be produced by an occupant is fraudulent.

8. .... The unauthorized person or persons sought to be removed are not an owner or a co-owner of the property and have not been listed on the title to the property unless the person or persons have engaged in title fraud.

9. .... The unauthorized person or persons are not immediate family members of the property owner.

10. .... There is no litigation related to the real property pending between the property owner and any person sought to be removed.

11. .... I understand that a person or persons removed from the property pursuant to this procedure may bring a cause of action against me for any false statements made in this complaint, or for wrongfully using this procedure, and that as a result of such action I may be held liable for actual damages, penalties, costs, and reasonable attorney fees.

12. .... I am requesting the sheriff to immediately remove

the unauthorized person or persons from the residential property.

13. .... A copy of my valid government-issued identification is attached, or I am an agent of the property owner, and documents evidencing my authority to act on the property owner's behalf are attached.

I HAVE READ EVERY STATEMENT MADE IN THIS PETITION AND EACH STATEMENT IS TRUE AND CORRECT. I UNDERSTAND THAT THE STATEMENTS MADE IN THIS PETITION ARE BEING MADE UNDER PENALTY OF PERJURY, PUNISHABLE AS PROVIDED IN SECTION 837.02, FLORIDA STATUTES.

...(Signature of Property Owner or Agent of Owner)...

(4) Upon receipt of the complaint, the sheriff shall verify that the person submitting the complaint is the record owner of the real property or the authorized agent of the owner and appears otherwise entitled to relief under this section. If verified, the sheriff shall, without delay, serve a notice to immediately vacate on all the unlawful occupants and shall put the owner in possession of the real property. Service may be accomplished by hand delivery of the notice to an occupant or by posting the notice on the front door or entrance of the dwelling. The sheriff shall also attempt to verify the identities of all persons occupying the dwelling and note the

identities on the return of service. If appropriate, the sheriff may arrest any person found in the dwelling for trespass, outstanding warrants, or any other legal cause.

(5) The sheriff is entitled to the same fee for service of the notice to immediately vacate as if the sheriff were serving a writ of possession under s. 30.231. After the sheriff serves the notice to immediately vacate, the property owner or authorized agent may request that the sheriff stand by to keep the peace while the property owner or agent of the owner changes the locks and removes the personal property of the unlawful occupants from the premises to or near the property line. When such a request is made, the sheriff may charge a reasonable hourly rate, and the person requesting the sheriff to stand by and keep the peace is responsible for paying the reasonable hourly rate set by the sheriff. The sheriff is not liable to the unlawful occupant or any other party for loss, destruction, or damage of property. The property owner or his or her authorized agent is not liable to an unlawful occupant or any other party for the loss, destruction, or damage to the personal property unless the removal was wrongful.

(6) A person may bring a civil cause of action for wrongful removal under this section. A person harmed by a wrongful removal under this section may be restored to possession of the real property and may recover actual costs and damages incurred, statutory damages equal to triple the fair

market rent of the dwelling, court costs, and reasonable attorney fees. The court shall advance the cause on the calendar.

(7) This section does not limit the rights of a property owner or limit the authority of a law enforcement officer to arrest an unlawful occupant for trespassing, vandalism, theft, or other crimes.

Section 2. Subsections (4) through (11) of section 806.13, Florida Statutes, are redesignated as subsections (5) through (12), respectively, a new subsection (4) is added to that section, and present subsection (10) of that section is amended, to read:

806.13 Criminal mischief; penalties; penalty for minor.—

(4) A person who unlawfully detains or occupies or trespasses upon a residential dwelling and who intentionally damages the dwelling causing $1,000 or more in damages commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(11) ~~(10)~~ A minor whose driver license or driving privilege is revoked, suspended, or withheld under subsection (10) ~~(9)~~ may elect to reduce the period of revocation, suspension, or withholding by performing community service at the rate of 1 day for each hour of community service performed. In addition, if the court determines that due to a family hardship, the minor's driver license or driving privilege is necessary for employment

or medical purposes of the minor or a member of the minor's family, the court shall order the minor to perform community service and reduce the period of revocation, suspension, or withholding at the rate of 1 day for each hour of community service performed. As used in this subsection, the term "community service" means cleaning graffiti from public property.

Section 3. Section 817.03, Florida Statutes, is amended to read:

817.03 Making false statement to obtain property or credit or to detain real property.—

(1) Any person who shall make or cause to be made any false statement, in writing, relating to his or her financial condition, assets or liabilities, or relating to the financial condition, assets or liabilities of any firm or corporation in which such person has a financial interest, or for whom he or she is acting, with a fraudulent intent of obtaining credit, goods, money or other property, and shall by such false statement obtain credit, goods, money or other property, commits ~~shall be guilty of~~ a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(2) Any person who, with the intent to detain or remain upon real property, knowingly and willfully presents to another person a false document purporting to be a valid lease agreement, deed, or other instrument conveying real property

rights commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

Section 4. Section 817.0311, Florida Statutes, is created to read:

817.0311 Fraudulent sale or lease of residential real property.—A person who lists or advertises residential real property for sale knowing that the purported seller has no legal title or authority to sell the property, or rents or leases the property to another person knowing that he or she has no lawful ownership in the property or leasehold interest in the property, commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 5. This act shall take effect July 1, 2024.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

Family Denies Squatting In Coral Gables Home, CBS Miami, Feb. 6, 2013

For the last six months, Robert Ramos, his wife Ana Alvarez, and her grown son, Jonathan, and a menacing American Bulldog have been living in a million-dollar house in a swanky section of Coral Gables without paying a cent in rent.

The city says they're squatters. The couple say they were duped by a shady landlord. Since September, the confusion has created a stalemate.

On Tuesday, Coral Gables commissioners made a move to resolve what can be a complicated situation arising from the murky world of foreclosures and title fraud by asking their city attorney to draft suggestions for beefing up the city's code on abandoned property. The city also took steps to unravel the property's ownership, and decide once and for all, who should live in the house at 601 Sunset Dr.

"Our issue, and it's a complicated issue, is who is the owner and who has the authority to allow these people on the land," said City Attorney Craig Leen. "We're still trying to figure out the chain of title because it's so complicated."

The sprawling, four-bedroom house with a home theater and marble floors, which sits on an 31,000-square-foot lot just down the street from CocoPlum, has a dicey history. Built in 1953, it first went into foreclosure in 1997, property records show. Damian Echauri, a former candy seller and now a distributor for Green Mountain Coffee, bought it the following year.

"I redid the whole thing: the roof, the floors, the pool, the landscaping, three central ACs," Echauri said. "That house was impeccable."

But five years ago Echauri and his wife divorced. His wife, he said, got 75 percent of the house and he took 25 percent, with the understanding they would sell the house and divide the profits. Then his ex-wife, he said, stopped paying the mortgage.

Here's where things get messy.

Property records still list the Echauris as the owners. However, in September 2009, Miami-Dade Circuit Judge Maxine Cohen Lando ordered the Echauris to pay Citibank $296,200.93 after the bank filed for foreclosure. In April 2010, the judge vacated the foreclosure and their note was reinstated, records show.

"We don't know how or why," Echauri said.

The house, meanwhile, sat empty. Then in September 2012, Lissette Denice Lima, a 37-year-old designer who said she was renting a room at the house, called the police. Lima told police her landlord, Jonathan Alvarez, wanted $310 to pay the electric and water bill.

Police determined that "the home was in foreclosure and that both parties appeared to be squatters."

Lima, who could not be reached for comment, told police she was moving out.

Echauri said he did not learn the house was occupied until November 2012, when his son spotted a listing on Craigslist for a room for rent. His son called Alvarez to look at the room, and the father and son headed over to confront the occupants. Echauri also called police.

In their report, police noted that Alvarez said he pays rent to his mother, who pays rent to "a guy." They told Echauri he needed to take the

proper steps to evict the family. In the meantime, they arrested Alvarez, 27, on an outstanding traffic warrant.

"The police told me I could not go in, that I had to go through a long process and one even laughed and said I had to get in a long line," Echauri said.

Police were called to the house again on Dec. 29, when another tenant complained that Ramos, his wife and her son broke into her room and threatened her with their dog, according to the police report. Ramos says the victim made up the claims and that they in fact had called police because they believed the tenant was using drugs.

Police arrested Ramos for aggravated assault for a deadly weapon, and charged Jonathan Alvarez with burglary to an occupied dwelling, assault and criminal mischief. The charges were dropped in both cases.

Proving ownership and the right to inhabit a property can be a tricky matter, Leen explained.

"The police aren't fact finders. They're not supposed to look at leases and figure out which is the better one," he said.

Indeed, after Tuesday's commission meeting, Leen and an attorney working with the city found a warranty deed recorded with the clerk of court showing Echauri sold the house to Prescott Rosche LLP in January 2012. But Echauri said Tuesday the deed was a fraud and his signature on the document was forged.

"I could record a deed for the Brooklyn Bridge. They'll take anything," said attorney Jordan Bublick, who handled Echauri's filing of Chapter 7 bankruptcy in 2008.

In fact, Alvarez's mother, Ana, said Tuesday the family signed a lease. She and Ramos said Jonathan Alvarez originally found the house through a real estate agent and moved in with his wife and two young children. When the couple split, Ramos said he and Ana moved in to the rambling house about a year ago to help out her son. He said they paid rent of $1,500 a month for the first six or seven months, but when they learned the house was in foreclosure, they stopped.

Ana Alvarez said she tracked down the bank, Chase, and was told as long as they maintained the property, they were allowed to stay. Chase paid the 2012 tax bill of $20,460.15 on the house, records show.

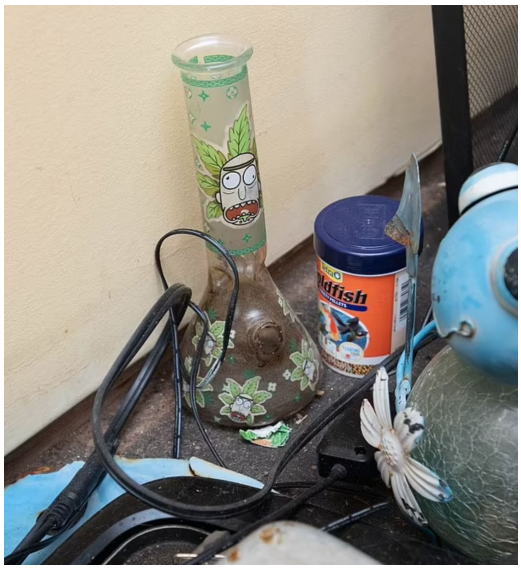
But the couple could not provide a name when asked to whom they paid rent and could not provide a lease.

"They say we're squatters, which isn't true," Ramos said. "Until the bank comes and tells us to leave, we're not going anywhere."

But unless they can produce a lease, Leen says the family's days living in luxury may be numbered.

"If they can't show us one, we will take any legal means we can to see that this ends," he said.

Bethan Sexton, *Ex-girlfriend and a dozen others take over Florida home and leave it trashed with garbage and drug paraphernalia when they finally leave - as horrifying tales of squatters continue to spread across US*, Daily Mail., March 5, 2024



The squatters trashed the premises, leaving drug paraphernalia and trash strewn across the property.

Squatters have trashed a Florida home leaving behind drug paraphernalia, garbage and signs threatening to 'shock' and blow up visitors.

Carrie Black-Phillips was stunned when she arrived at the Milton property and found her brother's ex-girlfriend and a dozen others crammed inside. She had been asked to take care of the property, which belonged to her mom, while her brother is in jail.

But when she tried to evict them, the ex-partner told Black-Phillips that she is a 'tenant' and so entitled to 48 hours notice to move out, the Pensacola New Journal reports.

'It's been a nightmare trying to deal with all this,' she told the outlet. 'It's very disheartening.'

Black-Phillips' struggle is just one of countless headaches homeowners across the US have faced in recent weeks as they deal with squatters and the bureaucracy in trying to remove them.

After almost two months of battling, Black-Phillips was finally able to have the squatters - a neighbor reporting seeing up to 15 people on the property - removed and gain access to the house, which had been left in total disrepair.

'Danger,' a sign on the property read. 'If you try to open door and get blowen (sic) up or shocked your bad.'

'Keep out if you don't want to get hurt,' another reads.

Images show the disgusting living conditions with trash strewn across the property, moldy food on the hob and drug paraphernalia littered around the home.

Other photos show slashes on the wall, while a back door was so badly damaged so badly a locksmith couldn't fix it. In the yard, a shopping cart overflowing with trash was dumped.

Black-Phillips, from Eclectic, Alabama, also said that a microwave and washing machine had been stolen.

Her nightmare began on January 1 when she was called to look after the property while brother awaits trial on charges of assaulting his ex-girlfriend.

Carrie Black-Phillips says she found more than a dozen people squatting at her mother's home in Milton, Florida

Black-Phillips is far from complacent and is convinced the squatters will return. 'They'll be back,' she said.

It was not until last week that she was able to remove six individuals from the property, one of whom was living in a trailer in the yard.

Since clearing out the home, Black-Phillips' mom hired an attorney and posted a writ of possession that is tacked on the front door.

By filing the document, the family notified the squatters they have five days to file a claim to tenant status. Court records showed that nobody made that claim.

However, Black-Phillips is far from complacent and is convinced they will return.

'They'll be back,' she said, adding the squatters had been taunting her as she tried to secure the property with a privacy fence by turning off her power tools.

She has faced an uphill battle to get the squatters out largely thanks to a law loophole known as 'adverse occupation.'

The same loophole was being quoted by a squatter refusing to leave a $2 million New York mansion.

Alleged 'squatter' Brett Flores claimed he 'deserves' to live in the property because he worked as the caretaker for the previous elderly owner, who is now dead.

Similarly, in Georgia, a homeowner is locked in a bitter battle over his property after squatters moved in while he was caring for his sick wife.

Paul Callins from DeKalb County near Atlanta had recently spent thousands of dollars refurbishing the home after it was left to him by his father in his will after he died from cancer in 2021.

But he says squatters broke into his home and changed the locks after spotting a rental listing for the property online.

He must now work for them to be evicted by working through the court system, which could take 60 to 90 days.

About 1,200 homes across DeKalb County are currently occupied by squatters, according to the National Rental Home Council trade group.

The proposed bill, named the Georgia Squatter Reform Act, expands criminal trespassing to include persons who enter property without the consent of the owner for any period of time.

A new law that would allow police to arrest squatters for trespassing and making fake lease a felony is close to passing in the Georgia General Assembly.

Maham Javaid & María Luisa Paúl, *Squatters have become a right-wing talking point. What to know about the rare practice*, Washington Post, April 3, 2024

The national conversation around "squatters" has reached a fever pitch in recent weeks, spurred by conflicts that have gone viral and legislative actions in at least four states.

Florida Gov. Ron DeSantis (R) last week signed a bill aimed at giving Floridian homeowners, as he put it, "the ability to quickly and legally remove a squatter from a property," while Georgia, South Carolina and New York have introduced legislation cracking down on people who illegally take over homes.

Squatting is extremely rare, according to experts — so rare that there is no reliable data available on the number of squatters across the country. But with a handful of high-profile cases of property owners going to court to evict illegal residents, a right-wing media frenzy and the introduction of state bills, the topic has become ubiquitous.

Here's what you need to know:

What is squatting?

Squatting occurs when "somebody goes into a property with no legal right to it whatsoever," said Eric Dunn, director of litigation at the National Housing Law Project.

It's a form of trespassing, but it also involves the intent to claim ownership or permanent residency.

In recent weeks, politicians and news outlets have referenced "squatters' rights" — often conflating them with adverse possession, a rarely applicable legal doctrine used in cases when a person "occupies a home openly and notoriously" for years or decades, Dunn said. In such cases, there's usually a dispute about ownership stemming from issues such as botched deeds.

But in the most literal sense, there's no such thing as "squatters' rights," according to Dunn.

There are "some meager legal protections" for people accused of squatting, Dunn said. For instance, a homeowner can't change the locks or go in with a gun and order squatters off the property.

Is squatting really a problem?

The short answer, experts say: No.

Juan Pablo Garnham, a researcher and communications manager at Princeton University's Eviction Lab, called squatting "an extremely rare issue."

Dunn, who started his law career in Detroit — "where there's more abandoned homes than the city can count" — said, "I can probably count on one hand the number of legitimate squatting cases I've seen."

Sateesh Nori, a clinical adjunct professor of housing rights at NYU Law School, said, "I haven't heard of a single case recently in which a homeowner says there's squatters in their home."

No public data seems to be available. Squatting is not tracked in national crime databases, such as those managed by the FBI or the Public Policy Institute of California.

"What I think is happening is that it's just a good story," Nori said. "It only takes two or three examples for people to think this is rampant. I don't doubt the facts in these several incidents that have been reported — and it's quite horrible what's happened to these homeowners — but I don't think there is some kind of epidemic of squatters taking over neighborhoods in New York City or anywhere."

Despite its rarity, squatting has emerged as a political cudgel for the right wing — fueled by a flurry of headlines that "feed into the larger narrative of crime, which is a political issue," Nori said, noting that 2024 is a presidential election year and partisans are looking to motivate voters to go to the polls.

What are the new laws and proposals around squatting?

Since November, at least four states have introduced bills that aim to extend homeowners' rights and speed up the processes to remove people living illegally in their homes.

A bill introduced by a Republican in South Carolina's state House last week would allow a property owner to immediately remove a person unlawfully occupying a home and provide penalties for those breaking the law.

The bill DeSantis signed last week is similar, giving local sheriffs the power to quickly remove people illegally living in others' homes. The bill was initially filed in November. The law, which can lead to second-degree felony charges for those on others' property, takes effect July 1.

The Georgia Squatter Reform Act, introduced Jan. 24, has passed the state legislature and is awaiting the signature of Gov. Brian Kemp (R). It makes clear that squatting is a police matter, not a civil case, and aims to give landlords "a streamlined process for ejecting squatters."

In New York, four Republican state senators co-sponsored a bill, filed last week, that would define squatting as criminal trespassing and penalize it more harshly.

Dunn, from the National Housing Law Project, said that the new laws and proposals give police the power to adjudicate whether someone is a legitimate tenant or a squatter and are "a disaster waiting to happen."

"Anytime you have the police involved, you're creating more opportunities for violence and abuse of things that police are often involved in," he added.

How did this national conversation come about?

Several stories involving squatting gained media attention in recent weeks, with two standing out.

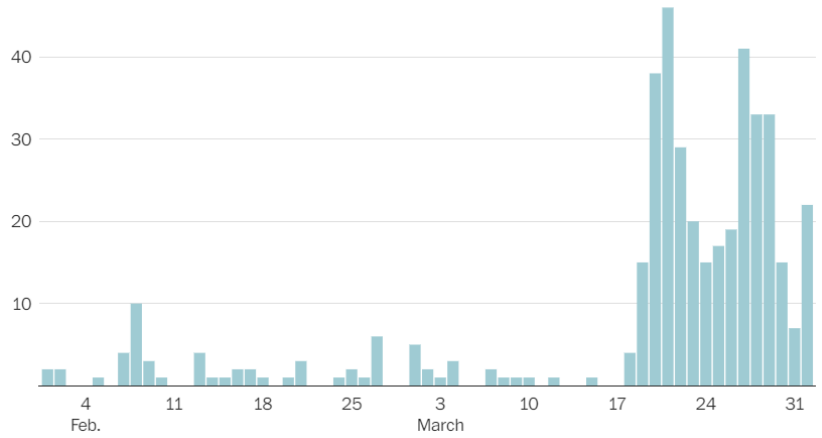
One involved Adele Andaloro, a New York woman who found that people had been living illegally in her home since February, according to the local ABC affiliate. Andaloro was arrested for changing the locks on her own house.

Also in March, Leonel Moreno, a Venezuelan citizen in the United States, created TikToks suggesting that people should occupy abandoned homes, citing adverse possession laws, which he called "squatters rights." Moreno was arrested in Ohio on March 29 by Immigration and Customs Enforcement agents for entering the United States illegally, the Columbus Dispatch reported.

Moreno's TikToks, the video of Andaloro getting arrested and a handful of similar incidents nationwide prompted a round of media coverage suggesting that squatting, particularly by

Squatters became a big topic in mid-March

Over the past month, a handful of squatting incidents across the country have resulted in a media frenzy, particularly among right-wing figures.



Mentions of "squatters" among social media posts, podcasts and other public statements from high-profile right-

undocumented immigrants, is on the rise.

A Fox News host claimed on March 20 that President Biden was allowing migrants to "break into the country and then break into your bedroom." Three days later, Joe Rogan, who hosts the country's most-streamed podcast, said the United States is "basically allowing people to steal people's houses."

Mentions of "squatters" were 14 times more common throughout the last week of March than they were a month earlier in social media posts, podcasts and other public statements from high-profile right-wing politicians, commentators and influencers, according to a Washington Post analysis.

Some observers view the narrative around the rise in squatters as a distraction from the housing crisis.

Brandon Weiss, a professor of law at American University, said an unprecedented number of U.S. households cannot afford housing right now.

"Stories about the growing number of squatters is a sort of narrative, or rhetorical tool, being used to push back against tenants," he said. "Narratives like this will shift the balance of power even further towards landlords."

Weiss said there are campaigns to provide greater housing security, but if the story becomes that landlords are victims of tenants, it will deflect from the bigger problem of housing insecurity.

"Nobody is advocating wildly reckless lawbreaking, but if you take these caricatured cases to enact law reform, that can affect people in ways that the law probably didn't intend," he said.

Florida's anti-squatter law: Is the new GOP buzzword a distraction from housing crisis? (Miami Herald Editorial, 4/11/24)

Florida passed a bill this legislative session to end "the squatter scam," as Gov. Ron DeSantis put it when he signed the measure into law in Orlando. Florida's not alone in this worry that strangers are taking over people's homes; Georgia and New York have introduced anti-squatter legislation, too.

The Florida bill, HB 621, which will allow homeowners to quickly remove people who illegally occupy homes, won overwhelming, bi-partisan support in the House and Senate. Property rights, it seems, is one of those issues that can bridge the turbulent waters of partisan politics in Florida.

Is there really a crisis of squatters? DeSantis certainly seems to think so. A number of high-profile stories from around the country have surely helped to fuel that perception, whether true or not. The case of Patti Peeples in Jacksonville got a lot of attention when she said she tried to sell a rental home only to find people living in it. They presented her with a fake lease; she videoed her encounters and testified in Tallahassee about how hard it was to make them leave. No doubt that was very persuasive to lawmakers.

Florida Governor Ron DeSantis comments on illegal immigration during a press conference held at the Sheriff's Operation Center in Winter Haven Fl. Friday March 15, 2024.

And then there's social media, the place where so many fears are fanned these days. There have been reports of videos being posted — by a Venezuelan immigrant in Ohio — advising people on how to take "adverse possession" of an unoccupied property.

Property rights plus immigration? "Squatters rights"? It all plays to the favorite right-wing theme that America is under siege from leftists, immigrants and criminals. Stoking fear is a powerful way to drive up turnout in elections.

There has been some pushback. The Washington Post published a story Wednesday that cast doubt on whether there's much of a crisis at all, saying experts called the situation "extremely rare."

Florida's law, which goes into effect July 1, allows for a fast removal of those who take possession of a home illegally but it also has some safeguards. It specifies that the unauthorized person or persons being removed "are not current or former tenants pursuant to a written or oral rental agreement authorized by the property owner," wording that is supposed to prevent the law from being misused by unscrupulous landlords who could view it as a shortcut for the regular eviction process.

That has allayed some concerns about the law. Florida Rising, a voting rights and organizing group, initially opposed the bill but now is "neutral" on it. But Cynthia Laurent, a housing justice campaigner with the group, told the Miami Herald Editorial Board that she worries the law still has the potential to place some vulnerable people at risk of being wrongly evicted, such as those who have what she termed "non-traditional" lease agreements, living long-term in hotels and motels. Forcing them out, possibly into the streets, would harm both them and the community.

Lawmakers in Tallahassee may intend to keep landlord-tenant disputes separate but will that really happen when there's an allegation of squatting? …

In a state like Florida, where rent and housing prices and the cost of insurance have become serious problems with no solution in sight, this may be mostly an attempt to distract us from focusing on what really needs fixing.

Beating the Squatter Epidemic (Wall St. J. editorial), 3/27/24

TikTok's latest contribution to American domestic tranquility is a video by a Venezuelan migrant outlining his plan for "invading a house in the United States" and taking it from the owner. "I found out that there is a law that says that if a house is not inhabited, we can seize it." Naturally this went viral.

The young migrant may have chutzpah, but he's gamed out President Biden's border abdication and, crazy enough, he's not wrong about his home-invasion scam. Squatters are moving into people's homes uninvited, and once in they can be almost impossible to dislodge.

We saw this in New York last week: When Adele Andaloro tried to rid the house she inherited from her parents of squatters by changing the locks, the cops led her away in handcuffs. The squatters could still make themselves at home.

It's happening all over. In Georgia, Paul Callins found squatters had moved into his home and changed the locks while he was away caring for his sick wife. In Texas, Houston schoolteacher Amberlyn Prather and her family used a fake lease to occupy a Houston home. In California, Flash Shelton retook his mother's house by moving in when the squatters were out—and then claimed squatter's rights himself. Two squatters were arrested Friday in connection with the murder of Nadia Vitel after she confronted them in her late mother's Manhattan apartment this month.

The problem is that most places have laws that give squatters rights after 30 days. If they claim to be tenants, the homeowner usually has to get a court order to evict them, which can take weeks. Until then the cops can't do anything because squatting is a civil matter.

"Squatting in years past was something that generally took place when homes were abandoned or simply ignored and uncared for," says David Howard, chief executive officer for the National Rental Home Council (NRHC). "Squatters were typically individuals that were literally in need of shelter from the storm. What we're seeing now is intentional acts of trespassing by people who know how to work the system."

Some states are wising up. On Wednesday Florida Gov. Ron DeSantis signed bipartisan legislation to let police boot squatters immediately, and apply criminal penalties for anyone presenting a fake lease or doing more than $1,000 in damage. On Tuesday, the Georgia Legislature approved a bill criminalizing squatting. A Long Island state assemblyman has introduced anti-squatting legislation in New York.

Numbers are hard to come by, but in a survey taken last fall of its members who own single-family rental homes, the NRHC found about 1,200 homes taken over by squatters in Atlanta. It was 475 in Dallas-Fort Worth, and 125 in Orange County, Fla.

The squatters are manipulating the legal system to abuse a fundamental right to property. A legal system that is time consuming and expensive works against actual homeowners. They can't get the squatters out or prevent them from inflicting costly damage. Without the power to remove people squatting in their homes, property rights become meaningless.

More states and cities should look to ban squatters so migrants don't think they can cross the border and take up residence in your home when you're visiting the relatives.

Perry Stein, *This Md. Family Says Their 'Dream Home' Is Infested with Snakes*, Washington Post, June 3, 2015

In early April, a 4-year old boy spotted a three-foot black rat snake emerging from the facade of his family's new Annapolis home. Jody and Jeffrey Brooks initially were excited about their son's discovery. They had encountered a snake's shedded skin in the house months earlier and thought they were now able to dispose of their serpent problem.

But a week or so later, Jeffrey Brooks found a thick, seven-foot black rat snake. Then the family found another. And another. And, yes, another.

They called in a contractor and snake inspector, who gutted the basement and deemed the house snake-infested and unsuitable for children. They moved into Jody Brooks's parents' house — leaving their new home after four months.

Now the couple are suing the previous owner of the house and the real estate agent who sold it to them last year for $410,000, claiming they knew of the snake infestation and concealed it from them so they'd buy the house.

The couple filed suit on May 19 and are asking for a combined $2 million in damages. The snake infestation was so severe, the suit alleges, that an inspector observed "highways in the basement walls that the snakes use to traverse the home." "It was a house we could make into our dream home," Jody Brooks said. But she added, "We had a fear that [a snake] would go into our daughter's crib and, like the movies, wrap itself around our baby girl."

The Brookses purchased the house, which had previously been used as a rental, from the Joan A. Broseker Revocable Trust in December. Joan Broseker had transferred the house to her namesake trust in 2010. Her daughter, Barbara Van Horn, is the real estate agent with Champion Realty who sold the house. She lives a few doors down from the allegedly snake-infested house. According to the suit, before they officially bought the house, the Brookses had heard rumors from neighbors that there was a problem with snakes, but when they approached Van Horn about it, she "assured the Brooks' that the prior tenants were 'gypsies' who did not want to pay rent and had Photo-shopped a picture of a snake at the Property to get out of the lease."

The suit alleges that Van Horn said she had a pest-control company perform a "snake away" treatment of the house. During all inspections of the house, no one, including the Brookses, observed snake activity. But, the suit alleges, that was all part of the ruse.

"Van Horn refused to keep a lock box on the premises while acting as the listing agent and would personally unlock the home and turn on the lights and, upon information and belief, check for snake activity before anyone entered the premises," the lawsuit states.

Barbara Palmer, an attorney for Champion Realty, declined to comment on the allegations, saying it's a policy not to speak about ongoing litigation.

Black rat snakes are nonvenomous and are not typically interested in humans. The family says, however, they've suffered from severe respiratory problems after living with an "excessive amount of snake feces." Black rat snakes leave behind a distinct smell and because of this, Jody Brooks said, the family could never move back to the property. The smell can attract more snakes and there would be a risk of them returning, she said. "Unfortunately, that's us, we're the snake family. . . . We've learned more about snakes than we've ever wanted to know," she said. "We just want them to let us start over and take the house back."

Question: What would be the seller's liability, if any, in a duty to disclose state? In a caveat emptor state?

Ron Lieber, *New Worry for Home Buyers: A Party House Next Door,* NY Times, 10/9/15

AUSTIN, TEX. — The houses are often among the nicest on the block, or at least the biggest. They may be new construction where a smaller structure once stood, or an extensively renovated home with cheery paint in shades of yellow or blue.

But then the telltale signs appear, including an electronic touch pad on the door that makes it easy for people to get in without a key. The ads on HomeAway or Airbnb eventually confirm it: A party house has come to the neighborhood.

This home in Austin, Tex., has been the subject of 15 complaints related to groups who have rented it for short stays. Ilana Panich-Linsman for The New York Times

Some neighbors have warmed in recent years to travelers dragging suitcases through their residential neighborhoods, and they are happy that the visitors spread their money around. But when profit-seeking entrepreneurs furnish homes they do not live in to make them attractive to big groups and then rent out those houses as much as possible, parties and noise are nearly inevitable.

And so it goes here in Austin, where a group of enraged and occasionally sleepless residents have taken their complaints to the city. Austin made rules in 2012 that were meant to keep short-term rentals under control, but the neighbors argue that many of the rules are unenforceable.

This week, I rented one of the most notorious party houses in Austin and invited some of the neighbors over for a chat to ask a few questions. Where do the rights of property owners to rent out their homes end, and where do those of quiet-loving neighbors begin? Do all home shoppers now need to be on the lookout for nearby problem properties? And if so, what might happen to home values when revelers can bunk up next door on any given night?

These are not new questions. In resort areas in particular, people have been renting out investment properties for ages. What's new is how easy it has become for people to make money by listing rooms or homes and for visitors to save money by staying there. This is particularly true in good-time destinations like Austin, Nashville, New Orleans and other bigger cities.

When Austin tried to bring some order to the proceedings three years ago, it limited the number of unrelated people who could stay in one place at one time to six. (It also capped the number of certain listings in many neighborhoods, albeit with a loophole that has allowed many unregistered properties to hit the market.)

Nevertheless, listings began appearing all over the city advertising beds for 10 or 15 people, or more. Austin has become a popular bachelor party destination, and the website Thrillist described one Airbnb listing as "the perfect place to bed down for a bonkers bachelor party, as it's a short bike ride from downtown, just the right blend of weird & huge, and not at all unaccustomed to rowdy entertainment."

Emmy Jodoin lives next door to that house with her family. "It is loud, and there is live music and karaoke stuff, and it's all done outside because of the pool," she said. "They're out in front at 4 in the afternoon waiting for their Uber to come, drunk on the front lawn."

Homeowners had other complaints about guests, including trash bins overflowing with beer cans, public urination, catcalling, foul language, racist remarks, companies throwing events and the appearance of a rainbow-colored painted pony. "Sometimes, when they are outside, they're playing beer pong just wearing their underwear," said Hazel Oldt, age 11, who can see them next door from the third-floor rooftop garden of her house.

Many of the complaints result when there are well over six people staying at these houses. So how do owners get away with renting to more people than city rules allow? "Determining how many are occupying versus just visiting is almost impossible," Carl Smart, who is the director of Austin's code department, said, chuckling as he did so.

What was so funny? Had some of the guests been coached to say that they were related? "I think so," he said. "There is no way for us to disprove or to prove it. We could ask them to, but they don't have to, so we have to take their word for it." KVUE, a local television station, tagged along with code enforcement officers who heard from guests at one house that there were triplets inside and that someone else was related to a fifth guest by marriage.

Each of the three bedrooms in the home includes at least one bunkbed and could sleep several adults. Ilana Panich-Linsman for The New York Times

The neighbors would prefer that the city simply cap guests at six people — or, better yet, stop allowing what they describe as rogue hotels to operate in residential neighborhoods. (They have no problem with people renting out their entire homes occasionally or renting rooms more frequently, while the owners themselves are in residence.)

At HomeAway, which is based in Austin and also owns Vrbo.com, executives did not want a ban and said that renting out one's home on a short-term basis was a fundamental right. Nor do they think that it is a commercial activity. "It's a residential use of the property," said Matt Curtis, who runs its governmental relations efforts. "It's no more a business than someone renting it out long-term would be a business."

Even if no one, in this instance, is doing any actual residing? HomeAway's contention is that the visitors coming for the weekend are the residents in this context.

The home, which has strict rules against parties, includes a game foyer on the second-floor landing. Ilana Panich-Linsman for The New York Times

Mr. Curtis questioned how widespread the problem was. Airbnb provided some statistics about its customers, noting that from Oct. 1, 2014, to Oct. 1 this year, 87 percent of trips to Austin involved four or fewer people and 97 percent involved eight or fewer. The average age of Airbnb guests in Austin is 36. According to the research company Airdna, of the 1,414 Airbnb listings in Austin as of Aug. 31 with three or more bedrooms, 33 offer lodging for four or more people per bedroom while 618 sleep over two per bedroom.

Airbnb offers a hotline for neighbors having problems with hosts anywhere it operates and is building tools that will try to recognize parties before they happen, say when someone books a large house and that listing is immediately viewed by many other site visitors.

Since October 2012, Austin has received 266 complaints about the type of registered properties where the homeowner is generally not present. Twenty percent of the properties have at least one complaint, with an average of 2.4 complaints among those. Seventeen percent of the complaints were about over-occupancy.

The house where I stayed has received 15 complaints, and the city has suspended its license once. The walls have "Dumb and Dumber" and "Anchorman" movie posters, and the three bedrooms are full of bunk beds and futons. "Our neighbors understand that your group is here to have a good time," the listing says.

But not too good a time. Each door to the outside has a framed copy of Austin's noise ordinance nearby, and Jason Martin, a limited partner with partial ownership in the property, sends an extensive list of house rules to guests urging them not to disturb the neighbors. "It is extremely professionally run," he said. "Any word of a bachelor party or fraternities is an immediate no-go."

In fact, house parties and "organized social events" are not allowed on the premises, a rule I thought I was not breaking when I invited the neighbors over. There's another rule noting that "all persons entering the premises are counted as chargeable

guests." I should have reread the rules and reviewed my original communications with Mr. Martin once I decided to hold the gathering in the days after I made the booking.

Those visitors were especially concerned about their property values. For many of them, their homes are their largest asset. Jessie Neufeld, who bought her home right before the local rules changed in 2012 and now has a 2-year-old child, put it most bluntly. "We did not buy our house to be living next to a hotel," she said. "Would you buy a home if you knew a hotel like this was operating next door, if you wanted to set your life up and raise a family?"

I put the question to two real estate professionals whose names I saw on for-sale signs for homes that were next to or close to some of the party houses. Were the properties going to sell for less because of the problem properties nearby, and did they have a duty to disclose these houses to any and all buyers?

Katie Brigmon of Dash Realty did not want to answer many questions about her listing, a house that is very close to one problem property, and my call to her quickly went dead.

Jeff Grant from Saddle Realty said that he wasn't aware of the short-term rental several homes down from the house he's trying to sell on Hidalgo Street. "But my philosophy has always been disclose, disclose, disclose," he said. "I don't think it affects property value in the least."

It probably won't if the buyer simply wants to rent out the home every weekend. But every other home buyer ought to be searching Airbnb, HomeAway and similar sites for listings that are close to a home that they're considering buying.

Ms. Neufeld said she resented the fact that people making a living from renting out homes for the weekend have put her own home's value at risk. "They are leveraging our neighborhood for their profit, telling people to come stay in this beautiful place where you would like to pretend that you live," she said. "And they are making people miserable."

Question: What if anything would Florida law require by way of disclosure relating to a party house nearby?

Susanna Kim, *Florida Couple Accused of Allegedly Lying about Sinkhole to Homebuyer*, ABCNews.com, July 17, 2015

A couple in Florida is accused of lying about a sinkhole on their property to a homebuyer after cashing an insurance check without fixing it.

Glenn Jasen, 64, and his wife Kathryn, 63, of Spring Hill, Tennessee, were arrested by the Florida Department of Law Enforcement and appeared in federal district court in Tampa yesterday for their bond hearing. The couple, who own an air conditioning installation business, are accused of wire fraud, which is a federal felony, according to an indictment filed this week. They face a maximum of 20 years in prison each if convicted, according to a statement from U.S. Attorney A. Lee Bentley III.

After the Jasens detected a sinkhole on their property, they made a claim to their insurer, the indictment states. But instead of repairing the sinkhole, they deposited the unspecified insurance check into a bank account, the U.S. attorney's office said. The couple allegedly failed to disclose the sinkhole in real estate documents and later sold the home to another family, according to the indictment.

Victor Martinez, a lawyer for the Jasens, told ABC News that omissions or errors in home sale disclosures are typically prosecuted civilly through lawsuits.

"This case is brought by federal indictment through wire fraud because money was transferred in the sale," Martinez told ABC News. "To the best of my knowledge, this is the first time this kind of case has been brought federally. We'll file motions suggesting this maybe isn't the best way to deal with that."

The indictment says the Jasens received $64,900 for the sale of the home, which authorities say was a wire fraud scheme that took place between February 2014 and March 2014. The Jasens allegedly sold the home "while falsely and fraudulently representing to the family buying the home that there was no sinkhole and no prior existing sinkhole claim," the indictment said.

The couple was released yesterday after pledging their property to secure a bail bond, according to documents filed with the court. They did not enter a plea at the hearing.

"The Florida Department of Law Enforcement is committed to investigating financial crimes that personally impact the citizens of the State of Florida. We will continue to work with the prosecutorial team to bring these criminals to justice," said special agent Rick Ramirez of Tampa Bay Regional Operations Center in a statement.

Kelly Magbee, who lived in the home after the Jasens sold it, told WFLA last month her family was forced to move out after it cracked down the middle of their living room.

"We couldn't stay in the house," Magbee told the station. "We couldn't even keep the animals in the house."

Magbee could not be reached for comment by ABC News.

Patty Ryan, *Judge sentences couple in Spring Hill sinkhole case*, Tampa Bay Times, 1/28/16

TAMPA — Kathryn and Glenn Jasen sold their Spring Hill home to a man with a fiancee and five children, without disclosing the $154,745 sinkhole claim they had made on it. Because loan money crossed state lines, the deception amounted to federal wire fraud, a jury decided.

It was a crime. But one worthy of prison? A prosecutor said yes, and sentencing guidelines suggested at least two years.

U.S. District Judge James D. Whittemore disagreed Thursday, instead putting the Jasens on probation for five years, with six months of house arrest, calling the latter "a reminder to you of what could have been."

Whittemore first anguished openly about the difficulty of the decision, exacerbated by the lack of legal precedent and by the Jasens' strong reputations for compassion in the community.

Neither had a criminal conviction before the October jury verdict against them. Whittemore estimated he spent 4-1/2 hours reading letters from people who told of their good deeds, and along the way, came to appreciate the Jasens, both 64.

"To put it very simply," Whittemore said, "is it really necessary to take two individuals and put them in prison for what amounts to an isolated instance of wrongdoing? And, I think not."

He said he didn't think the case even belonged in federal court and should have been resolved before it landed there.

Prosecutor Thomas Palermo had arrived at a different conclusion. He said the Jasens had earned incarceration, and their popularity shouldn't keep them from being punished.

They pocketed a $154,745 insurance settlement to fix sinkhole damage in 2010 but spent only about $30,000 on repairs. Then, in 2014, the Jasens sold the house to Thomas Jaje for $64,900, denying sinkhole claims on disclosure forms.

Palermo said only by geology, luck or divine providence had the ground beneath the home not collapsed into cavities, including one below the nursery. The Kimball Court home still stands.

Jaje and his fiancee, Kelly Magbee, described the financial and emotional toll of having to flee — after the foundation cracked — juggle the mortgage and an added rent payment, work extra hours and change schools.

The judge asked Jaje whether he would be satisfied if the Jasens bought back the home and covered expenses.

Jaje said yes, he would.

Magbee said she knows the Jasens aren't bad people. "We're not bad people, either," she said. "We wanted a safe home for our children."

The matter of restitution was not decided Thursday. Whittemore asked the prosecutor and defense attorneys Mark Horowitz and Fritz Scheller to discuss an appropriate amount and return to him. In addition to any restitution, he ordered the Jasens to each pay a $15,000 fine and to forfeit $60,069 to the government. The latter amount reflects alleged proceeds of the crime: the amount of an escrow check a title company wrote to the Jasens.

The Jasens did not exercise their right to address the judge at sentencing, leaving opening the possibility they may appeal.

A Spectre Looms over Hong Kong's Property Market: Why Mortgage Payments in the City Can Be Ghoulishly Expensive , The Economist, July 18, 2024

Properties on the Peak, a rich neighbourhood in Hong Kong, are among the world's most desirable. But nobody lives in Dragon Lodge, an Italianate mansion built in the 1920s. It was abandoned shortly after it sold, for HK$118m ($15m), in 1997. Rumour has it that nuns were beheaded there during the Japanese occupation in the second world war; they haunt the shadowy halls.

Dragon Lodge is known in Cantonese as a *hongza*, or "calamity house". In Hong Kong's expensive property market that label can make even the swankiest homes places to avoid. A paper in 2020 by Utpal Bhattacharya of the Hong Kong University of Science and Technology and fellow academics said ghost-inhabited homes in the city lose a fifth of their value on average; the prices of flats on the same floor as one drop by 9%. Murders can kill prices by 34%.

Property dealers need to be wary of ghouls. In 2004 a court ordered Centaline Property, an estate agency, to pay $40,000 for failing to tell a buyer that a property was a *hongza*. Spacious, a rental website, features a grisly page that lists properties where untimely deaths occur. Buyers of such places must pay more for their mortgages because their properties are harder to sell. Hui Wing Cheong, an estate agent, says his company has a hauntings database.

Homes do not need to be haunted to be tainted by death; those near cemeteries and funeral parlours are cheaper too. Even the prices of homes for the dead—columbariums—drop by half if they might be haunted, says Andrew Kipnis of the Chinese University of Hong Kong.

Mr Kipnis points out that rural communities in China do not typically show an aversion to the dead. The deceased are usually kept at home before funerals. But Hong Kong is different.

Unlike the mainland, the city has not undergone fierce campaigns against superstition. The dead are hurriedly removed from premises, heightening a sense that they are to be feared. People in big cities are also more likely to live and die on their own in unhappy circumstances. A study in 2023 found that 41% of elderly people surveyed in Hong Kong were socially isolated. Hong Kong's rapidly evolving cityscape conjures apparitions, too. The turnover of tenants and buildings results in a greater fear of skeletons lurking in the closet.

Rachel Kurzius, *How to sell a haunted house: Ghostly tales from real estate agents that are even scarier than this housing market*, The Washington Post, 10/23/2023

Real estate agent Arto Poladian knew that taking on the $2 million listing in Los Angeles could be a challenge — even though it was 2021 and the market was extremely hot.

The problem wasn't the property itself, which he describes as "exquisite": A spacious lot with views of the Rowena Reservoir, the downtown skyline, Griffith Park *and* the San Gabriel Mountains. Or its neighborhood of Los Feliz, which boasts hip shopping and historic estates. And although the home was dated and needed upgrades, its "trophy location" canceled out those concerns.

The issue was what happened in the house on Aug. 10, 1969.

That night, several members of the Manson family, including Charles Manson himself, broke in and stabbed the grocery store executive Leno LaBianca and his wife, Rosemary, dozens of times. The seemingly random murders occurred one night after Manson's followers killed the actress Sharon Tate across town.

Poladian's client had owned the one-story Spanish revival for two years. He was a paranormal investigator and TV host who told the Guardian that he had experienced "a very, very strong energy" there.

Very few spaces have the notoriety of this particular home, but real estate agents say they often contend with properties that just feel a bit off. Restless spirits may not actually materialize in the halls, but potential buyers get a bad vibe and walk away spooked nonetheless. In these cases, the tried-and-true tricks of decluttering, staging the rooms and applying a fresh coat of paint often are not enough to close the deal.

Poladian, who works for Redfin, says he personally "never dealt with anything freaky or scary" in the LaBianca house. "If I didn't know the history of the home, it never would have crossed my mind," he says. Although he said he wasn't concerned about ghosts popping out of corners or books flying off shelves, he was anxious about the property possibly attracting the wrong kind of attention. "In today's day and age, when you have a listing like this, it attracts social media wannabes, who will break out their camera and take a video of themselves," he says.

Still, he mentioned the "infamous" history directly in the listing because he also didn't want to catch any potential buyers unawares. To keep lookie-loos to a minimum, he did not hold open houses; he prescreened people and required them to submit proof of funds before allowing them to tour the place.

He also looked into changing the home's address as a way of further separating it from its grisly past, only to discover another owner had done that years earlier. It hadn't been terribly effective, apparently. Gawkers, he says, would "drive by daily." Ultimately, the home went under contract for $1,875,000 after about three months on the market.

Kelly Moye, a Compass real estate agent in Boulder, Colo., keeps a list of go-to professionals who help make her listings as appealing as possible: furniture stagers, floor repair people, lighting designers — and two "home energy clearers."

The "clearers," she says, are "the exact same as a stager — the stager stages the furniture, the clearer stages the energy." Moye calls on clearers when houses that otherwise seem prime for a sale just won't move for mysterious reasons. Although she was at first skeptical, she says the clearers' "actions have been so confirmed for me over the years, I kind of stopped thinking it was goofy."

Moye rattles off a half-dozen anecdotes about times when a property kept getting the same feedback from other agents — "It just doesn't feel right" — and calling in a clearer was what finally made the difference.

In one such instance, she was hired to sell a 19th-century Victorian in Denver. Her clients were giving her a tour of their home when they arrived at the entrance to the basement. As Moye began to descend into the old cellar, the owners' cats, which had followed her throughout the house, suddenly put on the brakes and refused to go past the top of the stairs.

"I get to the bottom of the stairs and my hair on my arms is standing up on end and everything is just heightened," Moye says. The basement was otherwise unremarkable, "but boy, you walked down there and you felt something really wrong."

She asked the owners whether anyone had ever commented about it. Turns out, nobody wanted to go down there, humans or animals. "And I said, 'Well, let me get my house clearer over here and see what's up, because if you get this funky feeling that I got, that's not going to work for a buyer,'" Moye recalls.

Both of the psychic-like professionals in Moye's Rolodex offer roughly the same service. For $300, they'll take between four and five hours to do an elaborate ritual, going into a trance-like state to "communicate" with the space. In this case, the clearer uncovered that past owners of the home had illegally made alcohol during Prohibition, and the basement had been the site of a deadly police raid. After clearing the energy of those murders, Moye says, the cats would enter the space without fear — the owners even put their litter boxes down there during showings.

Moye also offered to send a clearer to another home in a Boulder suburb. She had sold the house to the client years before and called to check in. The update? It had a ghost, described by the client as a "white-shrouded, kind of wispy sort of being," recalls Moye. Members of the family had all allegedly spotted it at one point or another.

"She said, 'You know, I'll be making dinner and I'll just catch something out of the corner of my eye,'" Moye says. The client even sent her a photo of herself folding laundry in the bedroom, in which Moye says she could see an apparition in the reflection of a window.

But the client declined the help. It turned out the family liked the ghost and had named her Lucy. "Just 'cause there is a spirit presence nearby does not necessarily mean something's wrong or it's a bad thing," Moye says.

States have different laws dictating what a seller must disclose about a home's history to a buyer, although most don't require sharing information about deaths or other "stigmatizing" events on the property. California, which has the strictest statute, calls for sellers to disclose all deaths going back three years. One famous property law case in New York from 1991, known as the Ghostbusters ruling, does require owners who have publicly stated their home is haunted (for instance, as part of a ghost-tour business) to disclose that haunted reputation to buyers.

Without such a mandate, though, it's relatively tough for a new owner to uncover information about deaths that may have occurred in a given home. This is what prompted Roy Condrey to launch the website DiedInHouse.com in 2013. Customers pay for a report with a slew of information about an address, including whether people have died there, although Condrey

acknowledges that "we can't find everything."

He says that how people use the information really varies. "They care because they may believe in ghosts," he says. "And then there are people who may not believe in ghosts but the house creeps them out. They got a bad vibe there and want to check it out." Others are hoping for a bargaining chip during the negotiating process or are trying to avoid moving into a home that might be a local tourist attraction.

Brian K. Lewis, an associate broker in New York City, has sold a number of "generational houses" — places that have been passed down through families, or where the owner lived for an especially long time. Those listings tend to attract more questions about who may have died there, and whenever he can, Lewis makes a point to tell interested buyers that the most recent occupants died off-site. Still, that's not always possible: "We're a dense, old city, and even in new buildings, things happen. People are born, people get married, people have babies, people die," he says.

On occasion, "I have had sellers who feel like different energy needs to be there, and they go to great effort and sometimes great expense to change the energy of a room," Lewis says. He has had clients bring in astrologists and feng shui specialists, and smudge their homes with sage to ward off otherworldly tenants.

And then there are the times when he's surprised that buyers don't care *more* about a building's eerie past. A few years ago, he was selling $2.5 million luxury apartments in a recently converted 1800s hospital. The history was well known, yet "zero-point-zero-zero buyers cared," he says.

By now, some may wish they'd asked more questions. "This place, I am told by the people that work there, has had some very interesting things happen since it became a residence," says Lewis, including strange noises at night and more than one unexpected death.

Coincidences? Maybe.

Stephanie Rosenbloom, *Some Buyers Regret Not Asking: Anyone Die Here?*, NY Times, April 30, 2006

DEALING WITH LATE OWNERS Danielle Cash was alarmed to discover, two years after buying her Brooklyn home, that the owner had died there. But talking to her neighbors and learning that the owner had been beloved changed her thinking.

SPRINGTIME house-hunting season has arrived, and as always, diligent shoppers will meet with brokers and fire off a litany of questions ranging from square footage to noisy neighbors. But one significant question will probably go unasked, even though its answer could end up, well, haunting homeowners.

"Has anyone died here lately?" is not the sort of thing buyers blurt out at open houses. Rather, it is the kind of out-of-kilter question one expects to hear uttered in a British accent during a Monty Python film.

Queries about cockroach extermination are as macabre as open houses generally get. Yet making a down payment and later discovering that someone went into that great good night in your great room can really put a damper on your housewarming party.

One couple bought an apartment on the Upper East Side last year only to learn weeks later from a building employee that the previous owner had committed suicide there.

"They were very, very upset," the couple's broker, Andia Smull, of Bellmarc Realty, said of the suicide. "It was a horrible thing to uncover." Ms. Smull said she had never been informed by the selling broker of the person's death and while her clients were distressed, she believed they had no legal recourse.

Plenty of prized homes in the tristate area are more than a century old, and to experience their magnificence one must accept the fact that someone probably died within their walls.

But not everyone is able to sleep soundly once they learn that a death — particularly a murder or suicide — happened in their home. For some, the mere thought of a specter is enough to set their arm hairs on end. Yet many people come to realize that living in a place where a death occurred is unpalatable to them only after the deed is signed and things begin to go bump in the night.

Such discomfort is not particularly surprising, given that in the 20th century death moved out of the home and into hospitals.

And while Americans are now accustomed to institutionalized death, people in previous periods commonly died at home. Some Victorian-era town houses in New York even have their original "coffin corners," the stairwell niches that enabled a coffin to be easily maneuvered down the stairs.

Today, a home associated with a murder or suicide can become what some brokers call a stigmatized property. So can homes reputed to have a resident ghost. Although they are free of physical defects like leaky roofs or lead paint, such properties can so spook potential buyers that they linger on the market and command less than market value. Or, the discovery of the death can prompt a sudden change of course.

Karen Kelley, a broker at the Corcoran Group, discovered that firsthand. After eight months of apartment hunting, an Asian couple she was working with won a bidding war and were viewing the apartment one last time when the seller's broker said, "It's too bad the tenant died here."

Ms. Kelley, who did not know about the death, said she watched the faces of her clients fall. Then they told her that a Chinese custom prevented them from buying an apartment where someone had died.

Lawyers said stigma was a particularly hot button issue in the 1980's, when AIDS began drawing public attention and people were consumed by irrational fears.

"People were frightened that if someone who had AIDS died there, they were going to get it," said Karen S. Sonn, a lawyer and founder of Sonn & Associates in Manhattan. "There wasn't a lot of information." Today, its connection to a property seems to provoke little worry.

In this decade, whether buyers are concerned about a death in a home depends on whether the person was celebrated or disgraced, how long ago he or she died and the manner of death (and if any publicity surrounded it).

The house in Beverly Hills in which Lyle and Erik Menendez killed their parents with shotguns in 1989 lost more than $1 million in value when it was sold. But the 15th-floor apartment at 1040 Fifth Avenue in Manhattan that was home to Jacqueline Kennedy Onassis — and the place where she died in 1994 — is by no means stigmatized. Rather, it connotes glamour and style (and is currently on the market for $32 million). In 1995 the apartment was sold to its current owner for $9.5 million.

Karen S. Sonn, a lawyer, said that in the early days of AIDS, some apartments shared the taint that accompanied the disease when it was more feared and erroneously viewed as something easily caught.

Those homes had highly publicized stories that were chronicled in the media, so potential buyers knew what they were getting. But when deaths are private, buyers may be caught unawares.

When the Manhattan couple who learned of the suicide in their apartment contacted Ms. Smull, their broker, they asked, "Shouldn't we have been told this?"

But even had Ms. Smull known about the suicide, New York is a caveat-emptor state, when it comes to apparitions and the like, meaning "buyer beware."

"The buyers' personal superstitions or beliefs are not recognized by law," explained Ms. Sonn. (There was a case in New York, however, in which a judge ruled that a buyer could get his deposit back because the seller took advantage of the buyer's ignorance of her home's haunted reputation, something she herself had fostered.)

Just as in New York, sellers in New Jersey are not required to tell buyers about a death on a property, or a rumor of a haunted house. "If it doesn't harm the property, under no circumstances do you have to report it," said Adam Leitman Bailey, who practices real estate law in New York and New Jersey.

Connecticut has enacted legislation, sometimes referred to as a "Ghostbusters law," that exempts sellers and their agents from having to voluntarily disclose deaths on the property, and might even cover rumors of a Casper in the closet. Mr. Bailey added that it requires a seller or a real estate agent to reveal the existence of a property that was suspected to have been the site of a homicide, other felony or a suicide if a potential buyer requests such information in writing.

Still, many brokers in New York and New Jersey say that if asked directly about a death, felony or supernatural occurrence, they have an ethical responsibility to disclose what they know.

"It's a matter of being cut and dry with what the law is telling you, and what your insides and conscience are telling you," said Bill Hanley, president-elect of the New Jersey Association of Realtors and the manager of Weichert Realtors in Metuchen, N.J. "My philosophy is, if you know something, you should disclose it."

Wendy Sarasohn, a broker with the Corcoran Group who has guided buyers away from apartments she felt had bad vibes and who has arranged smudgings (an American Indian practice during which smoke is used to cleanse a place of negative energy), said a broker should disclose if "something unharmonious" has taken place.

Countless buyers care more about getting a deal than inheriting an unfriendly ghost, but Ms. Sarasohn thinks the psychological cost of buying a stigmatized property far outweighs any potential monetary discount. Bad luck, she said, can be transferred with title.

"No matter how beautifully decorated a place is, when there's a bad energy there, it's toxic," said Ms. Sarasohn. "In my book even a 100 percent discount is not enough."

Mr. Hanley of the New Jersey Association of Realtors said that even if sellers were required to disclose the intangible, it is difficult to say what, if any, discount there might be on a stigmatized property, because it is almost impossible to determine when a property stops being under a psychological impairment. "What if it happened 100 years ago?" he said, adding that homeowners may not even know the history of their own property. "There are certain people in certain cultures where it's a problem no matter when it happened."

Ms. Sarasohn said she is "curious to see what's going to happen with that rental in Greenwich," referring to the home on Dairy Road that Andrew M. Kissel, the real estate developer who had been charged with fraud and was found slain in his basement earlier this month, was renting.

In January, Richard Keller was accused of stabbing his mother to death at Plaza 400, a 40-story building in the Sutton Place neighborhood. The headline "Murder on Sutton Place" appeared in The New York Post. Jonathan Miller, president of Miller Samuel, an appraisal firm, has been in the building numerous times in the last decade and said that the murder would have no effect on prices for other apartments in the building.

"In the transactions that we've seen, we don't see a hiccup or any issue in pricing," he said, adding that it is unclear whether there would be a significant effect on the price of the apartment where the murder actually took place. "As far as the unit goes, that's a lot more for a buyer to process," he said. "I do think that there would be some sort of stigma but that stigma would fade over time."

Mr. Miller said that in weaker housing markets there tends to be more effect on value. In

a tighter market, people tend to care less and there is less impact on price, he said.

Mr. Bailey, the lawyer, said that people who are truly worried about ghosts, suicide or murder should read through old newspaper articles and also find out the names of the previous owners and then search for death certificates. "If you're really worried, hire a detective," he said.

While stigmatized property is enough of an issue to warrant an official definition from the National Association of Realtors, there are buyers who simply do not care.

"No one ever asked me if someone died in an apartment," said Toni Haber, a broker with Prudential Douglas Elliman, who has been in the real estate business for more than two decades.

Many buyers are more concerned about square footage than about who is six feet under, especially in Manhattan, where stigma begins to fade away with the arrival of the next day's tabloid. People continue to live at 14 West 10th Street, which, while being the former home of Mark Twain, is also where Joel Steinberg beat to death his illegally adopted daughter, Lisa. (The building is reputedly haunted, to boot.)

Buyers are also acutely aware of the fact that death can result in a good deal.

"For many of my investor clients, death smells of opportunity and sometimes joy," Mr. Bailey wrote in an e-mail message. "Death and suicide of an owner may result in a lower priced sale from the estate than the sale price on the free market."

Many renters are not bothered, either, if even a fraction of the legion of only-in-New York stories about people scouring obituaries in search of reasonably priced apartments about to become available are true.

Indeed, tales of death and resale end in various ways, not all of them unpleasantly. After living in her brownstone in Bedford-Stuyvesant for two years, Danielle Cash, a broker who specializes in town house sales, learned from a friend and neighbor that the previous owner of her home had died there.

"I was freaked out," said Ms. Cash, founder and president of Abode Real Estate, which is located in her town house. "I said, 'You waited two years to tell me this?' "

But when neighbors and churchgoers regaled her with stories about how beloved the prior owner was, she came to realize that it was not such a grave matter.

"If he was a nightmare and died in the house, I would have been freaked out," Ms. Cash said. "I really do think energy lives in houses."

Given the age of the houses in Bedford-Stuyvesant, she said, she realized that people had probably died in their homes for generations. Besides, her three-story 1899 town house, with its built-in mirrors, fretwork, parquet floors, pocket doors and original shutters, was irresistible.

"This is a lovely house," Ms. Cash said. "I would have to die here before I let go."

Fla. Stat. Ann. § 689.25. Failure to disclose homicide, suicide, deaths, or diagnosis of HIV or AIDS infection in an occupant of real property

(1)(a) The fact that an occupant of real property is infected or has been infected with human immunodeficiencyvirus or diagnosed with acquired immune deficiency syndrome is not a material fact that must be disclosed in a real estate transaction.

(b) The fact that a property was, or was at any time suspected to have been, the site of a homicide, suicide, or death is not a material fact that must be disclosed in a real estate transaction.

(2) A cause of action shall not arise against an owner of real property, his or her agent, an agent of a transferee of real property, or a person licensed under chapter 475 for the failure to disclose to the transferee that the property was or was suspected to have been the site of a homicide, suicide, or death or that an occupant of that property was infected with human immunodeficiency virus or diagnosed with acquired immune deficiency syndrome.

Massachusetts General Laws, Ch. 93, § 114: Real estate transactions; disclosure; psychologically impacted property

Section 114. The fact or suspicion that real property may be or is psychologically impacted shall not be deemed to be a material fact required to be disclosed in a real estate transaction. "Psychologically impacted" shall mean an impact being the result of facts or suspicions including, but not limited to, the following:

(a) that an occupant of real property is now or has been suspected to be infected with the Human Immunodeficiency Virus or with Acquired Immune Deficiency Syndrome or any other disease which reasonable medical evidence suggests to be highly unlikely to be transmitted through the occupying of a dwelling;

(b) that the real property was the site of a felony, suicide or homicide; and

(c) that the real property has been the site of an alleged parapsychological or supernatural phenomenon.

No cause of action shall arise or be maintained against a seller or lessor of real property or a real estate broker or salesman, by statute or at common law, for failure to disclose to a buyer or tenant that the real property is or was psychologically impacted.

Notwithstanding the foregoing, the provisions of this section shall not authorize a seller, lessor or real estate broker or salesman to make a misrepresentation of fact or false statement.

Indiana Code Ann. Title 32. Property. Art. 21. Convenyance Procedures for Real Property, Chapters 5 and 6

IC 32-21-5 Chapter 5. Residential Real Estate Sales Disclosure

32-21-5-1Applicability of chapter
32-21-5-2"Buyer" defined
32-21-5-3"Closing" defined
32-21-5-4"Defect" defined
32-21-5-5"Disclosure form" defined
32-21-5-5.5Repealed
32-21-5-6"Owner" defined
32-21-5-7Disclosure form; contents
32-21-5-8Owner prepared disclosure form
32-21-5-8.5Disclosures relating to property covered by governing documents of homeowners association
32-21-5-9Disclosure form distinguished from warranty
32-21-5-10Disclosure form; presentation required before acceptance of offer
32-21-5-11Owner liability for errors in form
32-21-5-12Matters arising after form delivered; requirement to disclose at settlement; unknown or unavailable information
32-21-5-13Disclosure of defect after offer accepted; buyer's right to nullify contract; return of deposits

IC 32-21-5-1. Applicability of chapter

Sec. 1. (a) This chapter applies only to a sale of, an exchange of, an installment sales contract for, or a lease with option to buy residential real estate that contains not more than four (4) residential dwelling units.

(b) This chapter does not apply to the following:

(1) Transfers ordered by a court, including transfers:

(A) in the administration of an estate;

(B) by foreclosure sale;

(C) by a trustee in bankruptcy;

(D) by eminent domain;

(E) from a decree of specific performance;

(F) from a decree of divorce; or

(G) from a property settlement agreement.

(2) Transfers by a mortgagee who has acquired the real estate at a sale conducted under a foreclosure decree or who has acquired the real estate by a deed in lieu of foreclosure.

(3) Transfers by a fiduciary in the course of the administration of the decedent's estate, guardianship, conservatorship, or trust.

(4) Transfers made from at least one (1) co-owner solely to at least one (1) other co-owner.

(5) Transfers made solely to any combination of a spouse or an individual in the lineal line of consanguinity of at least one (1) of the transferors.

(6) Transfers made because of the record owner's failure to pay any federal, state, or local taxes.

(7) Transfers to or from any governmental entity.

(8) Transfers involving the first sale of a dwelling that has not been inhabited.

(9) Transfers to a living trust.

[Pre-2002 Recodification Citation: 24-4.6-2-1.]

As added by P.L.2-2002, SEC.6.

IC 32-21-5-2 "Buyer" defined

Sec. 2. As used in this chapter, "buyer" means a transferee in a transaction described in section 1 of this chapter.

[Pre-2002 Recodification Citation: 24-4.6-2-2.]

As added by P.L.2-2002, SEC.6.

IC 32-21-5-3 "Closing" defined

Sec. 3. As used in this chapter, "closing" means a transfer of an interest described in section 1 of this chapter by a deed, installment sales contract, or lease.

[Pre-2002 Recodification Citation: 24-4.6-2-3.]

As added by P.L.2-2002, SEC.6.

IC 32-21-5-4 "Defect" defined

Sec. 4. As used in connection with disclosure forms required by this chapter, "defect" means a condition that would have a significant adverse effect on the value of the property, that would significantly impair the health or safety of future occupants of the property, or that if not repaired, removed, or replaced would significantly shorten or adversely affect the expected normal life of the premises.

[Pre-2002 Recodification Citation: 24-4.6-2-4.]

As added by P.L.2-2002, SEC.6.

IC 32-21-5-5 "Disclosure form" defined

Sec. 5. As used in this chapter, "disclosure form" refers to a disclosure form prepared under section 8 of this chapter or a disclosure form that meets the requirements of section 8 of this chapter.

[Pre-2002 Recodification Citation: 24-4.6-2-5.]

As added by P.L.2-2002, SEC.6.

IC 32-21-5-5.5 Repealed

As added by P.L.186-2007, SEC.8. Repealed by P.L.3-2008, SEC.269.

IC 32-21-5-6 "Owner" defined

Sec. 6. As used in this chapter, "owner" means the owner of residential real estate that is for sale, exchange, lease with an option to buy, or sale under an installment contract.

[Pre-2002 Recodification Citation: 24-4.6-2-6.]

As added by P.L.2-2002, SEC.6.

IC 32-21-5-7 Disclosure form; contents

Sec. 7. The Indiana real estate commission established by IC 25-34.1-2-1 shall adopt a specific disclosure form that contains the following:

(1) Disclosure by the owner of the known condition of the following:

(A) The foundation.

(B) The mechanical systems.

(C) The roof.

(D) The structure.

(E) The water and sewer systems.

(F) Additions that may require improvements to the sewage disposal system.

(G) Other areas that the Indiana real estate commission determines are appropriate.

(2) Disclosure by the owner of known:

(A) contamination caused by the manufacture of a controlled substance (as defined by IC 35-48-1-9) on the property that has not been certified as decontaminated by a qualified inspector who is certified under IC 16-19-3.1; or

(B) manufacture of methamphetamine or dumping of waste from the manufacture of methamphetamine in a residential structure on the property.

(3) A notice to the prospective buyer that contains substantially the following language:

"The prospective buyer and the owner may wish to obtain professional advice or inspections of the property and provide for appropriate provisions in a contract between them concerning any advice, inspections, defects, or warranties obtained on the property.".

(4) A notice to the prospective buyer that contains substantially the following language:

"The representations in this form are the representations of the owner and are not the representations of the agent, if any. This information is for disclosure only and is not intended to be a part of any contract between the buyer and owner.".

(5) A disclosure by the owner that an airport is located within a geographical distance from the property as determined by the Indiana real estate commission. The commission may consider the differences between an airport serving commercial airlines and an airport that does not serve commercial airlines in determining the distance to be disclosed.

[Pre-2002 Recodification Citation: 24-4.6-2-7.]

As added by P.L.2-2002, SEC.6. Amended by P.L.1-2003, SEC.83; P.L.159-2011, SEC.41; P.L.180-2014, SEC.5; P.L.111-2018, SEC.13.

IC 32-21-5-8 Owner prepared disclosure form

Sec. 8. An owner may prepare or use a disclosure form that contains the information required in the disclosure form under section 7 of this chapter and any other information the owner determines is appropriate, including whether the subject property is located in a regional sewage district.

[Pre-2002 Recodification Citation: 24-4.6-2-8.]

As added by P.L.2-2002, SEC.6. Amended by P.L.97-2012, SEC.18.

IC 32-21-5-8.5 Disclosures relating to property covered by governing documents of homeowners association

Sec. 8.5. (a) This section applies to all transfers of title to property after June 30, 2015.

(b) The definitions in IC 32-25.5-2 apply in this section.

(c) As used in this section, "property" refers to real property covered by the governing documents of a homeowners association.

(d) As used in this section, "purchaser" refers to a person who purchases property.

(e) The following must be provided by the seller to a purchaser not later than ten (10) days before the sale of the property closes:

(1) A disclosure that the property is in a community governed by a homeowners association.

(2) A copy of the recorded governing documents.

(3) A statement indicating whether there are assessments and the amount of any assessments.

(4) The following information about a board member, homeowners association agent, or other person who has a contract with the homeowners association to provide any management services for the homeowners association:

(A) The name.

(B) The business or home address.

(f) A homeowners association or agent of a homeowners association providing a statement of unpaid assessments or other charges of the homeowners association relating to the property may charge not more than two hundred fifty dollars ($250) for the statement.

(g) The failure to provide any of the documents listed in subsection (e) does not limit or prevent enforcement of the governing documents by the homeowners association.

As added by P.L.141-2015, SEC.1.

IC 32-21-5-9 Disclosure form distinguished from warranty

Sec. 9. A disclosure form is not a warranty by the owner or the owner's agent, if any, and the disclosure form may not be used as a substitute for any inspections or warranties that the prospective buyer or owner may later obtain.

[Pre-2002 Recodification Citation: 24-4.6-2-9.]

As added by P.L.2-2002, SEC.6.

IC 32-21-5-10 Disclosure form; presentation required before acceptance of offer

Sec. 10. (a) An owner must complete and sign a disclosure form and submit the form to a prospective buyer before an offer for the sale of the residential real estate is accepted.

(b) An appraiser retained to appraise the residential real estate for which the disclosure form has been prepared shall be given a copy of the form upon request. This subsection applies only to appraisals made for the buyer or an entity from which the buyer is seeking financing.

(c) Before closing, an accepted offer is not enforceable against the buyer until the owner and the prospective buyer have signed the disclosure form. After closing, the failure of the owner to deliver a disclosure statement form to the buyer does not by itself invalidate a real estate transaction. A buyer may not invalidate a real estate transaction or a contract to purchase real estate due to the buyer's failure to sign a seller's disclosure form that has been received or acknowledged by the buyer.

[Pre-2002 Recodification Citation: 24-4.6-2-10.]

As added by P.L.2-2002, SEC.6. Amended by P.L.150-2013, SEC.3.

IC 32-21-5-11 Owner liability for errors in form

Sec. 11. The owner is not liable for any error, inaccuracy, or omission of any information required to be delivered to the prospective buyer under this chapter if:

(1) the error, inaccuracy, or omission was not within the actual knowledge of the owner or was based on information provided by a public agency or by another person with a professional license or special knowledge who provided a written or oral report or opinion that the owner reasonably believed to be correct; and

(2) the owner was not negligent in obtaining information from a third party and transmitting the information.

[Pre-2002 Recodification Citation: 24-4.6-2-11.]

As added by P.L.2-2002, SEC.6.

IC 32-21-5-12 Matters arising after form delivered; requirement to disclose at settlement; unknown or unavailable information

Sec. 12. (a) An owner does not violate this chapter if the owner subsequently discovers that the disclosure form is inaccurate as a result of any act, circumstance, information received, or agreement subsequent to the delivery of the disclosure form. However, at or before settlement, the owner is required to disclose any material change in the physical condition of the property or certify to the purchaser at settlement that the condition of the property is substantially the same as it was when the disclosure form was provided.

(b) If at the time disclosures are required to be made under subsection (a) an item of information required to be disclosed is unknown or not available to the owner, the owner may state that the information is unknown or may use an approximation of the information if the approximation is clearly identified, is reasonable, is based on the actual knowledge of the owner, and is not used to circumvent the disclosure requirements of this chapter.

[Pre-2002 Recodification Citation: 24-4.6-2-12.]

As added by P.L.2-2002, SEC.6.

IC 32-21-5-13 Disclosure of defect after offer accepted; buyer's right to nullify contract; return of deposits

Sec. 13. (a) Notwithstanding section 12 of this chapter, if a prospective buyer receives a disclosure form or an amended disclosure form after an offer has been accepted that discloses a defect, the prospective buyer may after receipt of the disclosure form and within two (2) business days nullify the contract by delivering a written rescission to the owner or the owner's agent, if any.

(b) A prospective buyer is not liable for nullifying a contract under this section and is entitled to a return of any deposits made in the transaction.

[Pre-2002 Recodification Citation: 24-4.6-2-13.]

As added by P.L.2-2002, SEC.6.

IC 32-21-6. Chapter 6. Psychologically Affected Properties

32-21-6-1"Agent"
32-21-6-2"Limited agent"
32-21-6-3"Psychologically affected property"
32-21-6-4"Transferee"
32-21-6-5Disclosure not required
32-21-6-6Refusal to disclose; misrepresentation

IC 32-21-6-1 "Agent"

Sec. 1. As used in this chapter, "agent" means a real estate agent or other person acting on behalf of the owner or transferee of real estate or acting as a limited agent.

[Pre-2002 Recodification Citation: 24-4.6-2.1-1.]

As added by P.L.2-2002, SEC.6.

IC 32-21-6-2 "Limited agent"

Sec. 2. As used in this chapter, "limited agent" means an agent who, with the written and informed consent of all parties to a real estate transaction, is engaged by both the seller and buyer or both the landlord and tenant.

[Pre-2002 Recodification Citation: 24-4.6-2.1-1.5.]

As added by P.L.2-2002, SEC.6.

IC 32-21-6-3 "Psychologically affected property"

Sec. 3. As used in this chapter, "psychologically affected property" includes real estate or a dwelling that is for sale, rent, or lease and to which one (1) or more of the following facts or a reasonable suspicion of facts apply:

(1) That an individual died on the property.

(2) That the property was the site of:

(A) a felony under IC 35;

(B) criminal organization (as defined in IC 35-45-9-1) activity;

(C) the discharge of a firearm involving a law enforcement officer while engaged in the officer's official duties; or

(D) the illegal manufacture or distribution of a controlled substance.

[Pre-2002 Recodification Citation: 24-4.6-2.1-2.]

As added by P.L.2-2002, SEC.6. Amended by P.L.25-2016, SEC.13; P.L.209-2018, SEC.14.

IC 32-21-6-4 "Transferee"

Sec. 4. As used in this chapter, "transferee" means a purchaser, tenant, lessee, prospective purchaser, prospective tenant, or prospective lessee of the real estate or dwelling.

[Pre-2002 Recodification Citation: 24-4.6-2.1-3.]

As added by P.L.2-2002, SEC.6.

IC 32-21-6-5 Disclosure not required

Sec. 5. An owner or agent is not required to disclose to a transferee any knowledge of a psychologically affected property in a real estate transaction.

[Pre-2002 Recodification Citation: 24-4.6-2.1-4.]

As added by P.L.2-2002, SEC.6.

IC 32-21-6-6 Refusal to disclose; misrepresentation

Sec. 6. An owner or agent is not liable for the refusal to disclose to a transferee:

(1) that a dwelling or real estate is a psychologically affected property; or

(2) details concerning the psychologically affected nature of the dwelling or real estate.

However, an owner or agent may not intentionally misrepresent a fact concerning a psychologically affected property in response to a direct inquiry from a transferee.

[Pre-2002 Recodification Citation: 24-4.6-2.1-5.]

As added by P.L.2-2002, SEC.6.

Fla. Stat. Ann. § 689.301

§ 689.301 Disclosure of known defects in sanitary sewer laterals to prospective purchaser.—

Before executing a contract for sale, a seller of real property shall disclose to a prospective purchaser any defects in the property's sanitary sewer lateral which are known to the seller. As used in this section, the term "sanitary sewer lateral" means the privately owned pipeline connecting a property to the main sewer line.

History.—s. 3, ch. 2020-158.

The Florida Senate, BILL ANALYSIS AND FISCAL IMPACT STATEMENT
(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Environment and Natural Resources

BILL: SB 150
INTRODUCER: Senator Brandes
SUBJECT: Sanitary Sewer Laterals

DATE: November 1, 2019

I. Summary:

SB 150 encourages counties and municipalities to establish, by July 1, 2022, an evaluation and rehabilitation program for sanitary sewer laterals on residential and commercial properties within their jurisdictions to identify and reduce extraneous flow from leaking sanitary sewer laterals.

The bill defines the term "sanitary sewer lateral" as a privately owned pipeline connecting a property to the main sewer line and which is maintained and repaired by the property owner.

The encouraged program's goals are to:
- Establish a system that identifies defective, damaged, or deteriorated sanitary sewer laterals on residential and commercial properties;
- Consider economical methods for a property owner to repair or replace damaged sanitary sewer laterals; and
- Establish a public database to store information on properties where damaged sewer laterals have been found.

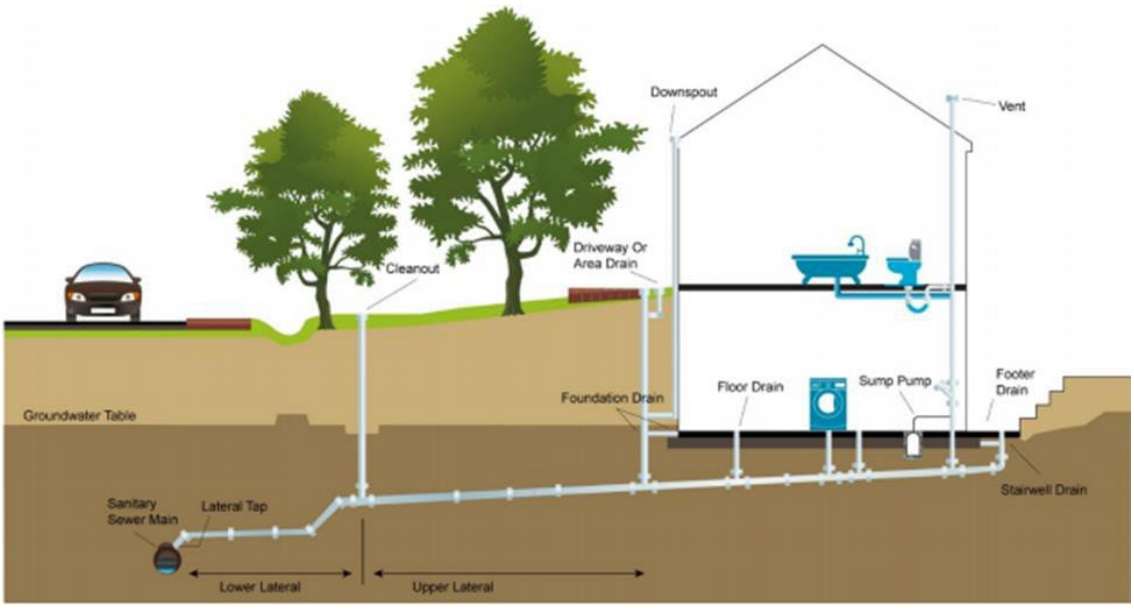
The bill also requires a seller of real property to disclose any known defects in the property's sanitary sewer lateral to a prospective buyer prior to executing a contract for sale.

II. Present Situation:

Sanitary Sewer Laterals

A sanitary sewer lateral is the portion of the sewer network connecting individual and private properties to the public sewer system. The diagram [on the next page] shows an example of a sanitary sewer lateral configuration.

Sanitary sewer laterals are often in poor condition and defects can occur due to aging systems, structural failure, lack of maintenance, or poor construction and design practices. Problems in sanitary sewer laterals can have a significant impact on the performance of the sewer system and treatment plan. Private laterals are estimated to contribute to about 40 percent of a system's infiltration and inflow to sanitary sewers. Cracked or broken laterals can allow groundwater and infiltrating rainwater to enter into the sewer system which, at high levels, can cause problems at the treatment facility or overload the sewers and cause sanitary sewer overflows.



The Florida Building Code requires that every building in which plumbing fixtures are installed and premises having drainage piping be connected to a publicly owned or investor-owned sewage system, when available, or an approved onsite sewage treatment and disposal system in accordance with the standards for Online Sewage Treatment and Disposal systems found in Chapter 64E-6, Florida Administrative Code. A building that has plumbing fixtures installed and is intended for human habitation, occupancy, or use on premises abutting on a street, alley or easement in which there is a public sewer is required to have a separate connection with the sewer.

Florida state laws and regulations are silent as to who is responsible for maintaining or replacing defective sanitary sewer laterals. However, cities such as Orlando and Tarpon Springs, require that property owners be responsible for the maintenance, operation, and repair of sanitary sewer laterals in their city ordinances.

Most homeowners lack knowledge and awareness of potential structural issues with their sanitary sewer laterals. Private sanitary sewer lateral maintenance issues are the leading cause of backups and overflows into municipality owned collection systems. In order to combat this, some cities have enacted policies to address the matter. For example, the City of Gulfport has
implemented rebate or replacement incentives to their citizens. The City of Gulfport's rebate program offers citizens 50 percent of the costs of the replacement up to $3500. The City of St. Petersburg is also looking into a rebate program within a potential city ordinance addressing sanitary sewer laterals in response to the 2015-2016 sewer crisis that released up to one billion gallons of sewage, 200 million gallons of which ended up in the Tampa Bay.

Required Disclosures for a Contract for Sale in Florida

Florida law requires sellers to disclose certain information as part of a sale to a prospective buyer before closing, including:

- A sinkhole claim;
- The potential for coastal erosion;

- Mandatory membership in a homeowner's association;
- Radon gas having been found in buildings in Florida;
- That the buyer should not rely on the seller's current property taxes; and
- Whether subsurface rights have been or will be severed or retained.

A seller is not required to disclose certain information to a buyer under Florida law. For example, a seller does not need to disclose that a property was or was suspected to be the site of a homicide, suicide, death, or that an occupant was infected or diagnosed with HIV.

Florida tort law requires a seller to disclose material defects to a buyer upon sale of a residence if:

- The seller has knowledge of facts about material defects;
- The facts are not readily observable by and are unknown to the buyer;
- The facts materially affect the value of the property; and
- The buyer has been damaged by the breach of the duty to disclose.

In Florida, sellers can use the "Seller's Property Disclosure Form" created by the Florida Association of Realtors, but there is no statutory obligation requiring that the form be completed. Also, a seller is not required to retain a home inspector to discover problems that the seller may not be aware of.

III. Effect of Proposed Changes:

The bill includes a series of whereas clauses that provide background information on sanitary sewer laterals and a description of potential implications that are caused by defects.

The bill defines "sanitary sewer lateral" as a privately owned pipeline connecting a property to the main sewer line and which is maintained and repaired by the property owner.

The bill encourages counties and municipalities to establish by July 1, 2022, an evaluation and rehabilitation program for sanitary sewer laterals on residential and commercial properties within their jurisdictions to identify and reduce extraneous flow from leaking sanitary sewer laterals.

Although the program is encouraged and not required, the bill states that the program may at minimum:

- Establish a system to identify defective, damaged, or deteriorated sanitary sewer laterals on residential and commercial properties within their jurisdiction;
- Consider economical methods for a property owner to repair or re-place a defective, damaged, or deteriorated sanitary sewer lateral;
- Establish and maintain a publicly accessible database to store information concerning properties where a defective, damaged, or deteriorated sanitary sewer lateral has been identified. The database must include (but is not limited to) the address of the property, the names of any people the county or municipality notified concerning the damaged sewer lateral, and the date and method of the notification.

The bill also creates a new section of law requiring a seller of real property to disclose to a prospective purchaser any known defects in the property's sanitary sewer laterals prior to executing a contract for sale.

The bill provides an effective date of July 1, 2020.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

Pashman, J. In this case, we are called upon to decide whether an implied warranty of workmanship and habitability arises upon the sale of a home by a builder-vendor, and, if so, whether potability of the water supply is included within the realm of warranted items. For the reasons given herein, we conclude that both questions must be answered in the affirmative. . . .

I. Factual Background

In 1972 Joseph Mianecki, one of the defendants herein, placed a newspaper advertisement in which he offered to build a house on a certain piece of property now identified as 7 Dolores Place, Mine Hill Township. Plaintiffs Mr. and Mrs. Henry McDonald, desirous of purchasing a new home, responded to this advertisement and in July 1972 met with Mianecki at the proposed site and discussed the type of house they wished to have constructed. At that meeting the McDonalds were informed that Mianecki had built two other houses in the area. Although Mianecki was also employed as a construction project engineer by a large commercial contractor, by the start of the present litigation he classified his occupation as that of "builder."

The parties reached agreement as to the dwelling to be erected which was formalized in a written contract dated July 17, 1972. The purchase price was $44,500. The contract provided, inter alia, that the house would be serviced by water from a well to be constructed by Mianecki, and that the well system would be guaranteed for a one- year period. The McDonalds had never before had a house built for them nor had they lived in a home serviced by well water.

During the early stages of the construction process, the McDonalds frequently visited the property to do some painting and perform other odd jobs. At first they cleaned their hands and brushes at a nearby barn as their water supply had not yet been connected. Later, as the house neared completion, the water began to flow and the McDonalds washed up inside the home. They soon noticed that the sinks and toilet fixtures were becoming discolored and that standing water in the fixtures had a "chocolate brown" tint. The McDonalds apprised Mianecki of the situation and were told that inasmuch as the well was newly dug there might be some impurities still present. A commercial stain-remover, "Rust-Raze," was supplied to Mrs. McDonald, who cleaned the discolored fixtures. The stains, however, shortly returned.

Due to the continuing discoloration problem, Mianecki arranged to have the water tested. This test was, in any event, a prerequisite to the obtaining of a certificate of occupancy. The test, performed by third-party defendant Duncan Medical Laboratory, indicated an unacceptably high iron content. Mianecki attempted to rectify this situation through the installation of a water softener/conditioner, manufactured and installed by third-party defendant Deran Sales, Inc. A test performed after the installation of the unit indicated that the water was acceptable and, based upon its results, a certificate of occupancy was granted. Closing of title occurred on November 15, 1972, and two days later the McDonalds settled into their new home.

The problems with the water continued after the McDonalds moved in. Although water tests conducted before March 1973 showed that the water, after passing through the conditioner, met State standards, there was sufficient evidence from which a jury could have determined that the water was non-potable. It is clear that the raw water — i.e., water before it passed through the conditioner — never satisfied State standards of potability. There was

testimony that, among other things, the staining of the fixtures continued; the water had a bad odor and taste; when left standing the water fizzled like "Alka-Seltzer," gave off a vapor and turned colors; clothes washed in the washing machine became stained, as did dishware and utensils when washed in the dishwasher; and coffee would turn deep black and sugar would not dissolve. Furthermore, according to expert testimony, after March 1973 even the treated water continuously failed to meet State standards of potability.

According to plaintiffs, Mianecki was continuously informed about the condition of the water. A number of unsuccessful attempts were made to alleviate the problem. These included replacement of the heating coils, alteration of the back-flushing cycle on the water conditioner, and the installation of a venting system designed to eliminate gas in the water pipes. By the spring of 1973 the relationship between the parties had deteriorated and no further repairs were attempted. Alternative sources of water were suggested but, due to a variety of circumstances, no viable solution was adopted. Although each party alleged that these failures were due to the other's fault, there is sufficient evidence upon which a jury could have found that plaintiffs did not act unreasonably in their attempts to ameliorate the condition.

On March 25, 1974 the plaintiffs instituted the instant suit for damages against Mianecki. The complaint alleged breach of express and implied warranties, fraudulent and negligent misrepresentations, negligent construction of the well and water system and negligent supervision of the construction and water testing. At this time plaintiffs were still residing in the Mine Hill house. In December of 1975, however, they moved to Maryland as a result of Mr. McDonald's job transfer. . . .

A bifurcated jury trial was ordered and the trial as to liability commenced on January 19, 1976. . . . The jurors were charged as to fraud and misrepresentation, breach of contract, and breach of implied warranty, and were given special interrogatories to answer. They found that defendants were liable solely for breach of an implied warranty of habitability. . .

The case then proceeded to a trial as to damages. Evidence was introduced by plaintiffs with respect to the change in the quality of their lives occasioned by the lack of potable water, and as to the staining and odor. The McDonalds testified that in the spring of 1973 they had to discontinue using the water for cooking and drinking purposes, and instead were forced to obtain water by either purchasing it bottled or filling containers at a neighbor's home. Moreover, there was testimony from a real estate agent that the value of the house, assuming a lack of water problems, would be $57,660, but that with such problems the value was only $36,847. . . .

The trial court charged the jurors that in assessing damages they were to place the McDonalds in the position they would have been in had the implied warranty not been breached. Thus, the judge instructed that the McDonalds should be compensated for all damages proximately caused by the breach and within the reasonable contemplation of the parties at the time that the contract was entered into. He further elaborated on the nature of the damages awardable, charging that the McDonalds were entitled to (1) out of pocket expenses, (2) compensation for the deterioration in their quality of living, and (3) the reduction in the fair market value of their home attributable to the defect. . . .

The jury returned an award in favor of plaintiffs in the amount of $32,000. . . .

On appeal, defendants sought reversal of the finding of implied warranty of habit-

ability and raised numerous other allegations of error. The Appellate Division affirmed . . . . We granted Mianecki's petition for certification. . . .

II. Whether an Implied Warranty of Habitability Arose Under the Facts of This Case

A. General Legal Background

Prior to the mid-1950's the ancient maxim of caveat emptor ("let the buyer beware") long ruled the law relating to the sale of real property. Thought to have originated in late sixteenth-century English trade society, the doctrine was especially prevalent during the early 1800's when judges looked upon purchasing land as a "game of chance." Hamilton, "*The Ancient Maxim Caveat Emptor*," 40 YALE L.J. 1133, 1187 (1931). The maxim, derived from the then contemporary political philosophy of laissez faire, held that a "buyer deserved whatever he got if he relied on his own inspection of the merchandise and did not extract an express warranty from the seller." . . .

According to one commentator, however,

> Caveat emptor * * * did not adversely affect the typical buyer of a new house during the nineteenth century. In those days, after all, the home-owner-to-be was commonly a middle-class fellow who purchased his own lot of land and then retained an architect to design a home for him. Once the plans were ready the landowner hired a contractor who built a house according to the plans. Quality control was assured because the builder was paid in stages as he completed each part of the house to the satisfaction of the architect. If the house did happen to collapse, the homeowner had a choice of lawsuits to recoup his losses: either the plans were defective, in which case the architect had been negligent, or the building job had not been workmanlike, in which case the contractor was liable.
>
> Unfortunately, this blissful state of affairs has not carried over to the modern day.
>
> After World War II * * * the building industry underwent a revolution. It became common for the builder to sell the house and land together in a package deal. Indeed, the building industry outgrew the old notion that the builder was an artisan and took on all the color of a manufacturing enterprise, with acres of land being cleared by heavy machinery and prefabricated houses being put up almost overnight. Having learned their law by rote, however, the lawyers tended to insist that caveat emptor nonetheless applied to these sales.

[Id.]

In light of this modern day change in home buying practices, it is not surprising that increased pressure developed to abandon or modify the ancient doctrine. A host of commentators began to advocate the recognition of implied warranties in the sale of new houses. See, e.g., Haskell, "The Case for an Implied Warranty of Quality in Sales of Real Property," 53 Geo. L.J. 633 (1965) (hereinafter Haskell); Bearman, "Caveat Emptor in Sales of Realty — Recent Assaults Upon the Rule," 14 Vand. L. Rev. 541 (1961) (hereinafter Bearman); Dunham, "Vendor's Obligation as to Fitness of Land for a Particular Purpose," 37 Minn. L. Rev. 108 (1953).

A further catalyst to change derived from the evolving doctrine of implied warranties in the sale of personal property. Today, sale of a chattel generally carries with it an implied warranty of merchantability and often an implied warranty of fitness for a particular purpose. See U.C.C., §§ 2-314, 2-315 (N.J.S.A. 12A:2-314, 315). The re-

sulting distinction between real and personal property — a distinction which one commentator has labelled a merely fortuitous by-product of the separate historical development of legal thinking in the two areas, . . . — has been increasingly viewed as anomalous. . . . . The irony of this system was that the law "offer[ed] greater protection to the purchaser of a seventy-nine cent dog leash than it [did] to the purchaser of a 40,000-dollar house," Haskell, . . . and that the buyer of a defective two-dollar fountain pen could "look to the law to get him his money back" but the person who spent his life's savings on a new home whose ceiling collapsed could not. . . .

As a result of these pressures, the law began to change. As of today, a growing number of jurisdictions have applied some form of implied warranty of habitability to the sale of new homes. . . . The modern trend is clearly in favor of implied warranties and this may, indeed, now be the majority rule. . . .

Although major developments in the area of implied warranty have generally been initiated by the judiciary, other branches of government have not been inactive. In this respect, we note that § 2-309 of the Uniform Land Transactions Act — not yet adopted in New Jersey — provides for implied warranties. The Commissioner's Prefatory Note to this law states that: Perhaps the most important example of modernization of real estate law [effected] by this Act is Section 2-309 which imposes implied warranties of quality on persons in the business of selling real estate. For a substantial period of years, the nearly universal opinion of writers on the subject has been that the old rules of caveat emptor were totally out of date and pernicious in effect. . . .

Further, the building industry itself, through the National Association of Home Builders (N.A.H.B.) has promulgated a Home Owners Warranty Program commonly known as H.O.W. See "The National Association of Home Builders, What About H.O.W. — Home Owners Warranty," (N.A.H.B. Library No. 60.13, 1975), at 5. Although the program has not yet been widely adopted, N.A.H.B. claims that the express warranty is "good for the builder, good for the consumer [and] good for business." Id.

Finally, we would be remiss if we did not note our own Legislature's commendable program of protecting homeowners. It has recently enacted The New Home Warranty and Builders' Registration Act, N.J.S.A. 46:3B-1 et seq., which provides for the registration of all builders of new homes, N.J.S.A. 46:3B-5, and authorizes the Commissioner of the Department of Community Affairs to establish certain new home warranties, N.J.S.A. 46:3B-3. Claims for breach may be satisfied out of a home warranty security fund after notice and hearing. N.J.S.A. 46:3B-7. The statute specifically states that the protection it offers does not affect other rights and remedies available to the owner, although an election of remedies is required. N.J.S.A. 46:3B-9. The implied warranty which we today find exists in a contract for the sale of a new home thus complements the Act and is, in our opinion, fully in accord with the legislative policy there evinced.

The reasoning underlying the abandonment of caveat emptor in the area of home construction is not difficult to fathom. Tribunals have come to recognize that "[t]he purchase of a new home is not an everyday transaction for the average family[;] * * * in many instances [it] is the most important transaction of a lifetime." Bethlahmy v. Bechtel, supra, 415 P. 2d at 710. . . . Courts have also come to realize that the two parties involved in this important transaction generally do not bargain as equals. The average buyer lacks the skill and expertise necessary to make an adequate inspection. . . .

Furthermore, most defects are undetectable to even the most observant layman and the expense of expert advice is often prohibitive. . . . The purchaser therefore ordinarily relies heavily upon the greater expertise of the vendor to ensure a suitable product . . . and this reliance is recognized by the building trade. . . .

Aside from superior knowledge, the builder-vendor is also in a better position to prevent the occurrence of major problems. . . . As one court has stated, "[i]f there is a comparative standard of innocence, as well as of culpability, the defendants who built and sold the house were less innocent and more culpable than the wholly innocent and unsuspecting buyer." . . .

It is not in expertise alone that the builder-vendor is generally superior. In the vast majority of cases the vendor also enjoys superior bargaining position. . . . Standard form contracts are generally utilized and "[e]xpress warranties are rarely given, expensive, and impractical for most buyers to negotiate. Inevitably the buyer is forced to rely on the skills of the seller." . . .

The application of an implied warranty of habitability to sellers of new homes is further supported by the expectations of the parties. Clearly every builder-vendor holds himself out, expressly or impliedly, as having the expertise necessary to construct a livable dwelling. It is equally as obvious that almost every buyer acts upon these representations and expects that the new house he is buying, whether already constructed or not yet built, will be suitable for use as a home. Otherwise, there would be no sale. . . .

Other considerations also press in favor of an implied warranty of habitability. As previously mentioned, implied warranties of merchantability and fitness have become standard fare in the area of personal property; and the failure to provide similar protection to a family's most important purchase has become increasingly indefensible. Moreover, the existence of warranties may well discourage sloppy building practices and encourage care in the construction of houses. . . .

[W]e therefore hold that builder-vendors do impliedly warrant that a house which they construct will be of reasonable workmanship and habitability. An implicit understanding of the parties to a construction contract is that the agreed price is tendered as consideration for a home that is reasonably fit for the purpose for which it was built — i.e., habitation. Illusory value is a poor substitute for quality. The consumer-purchaser should not be subjected to harassment caused by structural defects. He deserves both the focus and concern of the law. Any other result would be intolerable and unjust. . . .

Further, we hold that such a warranty arises whenever a consumer purchases from an individual who holds himself out as a builder-vendor of new homes — regardless of whether he can be labeled a "mass producer." Whether the builder be large or small, the purchaser relies upon his superior knowledge and skill, and he impliedly represents that he is qualified to erect a habitable dwelling. He is also in a better position to prevent the existence of major defects. Whether or not engaged in mass production, builders utilize standard form contracts, and hence the opportunity to bargain for protective clauses is by and large nonexistent. Finally, it is the builder who has introduced the article into the stream of commerce. Should defects materialize, he — as opposed to the consumer purchaser — is the less innocent party.

That a consumer purchases from a "small-scale" builder-vendor does not alter the fact that to him this transaction is one of, if not the, major investment of his lifetime and hence worthy of great protection. Moreover, there is no less need to discourage faulty craftsmanship merely because

the builder is not a mass producer. Indeed, a holding that small builders are exempt from the implied warranty of habitability would encourage the very "unscrupulous, fly-by-night operator[s] and purveyor[s] of shoddy work" which were condemned by the court in Humber v. Morton, supra, 426 S.W. 2d at 562. We shall not place our imprimatur upon a rule which would have such an effect. Finally, it should be noted that tribunals in other jurisdictions have extended warranties to small builder-vendors. . . .

We need not here decide whether an implied warranty of habitability applies to every sale of a new home. This is not a case, for example, where an individual builds a house for his own use and later decides to sell. The sale here was "commercial in nature, not casual or personal." Bolkum v. Staab, supra, 346 A. 2d at 211. Mr. Mianecki placed a general advertisement evidencing his willingness to construct a home on a particular plot of land. He had previously built two homes in the same general neighborhood and so informed plaintiffs. By the time of trial he declared his profession to be that of "builder." Although he was also employed as a construction engineer, he was nevertheless in "business" as a builder, albeit on a part-time basis. Under these circumstances, we have no hesitation in finding that the doctrine of implied warranty applies. . . .

D. Whether an implied warranty of habitability should extend to potability of water

Defendants maintain that they should not be held responsible for the lack of potable water inasmuch as the defect was not due to any substandard construction on their part. Although we concede that the considerations in favor of an implied warranty do not weigh as strongly in a case such as this, nevertheless we are convinced that of the two parties the burden should fall on the less innocent defendant. . . .

IV. Conclusion

For the reasons set forth herein, we conclude that (1) the doctrine of implied warranty of habitability applies to the construction of new homes by builder-vendors whether or not they are mass-developers, and (2) potability of the water supply is included within the items encompassed by the implied warranty. Caveat emptor is an outmoded concept and is hereby replaced by rules which reflect the needs, policies and practices of modern day living. It is our conclusion that in today's society it is necessary that consumers be able to purchase new homes without fear of being "stuck" with an uninhabitable "lemon." Caveat emptor no longer accords with modern day practice and should therefore be relegated to its rightful place in the pages of history.

For the foregoing reasons, the judgment of the Appellate Division is affirmed.

Fl. Stat. Ann. § 553.835 Implied Warranties

(1) The Legislature finds that the courts have reached different conclusions concerning the scope and extent of the common law doctrine or theory of implied warranty of fitness and merchantability or habitability for improvements immediately supporting the structure of a new home, which creates uncertainty in the state's fragile real estate and construction industry.

(2) It is the intent of the Legislature to affirm the limitations to the doctrine or theory of implied warranty of fitness and merchantability or habitability associated with the construction and sale of a new home.

(3) As used in this section, the term "offsite improvement" means:

(a) The street, road, driveway, sidewalk, drainage, utilities, or any other improvement or structure that is not located on or under the lot on which a new home is constructed, excluding such improvements that are shared by and part of the overall structure of two or more separately owned homes that are adjoined or attached whereby such improvements affect the fitness and merchantability or habitability of one or more of the other adjoining structures; and

(b) The street, road, driveway, sidewalk, drainage, utilities, or any other improvement or structure that is located on or under the lot but that does not immediately and directly support the fitness and merchantability or habitability of the home itself.

(4) There is no cause of action in law or equity available to a purchaser of a home or to a homeowners' association based upon the doctrine or theory of implied warranty of fitness and merchantability or habitability for damages to offsite improvements. However, this section does not alter or limit the existing rights of purchasers of homes or homeowners' associations to pursue any other cause of action arising from defects in offsite improvements based upon contract, tort, or statute, including, but not limited to, ss. 718.203 and 719.203.

History.—s. 1, ch. 2012-161.

Questions:

(1) If different courts within a state reach different conclusions regarding the scope and extent of common law doctrine on a particular subject, should it be left to the state's supreme court to resolve the differences? The legislature?

(2) Section 3 of the enacting bill [Section 553.835 was section 1 of the enacting bill] stated that "This act shall take effect July 1, 2012, and applies to all cases accruing before, pending on, or filed after that date." Senate Bill 1013 (2012). If you were a member of the Florida legislature and supported the content of § 553.835, how would you have voted on a proposed amendment to substitute the following for section 3 of the enacting bill: "This act shall take effect July 1, 2012, and applies to all claims accruing after that date"?

Question No. 3 (Florida Bar Exam, July 1990)

Builder owned a tract of land with a small cottage on the property. Builder used the cottage as a vacation home. Because of this intermittent use, Builder was not aware of a termite infestation of the cottage until there was extensive damage to the structure. Upon discovery of the termites, Builder had them exterminated and made some minor repairs to the damage. Thereafter, in order to make the property more attractive for resale, Builder installed aluminum siding to the exterior of the cottage which concealed all visible evidence of the termite damage to the outside of the cottage, although there was crawl space beneath the cottage where the termite damage was still readily visible. Builder also constructed a large centrally air conditioned house on the property. Immediately after completing this work, Builder listed the property, including the land and both buildings, for sale, with a real estate broker.

While Purchasers was being shown the property by the broker, builder assured Purchaser that the cottage was "in pretty good condition." Purchaser brought the lot and both structures. Purchaser used the cottage as a guest house and occupied the new house herself. Sometime after the purchase was closed, Purchaser discovered that the termite damage to the cottage was extensive. Also, from the inception of her occupancy of the new house, Purchaser found that the air conditioning system did not work properly. Not only did it not cool the new house which had very few windows which could be opened because of its unique design, but at night the system made so much noise that it disturbed Purchaser's sleep. After attempts to get Builder to repair the termite damage to the cottage and to correct the problems with the air conditioning, Purchaser hired her own contractor who did the work. The cost of repairing the termite damage was $10,000 and the cost of repairing the air conditioning was $5,000.

Purchaser comes to you to find out if she has any rights and remedies against Builder. Discuss.

Questions on Equitable Conversion

1. Suppose that on August 1, A signs a contract to purchase B's house in the state of Cania, a hypothetical jurisdiction that generally follows the common law. They use the form contract at CB 574-587, filling in the blanks. The closing date is set for two months later on October 1, to give time to A to secure financing. On September 15, a hurricane destroys a tool shed out in the backyard. The rest of the house is undamaged. A asks you for advice regarding her rights under the contract. What do you tell her? What if she mentions she's had second thoughts about the place — can she back out? What do you tell her? Alternatively, what if she says she really wants the house, but also wants the tool shed replaced, and is concerned because the B has said he doesn't want to bother putting in a new tool shed?

2. Suppose that on August 1, A signs a contract to purchase B's house in New York. The closing date is set for two months later on October 1, to give time to A to secure financing. The form contract A and B use is silent on the question of who bears the risk of loss during the period between signing the contract and closing. On September 15, a tornado destroys a tool shed out in the backyard. The rest of the house is undamaged. A asks you for advice regarding her rights under the contract. What do you tell her? What if she mentions she's had second thoughts about the place — can she back out? Alternatively, what if she says she really wants the house, but also wants the tool shed replaced, and is concerned because the B has said he doesn't want to bother putting in a new tool shed? What difference would it make to any of your answers if, prior to the closing, A had moved into the house?

Note: New York has the following statute.

§ 5-1311. Uniform Vendor and Purchaser Risk Act

1. Any contract for the purchase and sale or exchange of realty shall be interpreted, unless the contract expressly provides otherwise, as including an agreement that the parties shall have the following rights and duties:

a. When neither the legal title nor the possession of the subject matter of the contract has been transferred to the purchaser: (1) if all or a material part thereof is destroyed without fault of the purchaser or is taken by eminent domain, the vendor cannot enforce the contract, and the purchaser is entitled to recover any portion of the price that he has paid; but nothing herein contained shall be deemed to deprive the vendor of any right to recover damages against the purchaser for any breach of contract by the purchaser prior to the destruction or taking; (2) if an immaterial part thereof is destroyed without fault of the purchaser or is taken by eminent domain, neither the vendor nor the purchaser is thereby deprived of the right to enforce the contract; but there shall be, to the extent of the destruction or taking, an abatement of the purchase price.

b. When either the legal title or the possession of the subject matter of the contract has been transferred to the purchaser, if all or any part thereof is destroyed without fault of the vendor or is taken by eminent domain, the purchaser is not thereby relieved from a duty to pay the price, nor is he thereby entitled to recover any portion thereof that he has paid; but nothing herein contained shall be deemed to deprive the purchaser of any

right to recover damages against the vendor for any breach of contract by the vendor prior to the destruction or taking.

2. This section shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

3. This section may be cited as the Uniform Vendor and Purchaser Risk Act.

Fla. Stat. Ann. § 689.29

§ 689.29 Disclosure of subsurface rights to prospective purchaser.—

(1) A seller must provide a prospective purchaser of residential property with a disclosure summary at or before the execution of a contract if the seller or an affiliated or related entity has previously severed or retained or will sever or retain any of the subsurface rights or right of entry. The disclosure summary must be conspicuous, in boldface type, and in a form substantially similar to the following:

SUBSURFACE RIGHTS
DISCLOSURE SUMMARY

SUBSURFACE RIGHTS HAVE BEEN OR WILL BE SEVERED FROM THE TITLE TO REAL PROPERTY BY CONVEYANCE (DEED) OF THE SUBSURFACE RIGHTS FROM THE SELLER OR AN AFFILIATED OR RELATED ENTITY OR BY RESERVATION OF THE SUBSURFACE RIGHTS BY THE SELLER OR AN AFFILIATED OR RELATED ENTITY. WHEN SUBSURFACE RIGHTS ARE SEVERED FROM THE PROPERTY, THE OWNER OF THOSE RIGHTS MAY HAVE THE PERPETUAL RIGHT TO DRILL, MINE, EXPLORE, OR REMOVE ANY OF THE SUBSURFACE RESOURCES ON OR FROM THE PROPERTY EITHER DIRECTLY FROM THE SURFACE OF THE PROPERTY OR FROM A NEARBY LOCATION. SUBSURFACE RIGHTS MAY HAVE A MONETARY VALUE.

(Purchaser's Initials)

(2) If the disclosure summary is not included in the contract for sale, the contract for sale must refer to and incorporate by reference the disclosure summary and must include, in prominent language, a statement that the potential purchaser should not execute the contract until he or she has read the disclosure summary required under this section.

(3) As used in this section, the term:

(a) "Seller" means a seller of real property which, at the time of sale, is zoned for residential use and is property upon which a new dwelling is being constructed or will be constructed pursuant to the contract for sale with the seller or has been constructed since the last transfer of the property.

(b) "Subsurface rights" means the rights to all minerals, mineral fuels, and other resources, including, but not limited to, oil, gas, coal, oil shale, uranium, metals, and phosphate, whether or not they are mixed with any other substance found or located beneath the surface of the earth.

History.—s. 1, ch. 2014-34.

Legislative History, Fla. Stat. Ann. § 689.29 (Excerpts)

From: House of Representatives Staff Analysis, Bill # CS/CS/HB 489 Subsurface Rights, 3/10/2014

Background

Most owners of real property simply think of the surface boundaries when defining the extent of the ownership. However, common law real property theory is that the owner owns a projection from the center of the Earth to the extent of the Earth's atmosphere.

The owner of land is entitled to the surface of the land and all that is below it, provided that the deed does not contain a reservation of mineral, or subsurface, rights. However, upon transfer, the deed may convey only the surface rights while the transferor may retain the subsurface rights, creating two separate estates. A deed that is silent on the issue is deemed to convey all property rights.

Generally, a reservation or grant of mineral rights reflects an intent to sever the surface estate from the underlying mineral estate, thus establishing two separate estates. A property owner may sever the estates by either:

- Granting the mineral rights; or
- Conveying the property but retaining the mineral rights.

The owner of each estate has the right to exercise all the rights of ownership, subject to any laws and reservations that the deed may contain. Therefore, the owner of the subsurface rights is entitled to the profits from any minerals that are extracted from beneath the surface of the land.

When the estate is severed into separate surface and subsurface estates, the mineral estate is the dominant estate, and therefore the owner of the mineral estate has the right of ingress and egress to explore for, locate, and remove the minerals. However, in doing so, the owner of the mineral estate may not so abuse the surface estate so as to unreasonably injure or destroy its value. A grant or reservation of oil and mineral rights implies an easement for ingress and egress to explore for and remove the oil and minerals found on or underneath the surface estate, even if not specifically granted at the conveyance.

In practice, some developers retain mineral rights without a reference to the mineral rights on the face of the deed. A catch-all provision in the deed, such as, "Subject to Covenants, Conditions, Restrictions, Reservations, Limitations, Easements and Agreements of Records, if any," may be all that appears on the face of the deed to the prospective purchaser. In such cases, a separate grant may have been filed in the public records that list the lots within a development for which mineral rights are being retained by the developer. The developer may also waive its rights of ingress and egress, effectively retaining ownership of any valuable minerals that may reside in the subsurface, but waiving any claim to an easement that would interfere with or even be recognized by the surface owner. While this practice may satisfy constructive notice requirements to make the reservation of mineral rights legally effective, it arguably does not provide adequate notice to the purchaser of the surface property that the purchaser does not own the subsurface rights to the property.

Forgery and fraud. A forged deed is void. The grantor whose signature is forged to a deed prevails over all persons, including subsequent bona fide purchasers from the grantee who do not know the deed is forged.

On the other hand, most courts hold that a deed procured by fraud is voidable by the grantor in an action against the grantee, but a subsequent bona fide purchaser from the grantee who is unaware of the fraud prevails over the grantor. The grantor, having introduced the deed into the stream of commerce, made it possible for a subsequent innocent purchaser to suffer loss. As between two innocent persons, one of whom must suffer by the act of the fraudulent third party, the law generally places the loss on the person who could have prevented the loss to the other. McCoy v. Love, 382 So. 2d 647 (Fla. 1979), illustrates this. In the case, one B.G. Russell sought to buy certain mineral interests from Mary Elliott, "a totally illiterate 87-year-old widow." Mrs. Elliott agreed to sell Russell the mineral rights in 2 of 15 acres that she owned, but, unknown to her, the deed prepared by Russell and that Mrs. Elliott signed by her mark conveyed to him a much larger interest. Russell recorded his deed and promptly conveyed his interest to Love, who recorded. Oil was then found under the land. The court held that a deed procured by fraud, unlike a forged deed, is effectual to pass title to a bona fide purchaser. It remanded the case to determine if Love was a bona fide purchaser. If so, Love would prevail.

Determining the line between forgery and fraud is not always easy. See Sheffield v. Andrews, 679 So. 2d 1052 (Ala. 1996) (holding that a signature procured by deceiving the grantor into signing the instrument in ignorance of its true character is considered forged; $1 million punitive damages assessed); see also Delsas ex rel. Delsas v. Centex Home Equity Co., LLC, 186 P.3d 141 (Colo. App. 2008) (distinguishing between fraud in factum and fraud in the inducement).

Bad Deeds

(1) Olivia, who is 82 and retired, lives in her house on Blackacre, a 10-acre heavily wooded plot. Arlene, Olivia's nearest neighbor, becomes friendly with her and takes care of her house whenever Olivia is away. "You remind me so much of my daughter," Olivia tells Arlene one day. "She worked very closely with Sam Bankman-Fried, you know. I just wish I could see her more often, but the prison they put her in is so far away."

When Olivia leaves for a month's vacation, Arlene decides to make a fast buck. Pretending to be the owner, she deeds Blackacre to herself, signing Olivia's name. She then sells Blackacre to Bret for $575,000, which Bret thinks is a really great price compared to other properties in the area. He pays in cash. She gives Bret a deed, "from Arlene to Bret."

Right after closing Arlene takes her dream vacation in Las Vegas and gambles away the entire $575,000, and declares bankruptcy. Bret never takes possession because right after closing, he loses his job and decides to move to another state.

Olivia returns from vacation, unaware of what's happened. In the meantime, Bret sells the house to his cousin Claudette, who happens to be looking for a home in the area. She lives out of state so she doesn't inspect it, telling Bret, "I trust you." She pays $600,000 for it.

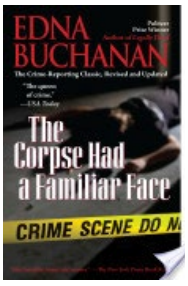
When Claudette tries to move in two weeks later, Olivia yells "Get off my property!" She calls the police, who tell Claudette to leave. Frustrated, Claudette hires a private detective who uncovers the whole story. "Well, that's Olivia's problem," Claudette says when she hears the story. "I paid good money for that house."

Claudette sues to eject Olivia. What result would you expect? What should be the result, in your view?

(2) Same facts as above, except that Olivia doesn't go on vacation. The initial transfer to Arlene takes place this way: Arlene tells Olivia she can lend her $5,000 at no interest to do some needed repairs to the house. Olivia is delighted. When Arlene gives her the check, she asks Olivia to sign "some papers for the lawyers." Included in the documents Olivia signs is in fact a deed from Olivia to Arlene conveying full title to Blackacre, though it's all gobbledygook to Olivia, who figures the papers are for the loan. The next day Arlene sells the property to Bret $575,000. Then Arlene heads to Vegas, Bret loses his job, and sells to Claudette, as above.

Claudette sues to eject Olivia. What result would you expect? What should be the result, in your view?

(3) EDNA BUCHANAN, THE CORPSE HAD A FAMILIAR FACE 11 (1987)



"And what of the plight of Richard Higgins, a man who spent his life's savings to buy a secluded home on five acres, so he could operate a plant nursery? Soon after he finished expensive improvements and renovations, police arrived asking to dig in his front yard. They unearthed two bodies: the real owners of the house. Higgins had unwittingly bought the house from the killer, who had posed as the dead owner."

* * *

Who would win out: the dead owners' heirs or devisees, or Richard Higgins? Who should *win out in your view? Assume that Higgins received a deed at closing purporting to be from the dead owner.*

Michael Powell & Gretchen Morgenson, *MERS? It May Have Swallowed Your Loan*, N.Y. TIMES, March 5, 2011

FOR more than a decade, the American real estate market resembled an overstuffed novel, which is to say, it was an engrossing piece of fiction.

Mortgage brokers hip deep in profits handed out no-doc mortgages to people with fictional incomes. Wall Street shopped bundles of those loans to investors, no matter how unappetizing the details. And federal regulators gave sleepy nods.

That world largely collapsed under the weight of its improbabilities in 2008.

But a piece of that world survives on Library Street in Reston, Va., where an obscure business, the MERS Corporation, claims to hold title to roughly half of all the home mortgages in the nation — an astonishing 60 million loans.

Never heard of MERS? That's fine with the mortgage banking industry—as MERS is starting to overheat and sputter. If its many detractors are correct, this private corporation, with a full-time staff of fewer than 50 employees, could turn out to be a very public problem for the mortgage industry.

Judges, lawmakers, lawyers and housing experts are raising piercing questions about MERS, which stands for Mortgage Electronic Registration Systems, whose private mortgage registry has all but replaced the nation's public land ownership records. Most questions boil down to this:

How can MERS claim title to those mortgages, and foreclose on homeowners, when it has not invested a dollar in a single loan?

And, more fundamentally: Given the evidence that many banks have cut corners and made colossal foreclosure mistakes, does anyone know who owns what or owes what to whom anymore?

The answers have implications for all American homeowners, but particularly the millions struggling to save their homes from foreclosure. How the MERS story plays out could deal another blow to an ailing real estate market, even as the spring buying season gets under way.

MERS has distanced itself from the dubious behavior of some of its members, and the company itself has not been accused of wrongdoing. But the legal challenges to MERS, its practices and its records are mounting.

The Arkansas Supreme Court ruled last year that MERS could no longer file foreclosure proceedings there, because it does not actually make or service any loans. Last month in Utah, a local judge made the no-less-striking decision to let a homeowner rip up his mortgage and walk away debt-free. MERS had claimed ownership of the mortgage, but the judge did not recognize its legal standing.

"The state court is attracted like a moth to the flame to the legal owner, and that isn't MERS," says Walter T. Keane, the Salt Lake City lawyer who represented the homeowner in that case.

And, on Long Island, a federal bankruptcy judge ruled in February that MERS could no longer act as an "agent" for the owners of mortgage notes. He acknowledged that his decision could erode the foundation of the mortgage business.

But this, Judge Robert E Grossman said, was not his fault.

"This court does not accept the argument that because MERS may be involved with 50 percent of all residential mortgages in the country," he wrote, "that is reason enough for this court to turn a blind eye to the fact that this process does not comply with the law."

With MERS under scrutiny, its chief executive, R. K. Arnold, who had been with the company since its founding in 1995, resigned earlier this year.

A birth certificate, a marriage license, a death certificate: these public documents note many life milestones.

For generations of Americans, public mortgage documents, often logged in longhand down at

the county records office, provided a clear indication of homeownership.

But by the 1990s, the centuries-old system of land records was showing its age. Many county clerk's offices looked like something out of Dickens, with mortgage papers stacked high. Some clerks had fallen two years behind in recording mortgages.

For a mortgage banking industry in a hurry, this represented money lost. Most banks no longer hold onto mortgages until loans are paid off. Instead, they sell the loans to Wall Street, which bundles them into investments through a process known as securitization.

MERS, industry executives hoped, would pull record-keeping into the Internet age, even as it privatized it. Streamlining record-keeping, the banks argued, would make mortgages more affordable.

But for the mortgage industry, MERS was mostly about speed — and profits. MERS, founded 16 years ago by Fannie Mae, Freddie Mac and big banks like Bank of America and JPMorgan Chase, cut out the county clerks and became the owner of record, no matter how many times loans were transferred. MERS appears to sell loans to MERS ad infinitum.

This high-speed system made securitization easier and cheaper. But critics say the MERS system made it far more difficult for homeowners to contest foreclosures, as ownership was harder to ascertain.

MERS was flawed at conception, those critics say. The bankers who midwifed its birth hired Covington & Burling, a prominent Washington law firm, to research their proposal. Covington produced a memo that offered assurances that MERS could operate legally nationwide. No one, however, conducted a state-by-state study of real estate laws.

"They didn't do the deep homework," said an official involved in those discussions who spoke on condition of anonymity because he has clients involved with MERS. "So as far as anyone can tell their real theory was: 'If we can get everyone on board, no judge will want to upend something that is reasonable and sensible and would screw up 70 percent of loans.' "

County officials appealed to Congress, arguing that MERS was of dubious legality. But this was the 1990s, an era of deregulation, and the mortgage industry won.

"We lost our revenue stream, and Americans lost the ability to immediately know who owned a piece of property," said Mark Monacelli, the St. Louis County recorder in Duluth, Minn.

And so MERS took off. Its board gave its senior vice president, William Hultman, the rather extraordinary power to deputize an unlimited number of "vice presidents" and "assistant secretaries" drawn from the ranks of the mortgage industry.

The "nomination" process was near instantaneous. A bank entered a name into MERS's Web site, and, in a blink, MERS produced a "certifying resolution," signed by Mr. Hultman. The corporate seal was available to those deputies for $25.

As personnel policies go, this was a touch loose. Precisely how loose became clear when a lawyer questioned Mr. Hultman in April 2010 in a lawsuit related to its foreclosure against an Atlantic City cab driver.

How many vice presidents and assistant secretaries have you appointed? the lawyer asked.

"I don't know that number," Mr. Hultman replied.

Approximately?

"I wouldn't even be able to tell you, right now."

In the thousands?

"Yes."

Each of those deputies could file loan transfers and foreclosures in MERS's name. The goal, as with almost everything about the mortgage business at that time, was speed. Speed meant money.

Alan Grayson has seen MERS's record-keeping up close. From 2009 until this year, he served as the United States representative for Florida's Eighth Congressional District — in the Orlando area, which was ravaged by foreclosures. Thousands of constituents poured

through his office, hoping to fend off foreclosures. Almost all had papers bearing the MERS name.

"In many foreclosures, the MERS paperwork was squirrelly," Mr. Grayson said. With no real legal authority, he says, Fannie and the banks eliminated the old system and replaced it with a privatized one that was unreliable.

A spokeswoman for MERS declined interview requests. In an e-mail, she noted that several state courts have ruled in MERS's favor of late. She expressed confidence that MERS's policies complied with state laws, even if MERS's members occasionally strayed.

"At times, some MERS members have failed to follow those procedures and/or established state foreclosure rules," the spokeswoman, Karmela Lejarde, wrote, "or to properly explain MERS and document MERS relationships in legal pleadings."

Such cases, she said, "are outliers, reflecting case-specific problems in process, and did not repudiate the MERS business model."

MERS's legal troubles, however, aren't going away. In August, the Ohio secretary of state referred to federal prosecutors in Cleveland accusations that notaries deputized by MERS were signing hundreds of documents without any personal knowledge of them. The attorney general of Massachusetts is examining a complaint by a county registrar that MERS owes the state tens of millions of dollars in unpaid fees.

As far back as 2001, Ed Romaine, the clerk for Suffolk County, on eastern Long Island, refused to register mortgages in MERS's name, partly because of complaints that the company's records didn't square with public ones. The state Court of Appeals later ruled that he had overstepped his powers.

But Judith S. Kaye, the state's chief judge at the time, filed a partial dissent. She worried that MERS, by speeding up property transfers, was pouring oil on the subprime fires. The MERS system, she wrote, ill serves "innocent purchasers."

"I was trying to say something didn't smell right, feel right or look right," Ms. Kaye said in a recent interview.

Little about MERS was transparent. Asked as part of a lawsuit against MERS in September 2009 to produce minutes about the formation of the corporation, Mr. Arnold, the former C.E.O., testified that "writing was not one of the characteristics of our meetings."

MERS officials say they conduct audits, but in testimony could not say how often or what these measured. In 2006, Mr. Arnold stated that original mortgage notes were held in a secure "custodial facility" with "stainless steel vaults." MERS, he testified, could quickly produce every one of those files.

As for homeowners, Mr. Arnold said they could log on to the MERS system to identify their loan servicer, who, in turn, could identify the true owner of their mortgage note. "The servicer is really the best source for all that information," Mr. Arnold said.

The reality turns out to be a lot messier. Federal bankruptcy courts and state courts have found that MERS and its member banks often confused and misrepresented who owned mortgage notes. In thousands of cases, they apparently lost or mistakenly destroyed loan documents.

The problems, at MERS and elsewhere, became so severe last fall that many banks temporarily suspended foreclosures.

Some experts in corporate governance say the legal furor over MERS is overstated. Others describe it as a useful corporation nearly drowning in a flood tide of mortgage foreclosures. But not even the mortgage giant Fannie Mae, an investor in MERS, depends on it these days.

"We would never rely on it to find ownership," says Janis Smith, a Fannie Mae spokeswoman, noting it has its own records.

Apparently with good reason. Alan M. White, a law professor at the Valparaiso University School of Law in Indiana, last year matched MERS's ownership records against those in the public domain.

The results were not encouraging. "Fewer than 30 percent of the mortgages had an accurate record in MERS," Mr. White says. "I kind of assumed that MERS at least kept an accurate list of current ownership. They don't. MERS is

going to make solving the foreclosure problem vastly more expensive."

The Sarmientos are one of thousands of American families who have tried to pierce the MERS veil.

Several years back, they bought a two-family home in the Greenpoint section of Brooklyn for $723,000. They financed the purchase with two mortgages from Lend America, a subprime lender that is now defunct.

But when the recession blew in, Jose Sarmiento, a chef, saw his work hours get cut in half. He fell behind on his mortgages, and MERS later assigned the loans to U.S. Bank as a prelude to filing a foreclosure motion.

Then, with the help of a lawyer from South Brooklyn Legal Services, Mr. Sarmiento began turning over some stones. He found that MERS might have violated tax laws by waiting too long before transferring his mortgage. He also found that MERS could not prove that it had transferred both note and mortgage, as required by law.

One might argue that these are just legal nits. But Mr. Sarmiento, 59, shakes his head. He is trying to work out a payment plan through the federal government, but the roadblocks are many. "I'm tired; I've been fighting for two years already to save my house," he says. "I feel like I never know who really owns this home."

Officials at MERS appear to recognize that they are swimming in dangerous waters. Several federal agencies are investigating MERS, and, in response, the company recently sent a note laying out a raft of reforms. It advised members not to foreclose in MERS's name. It also told them to record mortgage transfers in county records, even if state law does not require it.

MERS will no longer accept unverified new officers. If members ignore these rules, MERS says, it will revoke memberships.

That hasn't stopped judges from asking questions of MERS. And few are doing so with more puckish vigor than Arthur M. Schack, a State Supreme Court judge in Brooklyn.

Judge Schack has twice rejected a foreclosure case brought by Countrywide Home Loans, now part of Bank of America. He had particular sport with Keri Selman, who in Countrywide's court filings claimed to hold three jobs: as a foreclosure specialist for Countrywide Home Loans, as a servicing agent for Bank of New York and as an assistant vice president of MERS. Ms. Selman, the judge said, is a "milliner's delight by virtue of the number of hats that she wears."

At heart, Judge Schack is scratching at the notion that MERS is a legal fiction. If MERS owned nothing, how could it bounce mortgages around for more than a decade? And how could it file millions of foreclosure motions?

These cases, Judge Schack wrote in February 2009, "force the court to determine if MERS, as nominee, acted with the utmost good faith and loyalty in the performance of its duties."

The answer, he strongly suggested, was no.

Tanya March, Foreclosures and the Failure of the American Land Title Recording System, 111 COLUM L. REV. SIDEBAR 19 (2011)

The American land title system has straightforward goals. In conjunction with related state statutes, it is designed to establish a clear priority in title. To this end, the system is highly transparent. Everyone is on constructive notice of every recorded document, and has open access to those records. Additionally, to ease access, many urban and populous counties have placed recent records online to permit easier access. n4 All land title offices allow searching on-site. The combination of transparency and clear priority in title creates security in land interests and strengthens the confidence of investors to purchase real estate or lend money secured by real estate. Owners and lenders would have far less incentive to invest in real estate if their respective priorities of title were murky.

. . . There are over 3,000 local recording systems where holders of an interest in real estate can register that interest. . . . There are two methods of indexing land title records: the tract index and the grantor/grantee index. . . . The most significant problem in the recording process is the manner in which documents are indexed. America is wedded to crude grantor/grantee and tract indexes because they were the height of technological innovation when first implemented in the Massachusetts Bay Colony in 1640. Even progressive jurisdictions utilizing electronic recording have simply transferred this paper-based indexing system into a simple database akin to a Microsoft Excel spreadsheet.

. . .These mistakes have consequences. Courts have held that a mis-indexed conveyance is not binding on third parties. . . .Further, this static indexing system cannot account for changing legal descriptions of property parcels. . . .

Beyond the archaic nature of the system, the dispersion of the recording function into thousands of local offices means that there is no standard system for recording and indexing. Recording laws differ from state to state, and indexing practices can differ over time in the same county.

These obvious problems with the current system, particularly the cost of understanding and complying with the rules of over 3,000 separate offices, led major players in the residential housing lending process to form a private, parallel recording process.

The Mortgage Electronic Registration Systems, Inc. (MERS) was created by the Mortgage Bankers Association, Fannie Mae, Freddie Mac, the Government National Mortgage Association, the Federal Housing Administration, and the Department of Veterans Affairs in 1993 to provide "electronic processing and tracking of [mortgage] ownership and transfers." MERS was established in part to facilitate the bundling of debt and sale of mortgage portfolios. When a loan registered with MERS is made, the mortgage names MERS in conflicting terms. The Fannie Mae/Freddie Mac approved mortgage form contains the following provision: "'MERS' is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument."

When the mortgage or portfolio is subsequently sold, the conveyance information is registered in MERS, but no assignment is recorded. For example, my own residential mortgage names MERS as the lender's nominee. I write my monthly mortgage check to a particular financial services company, but I do not know if that company actually owns my mortgage, or is servicing it on behalf of another lender, or a trust of investors. If I were ever so unlucky as to receive a foreclosure notice, I

could not consult the county records to verify if the entity threatening foreclosure actually owns the debt on my home. That information is held only in MERS. Initially, only paid customers of MERS were able to access the information it stores. Perhaps in response to criticism of this lack of transparency, MERS has recently created a system, called MERS Servicer Identification System, n16 which is designed to permit homeowners to discover the identity of their servicer and the investor that owns their loan. Although the new service is a step forward in promoting transparency, it remains problematic. When I searched the system by the address of my home, the system was unable to find a record of my mortgage.

MERS has been a controversial innovation. Some observers have lauded its national scale and electronic indexing functions. Although many local recorders have viewed MERS with suspicion, n17 a number of state courts have expressly permitted the recording of mortgages with MERS. n18 Some courts and other observers, however, are concerned that the legal fiction of MERS's status as the "mortgagee of record," when it holds no beneficial interest in the property, is irreconcilable with mortgage law.

The residential foreclosure crisis has brought MERS's flaws into clearer view. The inherent opaqueness of MERS has apparently hidden from public view some rather shoddy recordkeeping practices on the part of the lenders. In the fall of 2010, several major residential lenders implemented self-imposed foreclosure moratoriums due to systemic problems in proving ownership of the relevant mortgages. If lenders had complied with the public land title system, a string of mortgage assignments would have easily allowed them to establish standing to file a foreclosure action.

IV. A BETTER SOLUTION

The banks invented MERS because the land title system, developed in a far different time and place, failed to meet the needs of the modern real estate industry. But a private, opaque MERS-like system is not the answer. Instead, the federal government should implement a solution that replaces both the existing local land title system and MERS.

An ideal system should be organized around some clear principles. It should be transparent. It should be easy to search, through dynamic, robust indexing, and easy to access, preferably through the Internet. Documents in PDF form should be downloadable. Electronic filing, which has been proposed by several scholars and implemented in limited ways, should be facilitated. There should be uniformity and consistency in the rules governing the form and substance of documents eligible for recording. The system should be public. Establishing and protecting a clear registry of property interests is and should continue to be an essential function of government.

An ideal system will deal with the fundamental problem with the American land title system: It is a paper-based system that has been awkwardly translated to computers. Rather than continue to try to force a square peg to fit into a round hole, we should start from scratch. In many larger jurisdictions, land title records are digitized for archiving purposes. It is one small step to apply optical character recognition (OCR) software and make each recorded document completely searchable.

Indexes should not be limited to the names of the parties, the type of conveyance, a legal description, and the date of recording. Conveyance documents could be identified with limitless data, including cross-referencing to prior conveyances. Imagine integrating property tax records, subdivision plats, and recorded documents with a dynamic map. With a click, a person could bring up all of the data in the records pertaining to a particular parcel. In such a system, it would be easier for a lawyer or title insurer to sort through the documents and determine which are properly in the chain of title and thus binding on the property.

Technologically, this type of system would be easy to implement within the existing structure of local offices. n24 However, if recorded documents were digitized and indexed online, the rationale for a local system would significantly diminish. Although precedent strongly dictates that land title records be kept at the local level, the original rationale for a local system has disappeared. It is no longer important that the recording office be located within one day's horse ride of the county limits.

A single, national system is the most appropriate solution for the modern real estate industry. Politically, however, it would be extremely difficult to dismantle the local system. The American recording system is in the hands of thousands of elected officials, many of whom hold offices established in their state's constitution. Eliminating them, particularly in one fell swoop, would be nearly impossible.

Given these difficulties, I propose that we simply make the local recorders obsolete. I propose that the federal government create an alternative recording system that includes the features that I outline above. A uniform state law would allow a parcel of real property to permanently migrate out of the local recording system and into the new federal system. A memorandum of the switch would be recorded at the local office, giving notice to all to use the federal database for updated title information. At the time of transfer, I propose that an attorney or title company prepare an abstract of title that includes all conveyances and encumbrances in the chain of title during the relevant marketable title period. That abstract of title, along with certified copies of all documents named therein, would be added to the federal system. Searchers interested in historical documents could still find them at the local level, but new conveyances would need to be added to the federal system.

A compromise approach may seem more feasible, but would be a clear second-best solution. Such a compromise might be to centralize the land title system at the state level, much like the registration system used for Article 9 filings under the Uniform Commercial Code. . . .

Given the fundamental problems inherent in MERS, particularly its private, nontransparent nature, I propose that registering mortgages and permitting assignments through MERS be prohibited. If they were deprived of their private system, I suspect that lenders would prefer the new federal approach to the status quo. . . .

I do not lightly suggest that we abandon 370 years of precedent. But the residential foreclosure crisis, and the role of MERS, demonstrates that the American land title system is broken. The time has come for a radical reinvention that meets the needs of the modern real estate industry.

Gretchen Morgenson, *Mortgage Registry Muddles Foreclosures*, N.Y. TIMES, 9/1/12

MORE good news from the housing front last week. Pending home sales rose 2.4 percent in July, to their highest level since April 2010. Mortgage delinquency rates are down: the Federal Reserve Bank of New York reported a decline of 6.3 percent at the end of June from the March quarter.

Granted, new foreclosures continued to be filed — 256,000 people had a foreclosure added to their credit reports in the June quarter — but that figure was the lowest since mid-2007, the Fed said.

In stark contrast to this improving backdrop are the legal battles still being waged over wrongful foreclosure practices. The glacial progress in these cases is not surprising, given the crowded courts and combatants' usual stalling tactics.

What is surprising is the fresh evidence these cases are turning up of cockeyed mortgage practices, during both the boom and the bust. As these matters are adjudicated, perhaps we will finally learn whether these practices were intended or accidental.

Take the problem of questionable legal fees levied on troubled borrowers. Although these costs may seem small in the scheme of things, they certainly add to the burdens of many hard-pressed Americans.

A foreclosure from Ohio highlights this problem. The facts from this matter are central to a prospective class action filed by a borrower, who contends he was charged improper court costs and legal-related fees in his foreclosure.

The case involved legal moves taken against a bank in 2007 that did not even have an interest in either of the two mortgage liens associated with the foreclosed property. Even though the bank should never have been dragged into the matter, it was — generating $775 in court costs and legal fees paid by the borrower, documents show. Only two years later, during the discovery process, did it emerge that the bank had no ownership in the underlying property.

That $775 may not sound like much. But Paul Grobman, a lawyer in New York who represents the borrower, said he believed the collection of what he called improper legal charges is rampant in foreclosures.

The case involving the $775 began in 2007 when Eugene D. Kline fell behind on the first and second mortgages on his home in Centerville, Ohio. Wells Fargo, noting that as trustee of a securitization it held the note backing the $160,000 first mortgage, sued Mr. Kline and his wife, Patricia, in state court.

Because Mr. Kline had also taken out a second mortgage, Wells Fargo sued the institution that it said owned the additional obligation. Here is where Mortgage Electronic Registration Systems comes in, the company that runs the database set up by banks in the mid-1990s to speed the transfer of mortgages nationwide and track their ownership. To save the costs of recording a mortgage's transfer from one institution to another, MERS acts as mortgagee in county land records. But it does not own the note underlying a property.

Amid the foreclosure crisis, however, critics have contended that the registry actually served to hide the true owner of a mortgage, making it difficult for borrowers to get help in working out their loans.

The facts in Mr. Kline's case seem to indicate another flaw with the MERS registry — that it may not even track mortgages effectively.

MERS was the nominee for WMC Mortgage, an entity that held the second lien on the Kline property, according to Wells Fargo's court filings. Oddly, lawyers for WMC confirmed that it had an interest in the loan, whose value was around $30,000.

In 2008, Mr. Kline advised the lawyers for the banks that he would sell the house and pay off the loans, which totaled approximately $200,000. He did so, paying the legal costs associated with the suit involving the second lien.

But in 2009, documents produced in the Ohio action showed that WMC Mortgage had not, in fact, held the second mortgage when the foreclosure began. WMC had sold Mr. Kline's loan three years earlier into a securitization trust put together by Merrill Lynch. That trust also held Mr. Kline's first mortgage and was overseen by — you guessed it — Wells Fargo.

So, to recap: At the time of the foreclosure, Wells Fargo held both loans taken on by Mr. Kline. Nevertheless, its lawyers sued WMC, contending WMC held the smaller loan. Even though WMC did not own the loan, its lawyers represented to the court that it did. All the while court costs and other charges were billed to Mr. Kline.

Many questions arise in this case. For starters, if the MERS registry is the accurate record it claims to be, why didn't Wells Fargo or its lawyers see that it, not WMC, held the second lien when the Kline foreclosure began?

A MERS spokeswoman declined to comment, citing the pending litigation. Elise Wilkinson, a spokeswoman for Wells Fargo, said that as trustee of the securitization, the bank "would not be in possession of any information regarding a foreclosure action."

"All such information would be in the possession of the mortgage loan servicer," she said, "which is the party responsible for initiating and managing all aspects of the mortgage loan foreclosure process." That was the HomEq Servicing Corporation, which is no longer in the business, the Wells spokeswoman said.

Ditto for WMC. Why didn't it recognize early on that it had sold the Kline loan years before, saving Mr. Kline legal fees? Rick DeBlasis, a lawyer handling the matter at Lerner Sampson & Rothfuss of Cincinnati, declined to comment, saying it was part of the class action.

It will be interesting to watch that case unfold. But in a unanimous ruling against MERS last month in Washington State Supreme Court, the judges described their problems with the registry. "Under the MERS system," they wrote, "questions of authority and accountability arise, and determining who has authority to negotiate loan modifications and who is accountable for misrepresentation and fraud becomes extraordinarily difficult."

Mr. Grobman agrees, arguing that the involvement of MERS in the Kline case allowed the law firms to charge improper fees. "Both Wells Fargo, MERS and their attorneys in this action could falsely represent that the first and second mortgage were owned by different entities," he said, "and could pass on the legal fees and expenses purportedly incurred in the suit."

And what about the Klines? They now rent a home. "It's a rental that we were blessed enough to be able to rent from a friend," said Ms. Kline.

Parsing Statutes

Would you say Oregon has a notice statute? A race statute? A race-notice statute?

ORS 93.640(1):

(1) Every conveyance, deed, land sale contract, assignment of all or any portion of a seller's or purchaser's interest in a land sale contract or other agreement or memorandum thereof affecting the title of real property within this state which is not recorded as provided by law is void as against any subsequent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance, deed, land sale contract, assignment of all or any portion of a seller's or purchaser's interest in a land sale contract or other agreement or memorandum thereof is first filed for record, and as against the heirs and assigns of such subsequent purchaser. As used in this section, "every conveyance, deed, land sale contract, assignment of all or any portion of a seller's or purchaser's interest in a land sale contract or other agreement or memorandum thereof affecting the title of real property" includes mortgages, trust deeds, and assignments for security purposes or assignments solely of proceeds, given by purchasers or sellers under land sale contract. As used in this section, "memorandum" means an instrument that contains the date of the instrument being memorialized, the names of the parties, a legal description of the real property involved, and the nature of the interest created, which is signed by the person from whom the interest is intended to pass, and acknowledged or proved in the manner provided for the acknowledgment or proof of deeds. A memorandum of an instrument conveying or contracting to convey fee title to any real estate shall state on its face the true and actual consideration paid for such transfer as provided in ORS 93.030.

How do you parse a statute like this?

First: Where do the sentences begin and end? Figure that out, and then one by one get a sense of what each sentence is about.

1. **Every conveyance, deed, land sale contract, assignment of all or any portion of a seller's or purchaser's interest … the heirs and assigns of such subsequent purchaser.**
Sets a rule about recording, voiding. (Don't worry at first step what this rule is.)
2. **As used in this section, "every conveyance, deed, land sale contract, assignment of all or any portion of a seller's or purchaser's interest … includes ….**
A definitional section. Will be useful in determining if the section applies. Does it for example cover wills? What about mortgages?
3. **As used in this section, "memorandum" means … proof of deeds**.
Another definitional section – this time of "memorandum."
4. **A memorandum of an instrument conveying or contracting to convey fee title to any real estate shall state on its face the true and actual consideration paid for such transfer as provided in ORS 93.030.** A requirement that a memorandum must fulfill.

Note that the subsection sets out broad a rule, then puts in two definitions, then ends with another rule just about one aspect – all without benefit of paragraph or section breaks. Not the best way to draft a statute, but not uncommon.

Let's focus on deeds.

First, find the **subject** *and the* **verb**: *[not just any verb, but the main one in the sentence]*

Every conveyance, **deed**, land sale contract, assignment of all or any portion of a seller's or purchaser's interest in a land sale contract or other agreement or memorandum thereof affecting the title of real property within this state which is not recorded as provided by law **is void** as against any subsequent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance, deed, land sale contract, assignment of all or any portion of a seller's or purchaser's interest in a land sale contract or other agreement or memorandum thereof is first filed for record, and as against the heirs and assigns of such subsequent purchaser.

Next: what kind of deeds is it talking about?

Every conveyance, **deed**, land sale contract, assignment of all or any portion of a seller's or purchaser's interest in a land sale contract or other agreement or memorandum thereof affecting the title of real property within this state ***which is not recorded as provided by law*** **is void** as against any subsequent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance, deed, land sale contract, assignment of all or any portion of a seller's or purchaser's interest in a land sale contract or other agreement or memorandum thereof is first filed for record, and as against the heirs and assigns of such subsequent purchaser.

Translate it into better English:

Every UNRECORDED conveyance, **deed**, land sale contract, assignment of all or any portion of a seller's or purchaser's interest in a land sale contract or other agreement or memorandum thereof affecting the title of real property within this state ~~***which is not recorded as provided by law***~~ **is void** as against any subsequent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance, deed, land sale contract, assignment of all or any portion of a seller's or purchaser's interest in a land sale contract or other agreement or memorandum thereof is first filed for record, and as against the heirs and assigns of such subsequent purchaser.

But Oregon is not voiding all unrecorded deeds. In this kind of statute you need to ask, void as against whom?

First cut:

Every UNRECORDED conveyance, **deed**, land sale contract, assignment of all or any portion of a seller's or purchaser's interest in a land sale contract or other agreement or memorandum thereof affecting the title of real property within this state ~~***which is not recorded as provided by law***~~ **is void** as against any subsequent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance, deed, land sale contract, assignment of all or any portion of a seller's or purchaser's interest in a land sale contract or other agreement or memorandum thereof is first filed for record, and as against the heirs and assigns of such subsequent purchaser.

You can shorten it to BFP for convenience, so long as you remember that technically, "purchaser" doesn't mean you bought it, but received it by a deed or similar instrument. BFP4VC (BFP for valuable consideration) might be better but it's awkward.

Every UNRECORDED conveyance, **deed**, land sale contract, assignment of all or any portion of a seller's or purchaser's interest in a land sale contract or other agreement or memorandum thereof affecting the title of real property within this state ~~***which is not recorded as provided by law***~~ **is void** as against any subsequent BFP [~~purchaser in good faith and for a valuable consideration of the same real property~~], or any portion thereof, whose conveyance, deed, land sale contract, assignment of all or any portion of a seller's or purchaser's interest in a land sale contract

or other agreement or memorandum thereof is first filed for record, and as against the heirs and assigns of such subsequent purchaser.

If you stop there, however, you're missing something – the rest of the sentence describes the kind of BFP the subsection has in mind. Normally we expect the adjective before the noun in English (red fox, not fox red), but that's not necessarily how it's done in statutes.

> **Every UNRECORDED** conveyance, **deed**, land sale contract, assignment of all or any portion of a seller's or purchaser's interest in a land sale contract or other agreement or memorandum thereof affecting the title of real property within this state ~~***which is not recorded as provided by law***~~ **is void** as against any subsequent BFP [~~purchaser in good faith and for a valuable consideration of the same real property~~], or any portion thereof, **whose** conveyance, **deed**, land sale contract, assignment of all or any portion of a seller's or purchaser's interest in a land sale contract or other agreement or memorandum thereof **is first filed** for record, and as against the heirs and assigns of such subsequent purchaser.

So it says, "Every unrecorded deed is void as against a subsequent BFP who filed their deed first [i.e., before the deed that is the subject of the sentence.]" *If you were going to characterize it, would you call this statute a notice statute? Race-notice? Race? Note also, in fairness to the legislature, that this skeletal version of the statute leaves out important details. But the legislature didn't do a very good job of filling in the details in an understandable way.*

It's tedious but not that hard to parse if you do it this way. What happens if you don't? You end up in the same bad company as the Oregon Court of Appeals, which said in Niday v. GMAC Mortgage, LLC, 284 P.3d 1157 (2012), aff'd on other grounds, 302 P.3d 444 (Ore. 2013):

> "[Recording statutes] protect *bona fide* purchasers who acquire interests in real property for consideration and without notice of prior interests. *E.g.*, ORS 93.640 ("Every conveyance, deed, land sale contract, assignment of all or any portion of a seller's or purchaser's interest in a land sale contract or other agreement or memorandum thereof affecting the title of real property within this state [including mortgages and trust deeds] which is not recorded as provided by law is void as against any subsequent purchaser in good faith and for a valuable consideration of the same real property * * *.").

Reading this excerpt, would you call this statute a notice statute? Race-notice? Race?

Problems on Recording Statutes

Consider the following series of deeds to Blackacre. In the following deeds, "→" means a transfer for valuable consideration; "⇒" means a devise or gift.

At the end of the following series of deeds, who owns Blackacre under –

- *the North Carolina statute (Supp. 167)?*
- *the Florida statute (CB 700)?*
- *the California statute (CB 700)?*
- *the Massachusetts statute (Supp. 167)?*

DON'T rely on the general descriptions of "race" versus "race/notice" versus "notice" statutes; look at their actual language.

1. **2020: O → A. A records.**
2024: O → B. B doesn't record.

2. **2020: O → A. A doesn't record.**
2024: O → B. B records. B knows nothing of the O → A conveyance.

3. **2020: O → A. A doesn't record.**
2024: O ⇒ B. B records. B in fact knows nothing of the O → A conveyance.

4. **2020: O → A. A doesn't record.**
2024: O → B. B doesn't record. B knows nothing of the O → A conveyance.

5. **2020: O → A. A doesn't record.**
2023: O → B. B doesn't record. B knows nothing of the O → A conveyance.
2024: A records.

6. **2020: O → A. A doesn't record or take possession.**
2023: O → B. B records. B knows nothing of the O → A conveyance.
2024: B → C. C was the lawyer who drew up the O → A deed. C records.

7. **2020: O → A. A doesn't record or take possession.**
2023: O → B. B records. B knows nothing of the O → A conveyance.
2024: B → O. O records.

8. **2020: X → O. O records.**
2023: O → A. A records, but the clerk's office mistakenly records the deed in the grantor index under "D" instead of "O."
2024: O → B. B records. B knew nothing of the earlier conveyance to A.

9. **2007: X → O. O records.**
2009: O → A. A does not record.
2020: O → B. B knows of the 2009 O → A deed. B records.
2023: A records the 2009 O → A deed.
2024: B → C. C has no actual knowledge of the O → A deed.

10. **2009: O → A. A records.**
2020: X → O. O records.
2024: O → B. B doesn't know of the 2009 O → A deed. B records.

N.C. Gen. Stat. § 47-18(a). Conveyances, contracts to convey, options and leases of land

(a) No (i) conveyance of land, or (ii) contract to convey, or (iii) option to convey, or (iv) lease of land for more than three years shall be valid to pass any property interest as against lien creditors or purchasers for a valuable consideration from the donor, bargainor or lessor but from the time of registration thereof in the county where the land lies, or if the land is located in more than one county, then in each county where any portion of the land lies to be effective as to the land in that county. Unless otherwise stated either on the registered instrument or on a separate registered instrument duly executed by the party whose priority interest is adversely affected, (i) instruments registered in the office of the register of deeds shall have priority based on the order of registration as determined by the time of registration, and (ii) if instruments are registered simultaneously, then the instruments shall be presumed to have priority as determined by:

(1) The earliest document number set forth on the registered instrument.
(2) The sequential book and page number set forth on the registered instrument if no document number is set forth on the registered instrument.

The presumption created by this subsection is rebuttable.

Mass. Ann. Laws ch. 183 § 4

§ 4. Effect of recordation or actual notice of deeds or leases, or of assignments of rents or profits.

A conveyance of an estate in fee simple, fee tail or for life, or a lease for more than seven years from the making thereof, or an assignment of rents or profits from an estate or lease, shall not be valid as against any person, except the grantor or lessor, his heirs and devisees and persons having actual notice of it, unless it, or an office copy as provided in section thirteen of chapter thirty-six, or, with respect to such a lease or an assignment of rents or profits, a notice of lease or a notice of assignment of rents or profits, as hereinafter defined, is recorded in the registry of deeds for the county or district in which the land to which it relates lies. A "notice of lease", as used in this section, shall mean an instrument in writing executed by all persons who are parties to the lease of which notice is given and shall contain the following information with reference to such lease:--the date of execution thereof and a description, in the form contained in such lease, of the premises demised, and the term of such lease, with the date of commencement of such term and all rights of extension or renewal. A "notice of assignment of rents or profits", as used in this section, shall mean an instrument in writing executed by the assignor and containing the following information:-- a description of the premises, the rent or profits of which have been assigned, adequate to identify the premises, the name of assignee, and the rents and profits which have been assigned. A provision in a recorded mortgage assigning or conditionally assigning rents or profits or obligating the mortgagor to assign or conditionally assign existing or future rents or profits shall constitute a "notice of assignment of rents or profits".

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PART I
NONRESIDENTIAL TENANCIES

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83.001 Application.—This part applies to nonresidential tenancies and all tenancies not governed by part II of this chapter.

History.—s. 1, ch. 73-330.

83.01 Unwritten lease tenancy at will; duration.—Any lease of lands and tenements, or either, made shall be deemed and held to be a tenancy at will unless it shall be in writing signed by the lessor. Such tenancy shall be from year to year, or quarter to quarter, or month to month, or week to week, to be determined by the periods at which the rent is payable. If the rent is payable weekly, then the tenancy shall be from week to week; if payable monthly, then from month to month; if payable quarterly, then from quarter to quarter; if payable yearly, then from year to year.

History.—ss. 1, 2, ch. 5441, 1905; RGS 3567, 3568; CGL 5431, 5432; s. 34, ch. 67-254.

83.02 Certain written leases tenancies at will; duration.—Where any tenancy has been created by an instrument in writing from year to year, or quarter to quarter, or month to month, or week to week, to be determined by the periods at which the rent is payable, and the term of which tenancy is unlimited, the tenancy

shall be a tenancy at will. If the rent is payable weekly, then the tenancy shall be from week to week; if payable monthly, then the tenancy shall be from month to month; if payable quarterly, then from quarter to quarter; if payable yearly, then from year to year.

History.—s. 2, ch. 5441, 1905; RGS 3568; CGL 5432; s. 2, ch. 15057, 1931; s. 34, ch. 67-254.

83.03 Termination of tenancy at will; length of notice.—A tenancy at will may be terminated by either party giving notice as follows:

(1) Where the tenancy is from year to year, by giving not less than 3 months' notice prior to the end of any annual period;

(2) Where the tenancy is from quarter to quarter, by giving not less than 45 days' notice prior to the end of any quarter;

(3) Where the tenancy is from month to month, by giving not less than 15 days' notice prior to the end of any monthly period; and

(4) Where the tenancy is from week to week, by giving not less than 7 days' notice prior to the end of any weekly period.

History.—s. 3, ch. 5441, 1905; RGS 3569; CGL 5433; s. 34, ch. 67-254; s. 3, ch. 2003-5.

83.04 Holding over after term, tenancy at sufferance, etc.—When any tenancy created by an instrument in writing, the term of which is limited, has expired and the tenant holds over in the possession of said premises without renewing the lease by some further instrument in writing then such holding over shall be construed to be a tenancy at sufferance. The mere payment or acceptance of rent shall not be construed to be a renewal of the term, but if the holding over be continued with the written consent of the lessor then the tenancy shall become a tenancy at will under the provisions of this law.

History.—s. 4, ch. 5441, 1905; RGS 3570; CGL 5434; s. 3, ch. 15057, 1931; s. 34, ch. 67-254.

83.05 Right of possession upon default in rent; determination of right of possession in action or surrender or abandonment of premises.—

(1) If any person leasing or renting any land or premises other than a dwelling unit fails to pay the rent at the time it becomes due, the lessor has the right to obtain possession of the premises as provided by law.

(2) The landlord shall recover possession of rented premises only:

(a) In an action for possession under s. 83.20, or other civil action in which the issue of right of possession is determined;

(b) When the tenant has surrendered possession of the rented premises to the landlord; or

(c) When the tenant has abandoned the rented premises.

(3) In the absence of actual knowledge of abandonment, it shall be presumed for purposes of paragraph (2)(c) that the tenant has abandoned the rented premises if:

(a) The landlord reasonably believes that the tenant has been absent from the rented premises for a period of 30 consecutive days;

(b) The rent is not current; and

(c) A notice pursuant to s. 83.20(2) has been served and 10 days have elapsed since service of such notice.

However, this presumption does not apply if the rent is current or the tenant has notified the landlord in writing of an intended absence.

History.—s. 5, Nov. 21, 1828; RS 1750; GS 2226; RGS 3534; CGL 5398; s. 34, ch. 67-254; s. 1, ch. 83-151.

83.06 Right to demand double rent upon refusal to deliver possession.—

(1) When any tenant refuses to give up possession of the premises at the end of the tenant's lease, the landlord, the landlord's agent, attorney, or legal representatives, may demand of such tenant double the monthly rent, and may recover the same at the expiration of every month, or in the same proportion for a longer or shorter time by distress, in the manner pointed out hereinafter.

(2) All contracts for rent, verbal or in writing, shall bear interest from the time the rent becomes due, any law, usage or custom to the contrary notwithstanding.

History.—ss. 4, 6, Nov. 21, 1828; RS 1759; GS 2235; RGS 3554; CGL 5418; s. 34, ch. 67-254; s. 427, ch. 95-147.

83.07 Action for use and occupation.—Any landlord, the landlord's heirs, executors, administrators or assigns may recover reasonable damages for any house, lands, tenements, or hereditaments held or occupied by any person by the landlord's permission in an action on the case for the use and occupation of the lands, tenements, or hereditaments when they are not held, occupied by or under agreement or demise by deed; and if on trial of any action, any demise or agreement (not being by deed) whereby a certain rent was reserved is given in evidence, the plaintiff shall not be dismissed but may make use thereof as an evidence of the quantum of damages to be recovered.

History.—s. 7, Nov. 21, 1828; RS 1760; GS 2236; RGS 3555; CGL 5419; s. 34, ch. 67-254; s. 428, ch. 95-147.

83.08 Landlord's lien for rent.—Every person to whom rent may be due, the person's heirs, executors, administrators or assigns, shall have a lien for such rent upon the property found upon or off the premises leased or rented, and in the possession of any person, as follows:

(1) Upon agricultural products raised on the land leased or rented for the current year. This lien shall be superior to all other liens, though of older date.

(2) Upon all other property of the lessee or his or her sublessee or assigns, usually kept on the premises. This lien shall be superior to any lien acquired subsequent to the bringing of the property on the premises leased.

(3) Upon all other property of the defendant. This lien shall date from the levy of the distress warrant hereinafter provided.

History.—ss. 1, 9, 10, ch. 3131, 1879; RS 1761; GS 2237; RGS 3556; CGL 5420; s. 34, ch. 67-254; s. 429, ch. 95-147.

83.09 Exemptions from liens for rent.—No property of any tenant or lessee shall be exempt from distress and sale for rent, except beds, bedclothes and wearing apparel.

History.—s. 6, Feb. 14, 1835; RS 1762; GS 2238; RGS 3557; CGL 5421; s. 34, ch. 67-254.

83.10 Landlord's lien for advances.—Landlords shall have a lien on the crop grown on rented land for advances made in money or other things of value, whether made directly by them or at their instance and requested by another person, or for which they have assumed a legal responsibility, at or before the time at which such advances were made, for the sustenance or well-being of the tenant or the tenant's family, or for preparing the ground for cultivation, or for cultivating, gathering, saving, handling, or preparing the crop for market. They shall have a lien also upon each and every article advanced, and upon all property purchased with money advanced, or obtained, by barter or exchange for any articles advanced, for the aggregate value or price of all the property or articles so advanced. The liens upon the crop shall be of equal dignity with liens for rent, and upon the articles advanced shall be paramount to all other liens.

History.—s. 2, ch. 3247, 1879; RS 1763; GS 2239; RGS 3558; CGL 5422; s. 34, ch. 67-254; s. 430, ch. 95-147.

83.11 Distress for rent; complaint.—Any person to whom any rent or money for advances is due or the person's agent or attorney may file an action in the court in the county where the land lies having jurisdiction of the amount claimed, and the court shall have jurisdiction to order the relief provided in this part. The complaint shall be verified and shall allege the name and relationship of the defendant to the plaintiff, how the obligation for rent arose, the amount or quality and value of the rent due for such land, or the advances, and whether payable in money, an agricultural product, or any other thing of value.

History.—s. 2, ch. 3131, 1879; RS 1764; GS 2240; RGS 3559; CGL 5423; s. 34, ch. 67-254; s. 1, ch. 80-282; s. 431, ch. 95-147.

83.12 Distress writ.—A distress writ shall be issued by a judge of the court which has jurisdiction of the amount claimed. The writ shall enjoin the defendant from damaging, disposing of, secreting, or removing any property liable to distress from the rented real property after the time of service of the writ until the sheriff levies on the property, the writ is vacated, or the court otherwise orders. A violation of the command of the writ may be punished as a contempt of court. If the defendant does not move for dissolution of the writ as provided in s.

83.135, the sheriff shall, pursuant to a further order of the court, levy on the property liable to distress forthwith after the time for answering the complaint has expired. Before the writ issues, the plaintiff or the plaintiff's agent or attorney shall file a bond with surety to be approved by the clerk payable to defendant in at least double the sum demanded or, if property, in double the value of the property sought to be levied on, conditioned to pay all costs and damages which defendant sustains in consequence of plaintiff's improperly suing out the distress.

History.—s. 2, ch. 3131, 1879; RS 1765; GS 2241; s. 10, ch. 7838, 1919; RGS 3560; CGL 5424; s. 34, ch. 67-254; s. 2, ch. 80-282; s. 432, ch. 95-147.

83.13 Levy of writ.—The sheriff shall execute the writ by service on defendant and, upon the order of the court, by levy on property distrainable for rent or advances, if found in the sheriff's jurisdiction. If the property is in another jurisdiction, the party who had the writ issued shall deliver the writ to the sheriff in the other jurisdiction; and that sheriff shall execute the writ, upon order of the court, by levying on the property and delivering it to the sheriff of the county in which the action is pending, to be disposed of according to law, unless he or she is ordered by the court from which the writ emanated to hold the property and dispose of it in his or her jurisdiction according to law. If the plaintiff shows by a sworn statement that the defendant cannot be found within the state, the levy on the property suffices as service on the defendant.

History.—s. 3, ch. 3721, 1887; RS 1765; GS 2241; RGS 3560; CGL 5424; s. 34, ch. 67-254; s. 3, ch. 80-282; s. 15, ch. 82-66; s. 8, ch. 83-255; s. 433, ch. 95-147; s. 5, ch. 2004-273.

83.135 Dissolution of writ.—The defendant may move for dissolution of a distress writ at any time. The court shall hear the motion not later than the day on which the sheriff is authorized under the writ to levy on property liable under distress. If the plaintiff proves a prima facie case, or if the defendant defaults, the court shall order the sheriff to proceed with the levy.

History.—s. 4, ch. 80-282.

83.14 Replevy of distrained property.—The property distrained may be restored to the defendant at any time on the defendant's giving bond with surety to the sheriff levying the writ. The bond shall be approved by such sheriff; made payable to plaintiff in double the value of the property levied on, with the value to be fixed by the sheriff; and conditioned for the forthcoming of the property restored to abide the final order of the court. It may be also restored to defendant on defendant's giving bond with surety to be approved by the sheriff making the levy conditioned to pay the plaintiff the amount or value of the rental or advances which may be adjudicated to be payable to plaintiff. Judgment may be entered against the surety on such bonds in the manner and with like effect as provided in s. 76.31.

History.—s. 3, ch. 3131, 1879; RS 1766; s. 1, ch. 4408, 1895; RGS 3561; CGL 5425; s. 34, ch. 67-254; s. 16, ch. 82-66; s. 9, ch. 83-255; s. 434, ch. 95-147.

83.15 Claims by third persons.—Any third person claiming any property so distrained may interpose and prosecute his or her claim for it in the same manner as is provided in similar cases of claim to property levied on under execution.

History.—s. 7, ch. 3131, 1879; RS 1770; GS 2246; RGS 3565; CGL 5429; s. 34, ch. 67-254; s. 17, ch. 82-66; s. 435, ch. 95-147.

83.18 Distress for rent; trial; verdict; judgment.—If the verdict or the finding of the court is for plaintiff, judgment shall be rendered against defendant for the amount or value of the rental or advances, including interest and costs, and against the surety on defendant's bond as provided for in s. 83.14, if the property has been restored to defendant, and execution shall issue. If the verdict or the finding of the court is for defendant, the action shall be dismissed and defendant shall have judgment and execution against plaintiff for costs.

History.—RS 1768; s. 3, ch. 4408, 1895; GS 2244; RGS 3563; CGL 5427; s. 14, ch. 63-559; s. 34, ch. 67-254; s. 18, ch. 82-66.

83.19 Sale of property distrained.—

(1) If the judgment is for plaintiff and the property in whole or in part has not been replevied, it, or the part not restored to the defendant, shall be sold and the proceeds applied on the payment of the execution. If the rental or any part of it is due in agricultural products and

the property distrained, or any part of it, is of a similar kind to that claimed in the complaint, the property up to a quantity to be adjudged of by the officer holding the execution (not exceeding that claimed), may be delivered to the plaintiff as a payment on the plaintiff's execution at his or her request.

(2) When any property levied on is sold, it shall be advertised two times, the first advertisement being at least 10 days before the sale. All property so levied on shall be sold at the location advertised in the notice of sheriff's sale.

(3) Before the sale if defendant appeals and obtains supersedeas and pays all costs accrued up to the time that the supersedeas becomes operative, the property shall be restored to defendant and there shall be no sale.

(4) In case any property is sold to satisfy any rent payable in cotton or other agricultural product or thing, the officer shall settle with the plaintiff at the value of the rental at the time it became due.

History.—ss. 5, 6, ch. 3131, 1879; RS 1769; GS 2245; RGS 3564; CGL 5428; s. 34, ch. 67-254; s. 19, ch. 82-66; s. 10, ch. 83-255; s. 436, ch. 95-147.

83.20 Causes for removal of tenants.—Any tenant or lessee at will or sufferance, or for part of the year, or for one or more years, of any houses, lands or tenements, and the assigns, under tenants or legal representatives of such tenant or lessee, may be removed from the premises in the manner hereinafter provided in the following cases:

(1) Where such person holds over and continues in the possession of the demised premises, or any part thereof, after the expiration of the person's time, without the permission of the person's landlord.

(2) Where such person holds over without permission as aforesaid, after any default in the payment of rent pursuant to the agreement under which the premises are held, and 3 days' notice in writing requiring the payment of the rent or the possession of the premises has been served by the person entitled to the rent on the person owing the same. The service of the notice shall be by delivery of a true copy thereof, or, if the tenant is absent from the rented premises, by leaving a copy thereof at such place.

(3) Where such person holds over without permission after failing to cure a material breach of the lease or oral agreement, other than nonpayment of rent, and when 15 days' written notice requiring the cure of such breach or the possession of the premises has been served on the tenant. This subsection applies only when the lease is silent on the matter or when the tenancy is an oral one at will. The notice may give a longer time period for cure of the breach or surrender of the premises. In the absence of a lease provision prescribing the method for serving notices, service must be by mail, hand delivery, or, if the tenant is absent from the rental premises or the address designated by the lease, by posting.

History.—s. 1, ch. 3248, 1881; RS 1751; GS 2227; RGS 3535; CGL 5399; s. 34, ch. 67-254; s. 20, ch. 77-104; s. 2, ch. 88-379; s. 1, ch. 93-70; s. 437, ch. 95-147.

83.201 Notice to landlord of failure to maintain or repair, rendering premises wholly untenantable; right to withhold rent.—When the lease is silent on the procedure to be followed to effect repair or maintenance and the payment of rent relating thereto, yet affirmatively and expressly places the obligation for same upon the landlord, and the landlord has failed or refused to do so, rendering the leased premises wholly untenantable, the tenant may withhold rent after notice to the landlord. The tenant shall serve the landlord, in the manner prescribed by s. 83.20(3), with a written notice declaring the premises to be wholly untenantable, giving the landlord at least 20 days to make the specifically described repair or maintenance, and stating that the tenant will withhold the rent for the next rental period and thereafter until the repair or maintenance has been performed. The lease may provide for a longer period of time for repair or maintenance. Once the landlord has completed the repair or maintenance, the tenant shall pay the landlord the amounts of rent withheld. If the landlord

does not complete the repair or maintenance in the allotted time, the parties may extend the time by written agreement or the tenant may abandon the premises, retain the amounts of rent withheld, terminate the lease, and avoid any liability for future rent or charges under the lease. This section is cumulative to other existing remedies, and this section does not prevent any tenant from exercising his or her other remedies.

History.—s. 2, ch. 93-70; s. 438, ch. 95-147.

83.202 Waiver of right to proceed with eviction claim.—The landlord's acceptance of the full amount of rent past due, with knowledge of the tenant's breach of the lease by nonpayment, shall be considered a waiver of the landlord's right to proceed with an eviction claim for nonpayment of that rent. Acceptance of the rent includes conduct by the landlord concerning any tender of the rent by the tenant which is inconsistent with reasonably prompt return of the payment to the tenant.

History.—s. 3, ch. 93-70.

83.21 Removal of tenant.—The landlord, the landlord's attorney or agent, applying for the removal of any tenant, shall file a complaint stating the facts which authorize the removal of the tenant, and describing the premises in the proper court of the county where the premises are situated and is entitled to the summary procedure provided in s. 51.011.

History.—s. 2, ch. 3248, 1881; RS 1752; GS 2228; RGS 3536; CGL 5400; s. 1, ch. 61-318; s. 34, ch. 67-254; s. 439, ch. 95-147.

83.22 Removal of tenant; service.—

(1) After at least two attempts to obtain service as provided by law, if the defendant cannot be found in the county in which the action is pending and either the defendant has no usual place of abode in the county or there is no person 15 years of age or older residing at the defendant's usual place of abode in the county, the sheriff shall serve the summons by attaching it to some part of the premises involved in the proceeding. The minimum time delay between the two attempts to obtain service shall be 6 hours.

(2) If a landlord causes, or anticipates causing, a defendant to be served with a summons and complaint solely by attaching them to some conspicuous part of the premises involved in the proceeding, the landlord shall provide the clerk of the court with two additional copies of the complaint and two prestamped envelopes addressed to the defendant. One envelope shall be addressed to such address or location as has been designated by the tenant for receipt of notice in a written lease or other agreement or, if none has been designated, to the residence of the tenant, if known. The second envelope shall be addressed to the last known business address of the tenant. The clerk of the court shall immediately mail the copies of the summons and complaint by first-class mail, note the fact of mailing in the docket, and file a certificate in the court file of the fact and date of mailing. Service shall be effective on the date of posting or mailing, whichever occurs later; and at least 5 days from the date of service must have elapsed before a judgment for final removal of the defendant may be entered.

History.—s. 2, ch. 3248, 1881; RS 1753; GS 2229; RGS 3537; CGL 5401; s. 1, ch. 22731, 1945; s. 34, ch. 67-254; s. 2, ch. 83-151; s. 3, ch. 84-339; s. 440, ch. 95-147.

83.231 Removal of tenant; judgment.—If the issues are found for plaintiff, judgment shall be entered that plaintiff recover possession of the premises. If the plaintiff expressly and specifically sought money damages in the complaint, in addition to awarding possession of the premises to the plaintiff, the court shall also direct, in an amount which is within its jurisdictional limitations, the entry of a money judgment in favor of the plaintiff and against the defendant for the amount of money found due, owing, and unpaid by the defendant, with costs. However, no money judgment shall be entered unless service of process has been effected by personal service or, where authorized by law, by certified or registered mail, return receipt, or in any other manner prescribed by law or the rules of the court, and no money judgment may be entered except in compliance

with the Florida Rules of Civil Procedure. Where otherwise authorized by law, the plaintiff in the judgment for possession and money damages may also be awarded attorney's fees and costs. If the issues are found for defendant, judgment shall be entered dismissing the action.

History.—s. 8, ch. 6463, 1913; RGS 3549; CGL 5413; s. 34, ch. 67-254; s. 1, ch. 87-195; s. 4, ch. 93-70; s. 441, ch. 95-147.

Note.—Former s. 83.34.

83.232 Rent paid into registry of court.—

(1) In an action by the landlord which includes a claim for possession of real property, the tenant shall pay into the court registry the amount alleged in the complaint as unpaid, or if such amount is contested, such amount as is determined by the court, and any rent accruing during the pendency of the action, when due, unless the tenant has interposed the defense of payment or satisfaction of the rent in the amount the complaint alleges as unpaid. Unless the tenant disputes the amount of accrued rent, the tenant must pay the amount alleged in the complaint into the court registry on or before the date on which his or her answer to the claim for possession is due. If the tenant contests the amount of accrued rent, the tenant must pay the amount determined by the court into the court registry on the day that the court makes its determination. The court may, however, extend these time periods to allow for later payment, upon good cause shown. Even though the defense of payment or satisfaction has been asserted, the court, in its discretion, may order the tenant to pay into the court registry the rent that accrues during the pendency of the action, the time of accrual being as set forth in the lease. If the landlord is in actual danger of loss of the premises or other hardship resulting from the loss of rental income from the premises, the landlord may apply to the court for disbursement of all or part of the funds so held in the court registry.

(2) If the tenant contests the amount of money to be placed into the court registry, any hearing regarding such dispute shall be limited to only the factual or legal issues concerning:

(a) Whether the tenant has been properly credited by the landlord with any and all rental payments made; and

(b) What properly constitutes rent under the provisions of the lease.

(3) The court, on its own motion, shall notify the tenant of the requirement that rent be paid into the court registry by order, which shall be issued immediately upon filing of the tenant's initial pleading, motion, or other paper.

(4) The filing of a counterclaim for money damages does not relieve the tenant from depositing rent due into the registry of the court.

(5) Failure of the tenant to pay the rent into the court registry pursuant to court order shall be deemed an absolute waiver of the tenant's defenses. In such case, the landlord is entitled to an immediate default for possession without further notice or hearing thereon.

History.—s. 5, ch. 93-70; s. 442, ch. 95-147.

83.241 Removal of tenant; process.—After entry of judgment in favor of plaintiff the clerk shall issue a writ to the sheriff describing the premises and commanding the sheriff to put plaintiff in possession.

History.—s. 9, ch. 6463, 1913; RGS 3550; CGL 5414; s. 34, ch. 67-254; s. 1, ch. 70-360; s. 5, ch. 94-170; s. 1371, ch. 95-147.

Note.—Former s. 83.35.

83.251 Removal of tenant; costs.—The prevailing party shall have judgment for costs and execution shall issue therefor.

History.—s. 11, ch. 6463, 1913; RGS 3552; CGL 5416; s. 34, ch. 67-254.

Note.—Former s. 83.37.

PART II
RESIDENTIAL TENANCIES

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History.—s. 2, ch. 73-330.

83.41 Application.—This part applies to the rental of a dwelling unit.

History.—s. 2, ch. 73-330; ss. 2, 20, ch. 82-66.

83.42 Exclusions from application of part.—This part does not apply to:

(1) Residency or detention in a facility, whether public or private, when residence or detention is incidental to the provision of medical, geriatric, educational, counseling, religious, or similar services. For residents of a facility licensed under part II of chapter 400, the provisions of s. 400.0255 are the exclusive procedures for all transfers and discharges.

(2) Occupancy under a contract of sale of a dwelling unit or the property of which it is a part in which the buyer has paid at least 12 months' rent or in which the buyer has paid at least 1 month's rent and a deposit of at least 5 percent of the purchase price of the property.

(3) Transient occupancy in a hotel, condominium, motel, roominghouse, or similar public lodging, or transient occupancy in a mobile home park.

(4) Occupancy by a holder of a proprietary lease in a cooperative apartment.

(5) Occupancy by an owner of a condominium unit.

History.—s. 2, ch. 73-330; s. 40, ch. 2012-160; s. 1, ch. 2013-136.

83.425 Preemption.— The regulation of residential tenancies, the landlord-tenant relationship, and all other matters covered under this part are preempted to the state. This section supersedes any local government regulations on matters covered under this part, including, but not limited to, the screening process used by a landlord in approving tenancies; security deposits; rental agreement applications and fees associated with such applications; terms and conditions of rental agreements; the rights and responsibilities of the landlord and tenant; disclosures concerning the premises, the dwelling unit, the rental agreement, or the rights and responsibilities of the landlord and tenant; fees charged by the landlord; or notice requirements.

History.—s. 1, ch. 2023-314.

83.43 Definitions.—As used in this part, the following words and terms shall have the following meanings unless some other meaning is plainly indicated:

(1) "Building, housing, and health codes" means any law, ordinance, or governmental regulation concerning health, safety, sanitation or fitness for habitation, or the construction, maintenance, operation, occupancy, use, or appearance, of any dwelling unit.

(2) "Dwelling unit" means:

(a) A structure or part of a structure that is rented for use as a home, residence, or sleeping place by one person or by two or more persons who maintain a common household.

(b) A mobile home rented by a tenant.

(c) A structure or part of a structure that is furnished, with or without rent, as an incident of employment for use as a home, residence, or sleeping place by one or more persons.

(3) "Landlord" means the owner or lessor of a dwelling unit.

(4) "Tenant" means any person entitled to occupy a dwelling unit under a rental agreement.

(5) "Premises" means a dwelling unit and the structure of which it is a part and a mobile home lot and the appurtenant facilities and grounds, areas, facilities, and property held out for the use of tenants generally.

(6) "Rent" means the periodic payments due the landlord from the tenant for occupancy under a rental agreement and any other payments due the landlord from the tenant as may be designated as rent in a written rental agreement.

(7) "Rental agreement" means any written agreement, including amendments or addenda, or oral agreement for a duration of less than 1 year, providing for use and occupancy of premises.

(8) "Good faith" means honesty in fact in the conduct or transaction concerned.

(9) "Advance rent" means moneys paid to the landlord to be applied to future rent payment periods, but does not include rent paid in advance for a current rent payment period.

(10) "Transient occupancy" means occupancy when it is the intention of the parties that the occupancy will be temporary.

(11) "Deposit money" means any money held by the landlord on behalf of the tenant, including, but not limited to, damage deposits, security deposits, advance rent deposit, pet deposit, or any contractual deposit agreed to between landlord and tenant either in writing or orally.

(12) "Security deposits" means any moneys held by the landlord as security for the performance of the rental agreement, including, but not limited to, monetary damage to the landlord caused by the tenant's breach of lease prior to the expiration thereof.

(13) "Legal holiday" means holidays observed by the clerk of the court.

(14) "Servicemember" shall have the same meaning as provided in s. 250.01.

(15) "Active duty" shall have the same meaning as provided in s. 250.01.

(16) "State active duty" shall have the same meaning as provided in s. 250.01.

(17) "Early termination fee" means any charge, fee, or forfeiture that is provided for in a written rental agreement and is assessed to a tenant when a tenant elects to terminate the rental agreement, as provided in the agreement, and vacates a dwelling unit before the end of the rental agreement. An early termination fee does not include:

(a) Unpaid rent and other accrued charges through the end of the month in which the landlord retakes possession of the dwelling unit.

(b) Charges for damages to the dwelling unit.

(c) Charges associated with a rental agreement settlement, release, buyout, or accord and satisfaction agreement.

History.—s. 2, ch. 73-330; s. 1, ch. 74-143; s. 1, ch. 81-190; s. 3, ch. 83-151; s. 17, ch. 94-170; s. 2, ch. 2003-72; s. 1, ch. 2008-131.

83.44 Obligation of good faith.—Every rental agreement or duty within this part imposes an obligation of good faith in its performance or enforcement.

History.—s. 2, ch. 73-330.

83.45 Unconscionable rental agreement or provision.—

(1) If the court as a matter of law finds a rental agreement or any provision of a rental agreement to have been unconscionable at the time it was made, the court may refuse to enforce the rental agreement, enforce the remainder of the rental agreement without the unconscionable provision, or so limit the application of any unconscionable provision as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the rental agreement or any provision thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to meaning, relationship of the parties, purpose, and effect to aid the court in making the determination.

History.—s. 2, ch. 73-330.

83.46 Rent; duration of tenancies.—

(1) Unless otherwise agreed, rent is payable without demand or notice; periodic rent is payable at the beginning of each rent payment period; and rent is uniformly apportionable from day to day.

(2) If the rental agreement contains no provision as to duration of the tenancy, the duration is determined by the periods for which the rent is payable. If the rent is payable weekly, then the tenancy is from week to week; if payable monthly, tenancy is from month to month; if payable quarterly, tenancy is from quarter to quarter; if payable yearly, tenancy is from year to year.

(3) If the dwelling unit is furnished without rent as an incident of employment and there is no agreement as to the duration of the tenancy, the duration is determined by the periods for which wages are payable. If wages are payable weekly or more frequently, then the tenancy is from week to week; and if wages are payable monthly or no wages are payable, then the tenancy is from month to month. In the event that the employee ceases employment, the employer shall be entitled to rent for the period from the day after the employee ceases employment until the day that the dwelling unit is vacated at a rate equivalent to the rate charged for similarly situated residences in the area. This subsection shall not apply to an employee or a resident manager of an apartment house or an apartment complex when there is a written agreement to the contrary.

History.—s. 2, ch. 73-330; s. 2, ch. 81-190; s. 2, ch. 87-195; s. 2, ch. 90-133; s. 1, ch. 93-255.

83.47 Prohibited provisions in rental agreements.—

(1) A provision in a rental agreement is void and unenforceable to the extent that it:

(a) Purports to waive or preclude the rights, remedies, or requirements set forth in this part.

(b) Purports to limit or preclude any liability of the landlord to the tenant or of the tenant to the landlord, arising under law.

(2) If such a void and unenforceable provision is included in a rental agreement entered into, extended, or renewed after the effective date of this part and either party suffers actual damages as a result of the inclusion, the aggrieved party may recover those damages sustained after the effective date of this part.

History.—s. 2, ch. 73-330.

83.48 Attorney fees.—In any civil action brought to enforce the provisions of the rental agreement or this part, the party in whose favor a judgment or decree has been rendered may recover reasonable attorney fees and court costs from the nonprevailing party. The right to attorney fees in this section may not be waived in a lease agreement. However, attorney fees may not be awarded under this section in a claim for personal injury damages based on a breach of duty under s. 83.51.

History.—s. 2, ch. 73-330; s. 4, ch. 83-151; s. 2, ch. 2013-136.

[1]**83.49 Deposit money or advance rent; duty of landlord and tenant.**—

(1) Whenever money is deposited or advanced by a tenant on a rental agreement as security for performance of the rental agreement or as advance rent for other than the next immediate rental period, the landlord or the landlord's agent shall either:

(a) Hold the total amount of such money in a separate non-interest-bearing account in a Florida banking institution for the benefit of the tenant or tenants. The landlord shall not commingle such moneys with any other funds of the landlord or hypothecate, pledge, or in any other way make use of such moneys until such moneys are actually due the landlord;

(b) Hold the total amount of such money in a separate interest-bearing account in a Florida banking institution for the benefit of the tenant or tenants, in which case the tenant shall receive and collect interest in an amount of at least 75 percent of the annualized average interest rate payable on such account or interest at the rate of 5 percent per year, simple interest, whichever the landlord elects. The landlord shall not commingle such moneys with any other funds of the landlord or hypothecate, pledge, or in any other way make use of such moneys until such moneys are actually due the landlord; or

(c) Post a surety bond, executed by the landlord as principal and a surety company authorized and licensed to do business in the state as surety, with the clerk of the circuit court in the county in which the dwelling unit is located in the total amount of the security deposits and advance rent he or she holds on behalf of the tenants or $50,000, whichever is less. The bond shall be conditioned upon the faithful compliance of the landlord with the provisions of this section and shall run to the Governor for the benefit of any tenant injured by the landlord's violation of the provisions of this section. In addition to posting the surety bond, the landlord shall pay to the tenant interest at the rate of 5 percent per year, simple interest. A landlord, or the landlord's agent, engaged in the renting of dwelling units in five or more counties, who holds deposit moneys or advance rent and who is otherwise subject to the provisions of this section, may, in lieu of posting a surety bond in each county, elect to post a surety bond in the form and manner provided in this paragraph with the office of the Secretary of State. The bond shall be in the total amount of the security deposit or advance rent held on behalf of tenants or in the amount of $250,000, whichever is less. The bond shall be conditioned upon the faithful compliance of the landlord with the provisions of this section and shall run to the Governor for the benefit of any tenant injured by the landlord's violation of this section. In addition to posting a surety bond, the landlord shall pay to the tenant interest on the security deposit or advance rent held on behalf of that tenant at the rate of 5 percent per year simple interest.

(2) The landlord shall, in the lease agreement or within 30 days after receipt of advance rent or a security deposit, give written notice to the tenant which includes disclosure of the advance rent or security deposit. Subsequent to providing such written notice, if the landlord changes the manner or location in which he or she is holding the advance rent or security deposit, he or she must notify the tenant within 30 days after the change as provided in paragraphs (a)-(d). The landlord is not required to give new or additional notice solely because the depository has merged with another financial institution, changed its name, or transferred ownership to a different financial institution. This subsection does not apply to any landlord who rents fewer than five individual dwelling units. Failure to give this notice is not a defense to the payment of rent when due. The written notice must:

(a) Be given in person or by mail to the tenant.

(b) State the name and address of the depository where the advance rent or security deposit is being held or state that the landlord has posted a surety bond as provided by law.

(c) State whether the tenant is entitled to interest on the deposit.

(d) Contain the following disclosure:

YOUR LEASE REQUIRES PAYMENT OF CERTAIN DEPOSITS. THE LANDLORD MAY TRANSFER ADVANCE RENTS TO THE LANDLORD'S ACCOUNT AS THEY ARE DUE AND WITHOUT NOTICE. WHEN YOU MOVE OUT, YOU MUST GIVE THE LANDLORD YOUR NEW ADDRESS SO THAT THE LANDLORD CAN SEND YOU NOTICES REGARDING YOUR DEPOSIT. THE LANDLORD MUST MAIL YOU NOTICE, WITHIN 30 DAYS AFTER YOU MOVE OUT, OF THE LANDLORD'S INTENT TO IMPOSE A CLAIM AGAINST THE DEPOSIT. IF YOU DO NOT REPLY TO THE LANDLORD STATING YOUR OBJECTION TO THE CLAIM WITHIN 15 DAYS AFTER RECEIPT OF THE LANDLORD'S NOTICE, THE LANDLORD WILL COLLECT THE CLAIM AND MUST MAIL YOU THE REMAINING DEPOSIT, IF ANY.

IF THE LANDLORD FAILS TO TIMELY MAIL YOU NOTICE, THE LANDLORD MUST RETURN THE DEPOSIT BUT MAY LATER FILE A LAWSUIT AGAINST YOU FOR DAMAGES. IF YOU FAIL TO TIMELY OBJECT TO A CLAIM, THE LANDLORD MAY COLLECT FROM THE DEPOSIT, BUT YOU MAY LATER FILE A LAWSUIT CLAIMING A REFUND.

YOU SHOULD ATTEMPT TO INFORMALLY RESOLVE ANY DISPUTE BEFORE FILING A LAWSUIT. GENERALLY, THE PARTY IN WHOSE FAVOR A JUDGMENT IS RENDERED WILL BE AWARDED COSTS AND ATTORNEY FEES PAYABLE BY THE LOSING PARTY.

THIS DISCLOSURE IS BASIC. PLEASE REFER TO PART II OF CHAPTER 83, FLORIDA STATUTES, TO DETERMINE YOUR LEGAL RIGHTS AND OBLIGATIONS.

(3) The landlord or the landlord's agent may disburse advance rents from the deposit account to the landlord's benefit when the advance rental period commences and without notice to the tenant. For all other deposits:

(a) Upon the vacating of the premises for termination of the lease, if the landlord does not intend to impose a claim on the security deposit, the landlord shall have 15 days to return the security deposit together with interest if otherwise required, or the landlord shall have 30 days to give the tenant written notice by certified mail to the tenant's last known mailing address of his or her intention to impose a claim on the deposit and the reason for imposing the claim. The notice shall contain a statement in substantially the following form:

This is a notice of my intention to impose a claim for damages in the amount of upon your security deposit, due to . It is sent to you as required by s. 83.49(3), Florida Statutes. You are hereby notified that you must object in writing to this deduction from your security deposit within 15 days from the time you receive this notice or I will be authorized to deduct my claim from your security deposit. Your objection must be sent to (landlord's address) .

If the landlord fails to give the required notice within the 30-day period, he or she forfeits the right to impose a claim upon the security deposit and may not seek a setoff against the deposit but may file an action for damages after return of the deposit.

(b) Unless the tenant objects to the imposition of the landlord's claim or the amount thereof within 15 days after receipt of the landlord's notice of intention to impose a claim, the landlord may then deduct the amount of his or her claim and shall remit the balance of the deposit to the tenant within 30 days after the date of the notice of intention to impose a claim for

damages. The failure of the tenant to make a timely objection does not waive any rights of the tenant to seek damages in a separate action.

(c) If either party institutes an action in a court of competent jurisdiction to adjudicate the party's right to the security deposit, the prevailing party is entitled to receive his or her court costs plus a reasonable fee for his or her attorney. The court shall advance the cause on the calendar.

(d) Compliance with this section by an individual or business entity authorized to conduct business in this state, including Florida-licensed real estate brokers and sales associates, constitutes compliance with all other relevant Florida Statutes pertaining to security deposits held pursuant to a rental agreement or other landlord-tenant relationship. Enforcement personnel shall look solely to this section to determine compliance. This section prevails over any conflicting provisions in chapter 475 and in other sections of the Florida Statutes, and shall operate to permit licensed real estate brokers to disburse security deposits and deposit money without having to comply with the notice and settlement procedures contained in s. 475.25(1)(d).

(4) The provisions of this section do not apply to transient rentals by hotels or motels as defined in chapter 509; nor do they apply in those instances in which the amount of rent or deposit, or both, is regulated by law or by rules or regulations of a public body, including public housing authorities and federally administered or regulated housing programs including s. 202, s. 221(d)(3) and (4), s. 236, or s. 8 of the National Housing Act, as amended, other than for rent stabilization. With the exception of subsections (3), (5), and (6), this section is not applicable to housing authorities or public housing agencies created pursuant to chapter 421 or other statutes.

(5) Except when otherwise provided by the terms of a written lease, any tenant who vacates or abandons the premises prior to the expiration of the term specified in the written lease, or any tenant who vacates or abandons premises which are the subject of a tenancy from week to week, month to month, quarter to quarter, or year to year, shall give at least 7 days' written notice by certified mail or personal delivery to the landlord prior to vacating or abandoning the premises which notice shall include the address where the tenant may be reached. Failure to give such notice shall relieve the landlord of the notice requirement of paragraph (3)(a) but shall not waive any right the tenant may have to the security deposit or any part of it.

(6) For the purposes of this part, a renewal of an existing rental agreement shall be considered a new rental agreement, and any security deposit carried forward shall be considered a new security deposit.

(7) Upon the sale or transfer of title of the rental property from one owner to another, or upon a change in the designated rental agent, any and all security deposits or advance rents being held for the benefit of the tenants shall be transferred to the new owner or agent, together with any earned interest and with an accurate accounting showing the amounts to be credited to each tenant account. Upon the transfer of such funds and records to the new owner or agent, and upon transmittal of a written receipt therefor, the transferor is free from the obligation imposed in subsection (1) to hold such moneys on behalf of the tenant. There is a rebuttable presumption that any new owner or agent received the security deposit from the previous owner or agent; however, this presumption is limited to 1 month's rent. This subsection does not excuse the landlord or agent for a violation of other provisions of this section while in possession of such deposits.

(8) Any person licensed under the provisions of s. 509.241, unless excluded by the provisions of this part, who fails to comply with the provisions of this part shall be subject to a fine or to the suspension or revocation of his or her license by the Division of Hotels and Restaurants of the Department of Business and

Professional Regulation in the manner provided in s. 509.261.

(9) In those cases in which interest is required to be paid to the tenant, the landlord shall pay directly to the tenant, or credit against the current month's rent, the interest due to the tenant at least once annually. However, no interest shall be due a tenant who wrongfully terminates his or her tenancy prior to the end of the rental term.

History.—s. 1, ch. 69-282; s. 3, ch. 70-360; s. 1, ch. 72-19; s. 1, ch. 72-43; s. 5, ch. 73-330; s. 1, ch. 74-93; s. 3, ch. 74-146; ss. 1, 2, ch. 75-133; s. 1, ch. 76-15; s. 1, ch. 77-445; s. 20, ch. 79-400; s. 21, ch. 82-66; s. 5, ch. 83-151; s. 13, ch. 83-217; s. 3, ch. 87-195; s. 1, ch. 87-369; s. 3, ch. 88-379; s. 2, ch. 93-255; s. 5, ch. 94-218; s. 1372, ch. 95-147; s. 1, ch. 96-146; s. 1, ch. 2001-179; s. 53, ch. 2003-164; s. 3, ch. 2013-136.

[1]**Note.**—Section 4, ch. 2013-136, provides that "[t]he Legislature recognizes that landlords may have stocks of preprinted lease forms that comply with the notice requirements of current law. Accordingly, for leases entered into on or before December 31, 2013, a landlord may give notice that contains the disclosure required in the changes made by this act to s. 83.49, Florida Statutes, or the former notice required in s. 83.49, Florida Statutes 2012. In any event, the disclosure required by this act is only required for all leases entered into under this part on or after January 1, 2014."

Note.—Former s. 83.261.

83.491 Fee in lieu of security deposit.—(1)(a) If a rental agreement requires a security deposit, a landlord may offer a tenant the option to pay a fee in lieu of a security deposit.

(b) A landlord may provide a tenant the option of paying a security deposit in monthly installments in an amount that is agreed upon between the tenant and the landlord while participating in the fee program.

(2)(a) If a tenant agrees to pay a fee in lieu of a security deposit, the landlord must notify the tenant within 30 days after the conclusion of the tenancy if there are any costs or fees due resulting from unpaid rent, fees, or other obligations under the rental agreement, including, but not limited to, costs required for repairing damage to the premises beyond normal wear and tear.

(b) A landlord may not submit a claim to an insurer to recover the landlord's losses associated with unpaid rent, fees, or other obligations under the rental agreement, including, but not limited to, costs required for repairing damage to the premises beyond normal wear and tear, until at least 15 days after providing the tenant with the required notice under paragraph (a).

1. The landlord must include an itemized list of any unpaid amounts and the dates such amounts were due, documentation supporting any itemized damages and costs of repairs, and a copy of any written objection or report of any communication of objection by the tenant when the landlord submits a claim to an insurer.

2. If an insurer pays a claim that was submitted under this subsection to a landlord and the insurer has subrogation rights, the insurer may, within 1 year after the tenancy that was the subject of the claim ends, seek reimbursement from the tenant for the amounts paid to the landlord. If the insurer seeks reimbursement from the tenant, the following apply:

a. The insurer must provide the tenant with all documentation for losses which the landlord provided to the insurer in support of the landlord's claim and a copy of the settlement statement documenting the insurer's payment of the landlord's claim.

b. The tenant retains any defenses against the insurer which the tenant would otherwise have against the landlord.

3. A landlord may not accept payment from both a tenant and an insurer for amounts associated with the same rent, fees, or damages.

(3) If a landlord offers a tenant the option to pay a fee in lieu of a security deposit, the landlord must notify the tenant in writing of all of the following:

(a) That the tenant has the option to pay a security deposit instead of the fee at any time.

(b) That the tenant may, at any time, terminate the agreement to pay the fee in lieu of the security deposit and instead pay a security deposit as listed in a rental agreement between the landlord and tenant or, if a security deposit was not agreed upon in a rental agreement between the landlord and tenant, in the amount that is otherwise offered to new tenants for a substantially similar dwelling unit on the date that the tenant terminates the agreement.

(c) That the tenant may choose to pay the security deposit in monthly installments in an amount that is agreed upon between the landlord and tenant while participating in the fee program.

(d) Whether any additional charges apply for the options provided in paragraphs (a) and (b).

(e) The amount of the payments required for each option the landlord offers.

(f) That the fee is nonrefundable, if applicable.

(g) That the fee is only for securing occupancy without paying a required security deposit.

(h) That the fee payment does not limit or change the tenant's obligation to pay rent and fees, if any, under the rental agreement or limit or change the tenant's obligation to pay the costs of repairing damage to the premises beyond normal wear and tear.

(i) That if the landlord uses any portion of the fee to purchase insurance, the tenant is not insured and is not a beneficiary of the landlord's insurance coverage, and that the insurance does not limit or change the tenant's obligations to pay rent and fees under the rental agreement or change the tenant's obligation to pay the costs of repairing damage to the premises beyond normal wear and tear.

(4)(a) If a tenant decides to pay a fee in lieu of a security deposit, a written agreement to collect the fee must be signed by the landlord, or the landlord's agent, and the tenant. The written agreement may not contain any clause that contradicts s. 83.45 or s. 83.47. The written agreement must, at a minimum, specify all of the following:

1. The amount of the fee, which may not be increased during the term of the rental agreement.

2. How and when the fee is to be collected.

3. The process and timeframe during which a tenant must pay the security deposit specified in the rental agreement if the tenant defaults on paying the fee, and that such default will not adversely affect the tenant's credit rating if the security deposit is timely paid.

4. That the written agreement may be terminated at any time as long as the tenant pays the amount of the security deposit specified in the rental agreement.

5. If the tenant pays the amount of the security deposit specified in the rental agreement, then the tenant's default on paying the fee or termination of the written agreement may not adversely impact the tenant's credit report.

(b) The written agreement specified under paragraph (a) must also include a disclosure in substantially the following form:

FEE IN LIEU OF SECURITY DEPOSIT

THIS FEE IS NOT A SECURITY DEPOSIT AND PAYMENT OF THE FEE DOES NOT ABSOLVE THE TENANT OF ANY OBLIGATIONS UNDER THE RENTAL AGREEMENT, INCLUDING THE OBLIGATION TO PAY RENT AS IT BECOMES DUE AND ANY COSTS AND DAMAGES BEYOND NORMAL WEAR AND TEAR WHICH THE TENANT OR HIS OR HER GUESTS MAY CAUSE.

THE TENANT MAY TERMINATE THIS AGREEMENT AT ANY TIME AND STOP PAYING THE FEE AND INSTEAD PAY THE SECURITY DEPOSIT AS PROVIDED IN SECTION 83.491, FLORIDA STATUTES.

THIS AGREEMENT HAS BEEN ENTERED INTO VOLUNTARILY BY BOTH PARTIES AND THE TENANT AGREES TO PAY THE LANDLORD A FEE IN LIEU OF A SECURITY DEPOSIT AS AUTHORIZED UNDER SECTION 83.491, FLORIDA STATUTES. IF THE LANDLORD USES ANY PORTION OF THE TENANT'S FEE TO PURCHASE INSURANCE, THE TENANT IS NOT INSURED AND IS NOT A BENEFICIARY OF SUCH COVERAGE, AND THE INSUR-

ANCE DOES NOT CHANGE THE TENANT'S FINANCIAL OBLIGATIONS UNDER THE RENTAL AGREEMENT.

THIS DISCLOSURE IS BASIC. PLEASE REFER TO PART II OF CHAPTER 83, FLORIDA STATUTES, TO DETERMINE YOUR LEGAL RIGHTS AND OBLIGATIONS.

(5) A fee in lieu of a security deposit may be:

(a) A recurring monthly fee, payable on the same date that the rent payment is due under the rental agreement; or

(b) Payable upon a schedule that the landlord and tenant choose and as specified in the written agreement.

(6) A fee collected under this section, or an insurance product or a surety bond accepted, by a landlord in lieu of a security deposit is not a security deposit as defined in s. 83.43(12).

(7) A landlord has exclusive discretion as to whether to offer tenants the option to pay a fee in lieu of a security deposit and is not required to offer such fee option to tenants. However, if a landlord offers a tenant an option to pay a fee in lieu of a security deposit, the landlord may not use a prospective tenant's choice to pay, or offer to pay, a fee in lieu of a security deposit as criteria in the determination to approve or deny an application for occupancy, and the landlord must also offer all new tenants renting a dwelling unit on the same premises the option to pay a fee in lieu of a security deposit, unless the landlord chooses to prospectively terminate the fee option for all new rental agreements.

(8)(a) This section does not:

1. Require a fee collected in lieu of a security deposit to be used to purchase an insurance product or a surety bond; or

2. Prohibit a tenant from being offered or sold an insurance product or a surety bond to present to the landlord in lieu of a security deposit if the offer or sale of such insurance product or surety bond complies with the laws of this state.

(b) Acceptance by a landlord of an insurance product or a surety bond that is purchased or procured by a tenant, a landlord, or an agent of the landlord may not be considered an offer on the part of the landlord to allow a tenant to pay a fee in lieu of a security deposit for the purposes of subsection (7).

(9) This section applies to rental agreements entered into or renewed on or after July 1, 2023.

History.—s. 1, ch. 2023-181.

83.50 Disclosure of landlord's address.—In addition to any other disclosure required by law, the landlord, or a person authorized to enter into a rental agreement on the landlord's behalf, shall disclose in writing to the tenant, at or before the commencement of the tenancy, the name and address of the landlord or a person authorized to receive notices and demands in the landlord's behalf. The person so authorized to receive notices and demands retains authority until the tenant is notified otherwise. All notices of such names and addresses or changes thereto shall be delivered to the tenant's residence or, if specified in writing by the tenant, to any other address.

History.—s. 2, ch. 73-330; s. 443, ch. 95-147; s. 5, ch. 2013-136.

83.51 Landlord's obligation to maintain premises.—

(1) The landlord at all times during the tenancy shall:

(a) Comply with the requirements of applicable building, housing, and health codes; or

(b) Where there are no applicable building, housing, or health codes, maintain the roofs, windows, doors, floors, steps, porches, exterior walls, foundations, and all other structural components in good repair and capable of resisting normal forces and loads and the plumbing in reasonable working condition. The landlord, at commencement of the tenancy, must ensure that screens are installed in a reasonable condition. Thereafter, the landlord must repair

damage to screens once annually, when necessary, until termination of the rental agreement. The landlord is not required to maintain a mobile home or other structure owned by the tenant. The landlord's obligations under this subsection may be altered or modified in writing with respect to a single-family home or duplex.

(2)(a) Unless otherwise agreed in writing, in addition to the requirements of subsection (1), the landlord of a dwelling unit other than a single-family home or duplex shall, at all times during the tenancy, make reasonable provisions for:

1. The extermination of rats, mice, roaches, ants, wood-destroying organisms, and bedbugs. When vacation of the premises is required for such extermination, the landlord is not liable for damages but shall abate the rent. The tenant must temporarily vacate the premises for a period of time not to exceed 4 days, on 7 days' written notice, if necessary, for extermination pursuant to this subparagraph.

2. Locks and keys.

3. The clean and safe condition of common areas.

4. Garbage removal and outside receptacles therefor.

5. Functioning facilities for heat during winter, running water, and hot water.

(b) Unless otherwise agreed in writing, at the commencement of the tenancy of a single-family home or duplex, the landlord shall install working smoke detection devices. As used in this paragraph, the term "smoke detection device" means an electrical or battery-operated device which detects visible or invisible particles of combustion and which is listed by Underwriters Laboratories, Inc., Factory Mutual Laboratories, Inc., or any other nationally recognized testing laboratory using nationally accepted testing standards.

(c) Nothing in this part authorizes the tenant to raise a noncompliance by the landlord with this subsection as a defense to an action for possession under s. 83.59.

(d) This subsection shall not apply to a mobile home owned by a tenant.

(e) Nothing contained in this subsection prohibits the landlord from providing in the rental agreement that the tenant is obligated to pay costs or charges for garbage removal, water, fuel, or utilities.

(3) If the duty imposed by subsection (1) is the same or greater than any duty imposed by subsection (2), the landlord's duty is determined by subsection (1).

(4) The landlord is not responsible to the tenant under this section for conditions created or caused by the negligent or wrongful act or omission of the tenant, a member of the tenant's family, or other person on the premises with the tenant's consent.

History.—s. 2, ch. 73-330; s. 22, ch. 82-66; s. 4, ch. 87-195; s. 1, ch. 90-133; s. 3, ch. 93-255; s. 444, ch. 95-147; s. 8, ch. 97-95; s. 6, ch. 2013-136.

83.515 Background screening of apartment employees; employment disqualification.

(1) The landlord of a public lodging establishment classified under s. 509.242(1)(d) or (e) as a nontransient apartment or transient apartment, respectively, must require that each employee of the establishment undergo a background screening as a condition of employment.

(2) The background screening required under subsection (1) must be performed by a consumer reporting agency in accordance with the federal Fair Credit Reporting Act and must include a screening of criminal history records and sexual predator and sexual offender registries of all 50 states and the District of Columbia.

(3) A landlord may disqualify a person from employment if the person has been convicted or found guilty of, or entered a plea of guilty or nolo contendere to, regardless of adjudication, any of the following offenses:

(a) A criminal offense involving disregard for the safety of others which, if committed in this state, is a felony or a misdemeanor of the first degree or, if committed in another state,

would be a felony or a misdemeanor of the first degree if committed in this state.

(b) A criminal offense committed in any jurisdiction which involves violence, including, but not limited to, murder, sexual battery, robbery, carjacking, home-invasion robbery, and stalking.

History.—s. 2, ch. 2022-222.

83.52 Tenant's obligation to maintain dwelling unit.—The tenant at all times during the tenancy shall:

(1) Comply with all obligations imposed upon tenants by applicable provisions of building, housing, and health codes.

(2) Keep that part of the premises which he or she occupies and uses clean and sanitary.

(3) Remove from the tenant's dwelling unit all garbage in a clean and sanitary manner.

(4) Keep all plumbing fixtures in the dwelling unit or used by the tenant clean and sanitary and in repair.

(5) Use and operate in a reasonable manner all electrical, plumbing, sanitary, heating, ventilating, air-conditioning and other facilities and appliances, including elevators.

(6) Not destroy, deface, damage, impair, or remove any part of the premises or property therein belonging to the landlord nor permit any person to do so.

(7) Conduct himself or herself, and require other persons on the premises with his or her consent to conduct themselves, in a manner that does not unreasonably disturb the tenant's neighbors or constitute a breach of the peace.

History.—s. 2, ch. 73-330; s. 445, ch. 95-147.

83.53 Landlord's access to dwelling unit.—

(1) The tenant shall not unreasonably withhold consent to the landlord to enter the dwelling unit from time to time in order to inspect the premises; make necessary or agreed repairs, decorations, alterations, or improvements; supply agreed services; or exhibit the dwelling unit to prospective or actual purchasers, mortgagees, tenants, workers, or contractors.

(2) The landlord may enter the dwelling unit at any time for the protection or preservation of the premises. The landlord may enter the dwelling unit upon reasonable notice to the tenant and at a reasonable time for the purpose of repair of the premises. "Reasonable notice" for the purpose of repair is notice given at least 24 hours prior to the entry, and reasonable time for the purpose of repair shall be between the hours of 7:30 a.m. and 8:00 p.m. The landlord may enter the dwelling unit when necessary for the further purposes set forth in subsection (1) under any of the following circumstances:

(a) With the consent of the tenant;

(b) In case of emergency;

(c) When the tenant unreasonably withholds consent; or

(d) If the tenant is absent from the premises for a period of time equal to one-half the time for periodic rental payments. If the rent is current and the tenant notifies the landlord of an intended absence, then the landlord may enter only with the consent of the tenant or for the protection or preservation of the premises.

(3) The landlord shall not abuse the right of access nor use it to harass the tenant.

History.—s. 2, ch. 73-330; s. 5, ch. 87-195; s. 4, ch. 93-255; s. 446, ch. 95-147; s. 3, ch. 2022-222.

83.535 Flotation bedding system; restrictions on use.—No landlord may prohibit a tenant from using a flotation bedding system in a dwelling unit, provided the flotation bedding system does not violate applicable building codes. The tenant shall be required to carry in the tenant's name flotation insurance as is standard in the industry in an amount deemed reasonable to protect the tenant and owner against personal injury and property damage to the dwelling units. In any case, the policy shall carry a loss payable clause to the owner of the building.

History.—s. 7, ch. 82-66; s. 5, ch. 93-255.

83.54 Enforcement of rights and duties; civil action; criminal offenses.—Any right or duty declared in this part is enforceable by civil action. A right or duty enforced by civil action

under this section does not preclude prosecution for a criminal offense related to the lease or leased property.

History.—s. 2, ch. 73-330; s. 7, ch. 2013-136.

83.55 Right of action for damages.—If either the landlord or the tenant fails to comply with the requirements of the rental agreement or this part, the aggrieved party may recover the damages caused by the noncompliance.

History.—s. 2, ch. 73-330.

83.56 Termination of rental agreement.—

(1) If the landlord materially fails to comply with s. 83.51(1) or material provisions of the rental agreement within 7 days after delivery of written notice by the tenant specifying the noncompliance and indicating the intention of the tenant to terminate the rental agreement by reason thereof, the tenant may terminate the rental agreement. If the failure to comply with s. 83.51(1) or material provisions of the rental agreement is due to causes beyond the control of the landlord and the landlord has made and continues to make every reasonable effort to correct the failure to comply, the rental agreement may be terminated or altered by the parties, as follows:

(a) If the landlord's failure to comply renders the dwelling unit untenantable and the tenant vacates, the tenant shall not be liable for rent during the period the dwelling unit remains uninhabitable.

(b) If the landlord's failure to comply does not render the dwelling unit untenantable and the tenant remains in occupancy, the rent for the period of noncompliance shall be reduced by an amount in proportion to the loss of rental value caused by the noncompliance.

(2) If the tenant materially fails to comply with s. 83.52 or material provisions of the rental agreement, other than a failure to pay rent, or reasonable rules or regulations, the landlord may:

(a) If such noncompliance is of a nature that the tenant should not be given an opportunity to cure it or if the noncompliance constitutes a subsequent or continuing noncompliance within 12 months of a written warning by the landlord of a similar violation, deliver a written notice to the tenant specifying the noncompliance and the landlord's intent to terminate the rental agreement by reason thereof. Examples of noncompliance which are of a nature that the tenant should not be given an opportunity to cure include, but are not limited to, destruction, damage, or misuse of the landlord's or other tenants' property by intentional act or a subsequent or continued unreasonable disturbance. In such event, the landlord may terminate the rental agreement, and the tenant shall have 7 days from the date that the notice is delivered to vacate the premises. The notice shall be in substantially the following form:

You are advised that your lease is terminated effective immediately. You shall have 7 days from the delivery of this letter to vacate the premises. This action is taken because (cite the noncompliance) .

(b) If such noncompliance is of a nature that the tenant should be given an opportunity to cure it, deliver a written notice to the tenant specifying the noncompliance, including a notice that, if the noncompliance is not corrected within 7 days from the date that the written notice is delivered, the landlord shall terminate the rental agreement by reason thereof. Examples of such noncompliance include, but are not limited to, activities in contravention of the lease or this part such as having or permitting unauthorized pets, guests, or vehicles; parking in an unauthorized manner or permitting such parking; or failing to keep the premises clean and sanitary. If such noncompliance recurs within 12 months after notice, an eviction action may commence without delivering a subsequent notice pursuant to paragraph (a) or this paragraph. The notice shall be in substantially the following form:

You are hereby notified that (cite the noncompliance) . Demand is hereby made that you remedy the noncompliance within 7 days of receipt of this notice or your lease shall be

deemed terminated and you shall vacate the premises upon such termination. If this same conduct or conduct of a similar nature is repeated within 12 months, your tenancy is subject to termination without further warning and without your being given an opportunity to cure the noncompliance.

(3) If the tenant fails to pay rent when due and the default continues for 3 days, excluding Saturday, Sunday, and legal holidays, after delivery of written demand by the landlord for payment of the rent or possession of the premises, the landlord may terminate the rental agreement. Legal holidays for the purpose of this section shall be court-observed holidays only. The 3-day notice shall contain a statement in substantially the following form:

You are hereby notified that you are indebted to me in the sum of dollars for the rent and use of the premises (address of leased premises, including county), Florida, now occupied by you and that I demand payment of the rent or possession of the premises within 3 days (excluding Saturday, Sunday, and legal holidays) from the date of delivery of this notice, to wit: on or before the day of , (year) .

(landlord's name, address and phone number)

(4) The delivery of the written notices required by subsections (1), (2), and (3) shall be by mailing or delivery of a true copy thereof or, if the tenant is absent from the premises, by leaving a copy thereof at the residence. The notice requirements of subsections (1), (2), and (3) may not be waived in the lease.

(5)(a) If the landlord accepts rent with actual knowledge of a noncompliance by the tenant or accepts performance by the tenant of any other provision of the rental agreement that is at variance with its provisions, or if the tenant pays rent with actual knowledge of a noncompliance by the landlord or accepts performance by the landlord of any other provision of the rental agreement that is at variance with its provisions, the landlord or tenant waives his or her right to terminate the rental agreement or to bring a civil action for that noncompliance, but not for any subsequent or continuing noncompliance. However, a landlord does not waive the right to terminate the rental agreement or to bring a civil action for that noncompliance by accepting partial rent for the period. If partial rent is accepted after posting the notice for nonpayment, the landlord must:

1. Provide the tenant with a receipt stating the date and amount received and the agreed upon date and balance of rent due before filing an action for possession;

2. Place the amount of partial rent accepted from the tenant in the registry of the court upon filing the action for possession; or

3. Post a new 3-day notice reflecting the new amount due.

(b) Any tenant who wishes to defend against an action by the landlord for possession of the unit for noncompliance of the rental agreement or of relevant statutes must comply with s. 83.60(2). The court may not set a date for mediation or trial unless the provisions of s. 83.60(2) have been met, but must enter a default judgment for removal of the tenant with a writ of possession to issue immediately if the tenant fails to comply with s. 83.60(2).

(c) This subsection does not apply to that portion of rent subsidies received from a local, state, or national government or an agency of local, state, or national government; however, waiver will occur if an action has not been instituted within 45 days after the landlord obtains actual knowledge of the noncompliance.

(6) If the rental agreement is terminated, the landlord shall comply with s. 83.49(3).

History.—s. 2, ch. 73-330; s. 23, ch. 82-66; s. 6, ch. 83-151; s. 14, ch. 83-217; s. 6, ch. 87-195; s. 6, ch. 93-255; s. 6, ch. 94-170; s. 1373, ch. 95-147; s. 5, ch. 99-6; s. 8, ch. 2013-136.

83.561 Termination of rental agreement upon foreclosure.—

(1) If a tenant is occupying residential premises that are the subject of a foreclosure sale, upon issuance of a certificate of title following the sale, the purchaser named in the certificate of title takes title to the residential

premises subject to the rights of the tenant under this section.

(a) The tenant may remain in possession of the premises for 30 days following the date of the purchaser's delivery of a written 30-day notice of termination.

(b) The tenant is entitled to the protections of s. 83.67.

(c) The 30-day notice of termination must be in substantially the following form:

NOTICE TO TENANT OF TERMINATION

You are hereby notified that your rental agreement is terminated on the date of delivery of this notice, that your occupancy is terminated 30 days following the date of the delivery of this notice, and that I demand possession of the premises on (date) . If you do not vacate the premises by that date, I will ask the court for an order allowing me to remove you and your belongings from the premises. You are obligated to pay rent during the 30-day period for any amount that might accrue during that period. Your rent must be delivered to (landlord's name and address) .

(d) The 30-day notice of termination shall be delivered in the same manner as provided in s. 83.56(4).

(2) The purchaser at the foreclosure sale may apply to the court for a writ of possession based upon a sworn affidavit that the 30-day notice of termination was delivered to the tenant and the tenant has failed to vacate the premises at the conclusion of the 30-day period. If the court awards a writ of possession, the writ must be served on the tenant. The writ of possession shall be governed by s. 83.62.

(3) This section does not apply if:

(a) The tenant is the mortgagor in the subject foreclosure or is the child, spouse, or parent of the mortgagor in the subject foreclosure.

(b) The tenant's rental agreement is not the result of an arm's length transaction.

(c) The tenant's rental agreement allows the tenant to pay rent that is substantially less than the fair market rent for the premises, unless the rent is reduced or subsidized due to a federal, state, or local subsidy.

(4) A purchaser at a foreclosure sale of a residential premises occupied by a tenant does not assume the obligations of a landlord, except as provided in paragraph (1)(b), unless or until the purchaser assumes an existing rental agreement with the tenant that has not ended or enters into a new rental agreement with the tenant.

History.—s. 1, ch. 2015-96.

[1]83.5615 Protecting Tenants at Foreclosure Act.—

(1) This section may be cited as the "Protecting Tenants at Foreclosure Act."

(2) In the case of any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property after the effective date of this section, any immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to:

(a) The successor in interest providing a notice to vacate to any bona fide tenant at least 90 days before the effective date of the notice; and

(b) The rights of any bona fide tenant:

1. Under any bona fide lease entered into before the notice of foreclosure to occupy the premises until the end of the remaining term of the lease, except that a successor in interest may terminate a lease effective on the date of sale of the unit to a purchaser who will occupy the unit as a primary residence, subject to the tenant receiving the 90-day notice under paragraph (a); or

2. Without a lease or with a lease terminable at will, subject to the tenant receiving the 90-day notice under paragraph (a).

This subsection does not affect the requirements for termination of any federal- or state-subsidized tenancy or of any state or local law that provides more time or other additional protections for tenants.

(3) For the purposes of this section:

(a) A lease or tenancy shall be considered bona fide only if:

1. The mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant;

2. The lease or tenancy was the result of an arms-length transaction; and

3. The lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent is reduced or subsidized due to a federal, state, or local subsidy.

(b) The term "federally-related mortgage loan" has the same meaning as in 12 U.S.C. s. 2602.

(c) The date of a notice of foreclosure shall be deemed to be the date on which complete title to a property is transferred to a successor entity or person as a result of an order of a court or pursuant to provisions in a mortgage, deed of trust, or security deed.

History.—s. 2, ch. 2020-99.

[1]**Note**.—Section 2, ch. 2020-99, created s. 83.5615 "[e]ffective upon the repeal of the federal Protecting Tenants at Foreclosure Act, Pub. L. No. 111-22."

83.57 Termination of tenancy without specific term.—A tenancy without a specific duration, as defined in s. 83.46(2) or (3), may be terminated by either party giving written notice in the manner provided in s. 83.56(4), as follows:

(1) When the tenancy is from year to year, by giving not less than 60 days' notice prior to the end of any annual period;

(2) When the tenancy is from quarter to quarter, by giving not less than 30 days' notice prior to the end of any quarterly period;

(3) When the tenancy is from month to month, by giving not less than 30 days' notice prior to the end of any monthly period; and

(4) When the tenancy is from week to week, by giving not less than 7 days' notice prior to the end of any weekly period.

History.—s. 2, ch. 73-330; s. 3, ch. 81-190; s. 15, ch. 83-217; s. 2, ch. 2023-314.

83.575 Termination of tenancy with specific duration.—

(1) A rental agreement with a specific duration may contain a provision requiring the tenant to notify the landlord within a specified period before vacating the premises at the end of the rental agreement, if such provision requires the landlord to notify the tenant within such notice period if the rental agreement will not be renewed; however, a rental agreement may not require less than 30 days' notice or more than 60 days' notice from either the tenant or the landlord.

(2) A rental agreement with a specific duration may provide that if a tenant fails to give the required notice before vacating the premises at the end of the rental agreement, the tenant may be liable for liquidated damages as specified in the rental agreement if the landlord provides written notice to the tenant specifying the tenant's obligations under the notification provision contained in the lease and the date the rental agreement is terminated. The landlord must provide such written notice to the tenant within 15 days before the start of the notification period contained in the lease. The written notice shall list all fees, penalties, and other charges applicable to the tenant under this subsection.

(3) If the tenant remains on the premises with the permission of the landlord after the rental agreement has terminated and fails to give notice required under s. 83.57(3), the tenant is liable to the landlord for an additional 1 month's rent.

History.—s. 3, ch. 2003-30; s. 1, ch. 2004-375; s. 9, ch. 2013-136; s. 3, ch. 2023-314.

83.58 Remedies; tenant holding over.—If the tenant holds over and continues in possession of the dwelling unit or any part thereof after the expiration of the rental agreement without the permission of the landlord, the landlord may recover possession of the dwelling unit in the manner provided for in s. 83.59. The landlord may also recover double the amount of rent due on the dwelling unit, or any part thereof, for the period during which the tenant refuses to surrender possession.

History.—s. 2, ch. 73-330; s. 10, ch. 2013-136.

83.59 Right of action for possession.—

(1) If the rental agreement is terminated and the tenant does not vacate the premises, the landlord may recover possession of the dwelling unit as provided in this section.

(2) A landlord, the landlord's attorney, or the landlord's agent, applying for the removal of a tenant, shall file in the county court of the county where the premises are situated a complaint describing the dwelling unit and stating the facts that authorize its recovery. A landlord's agent is not permitted to take any action other than the initial filing of the complaint, unless the landlord's agent is an attorney. The landlord is entitled to the summary procedure provided in s. 51.011, and the court shall advance the cause on the calendar.

(3) The landlord shall not recover possession of a dwelling unit except:

(a) In an action for possession under subsection (2) or other civil action in which the issue of right of possession is determined;

(b) When the tenant has surrendered possession of the dwelling unit to the landlord;

(c) When the tenant has abandoned the dwelling unit. In the absence of actual knowledge of abandonment, it shall be presumed that the tenant has abandoned the dwelling unit if he or she is absent from the premises for a period of time equal to one-half the time for periodic rental payments. However, this presumption does not apply if the rent is current or the tenant has notified the landlord, in writing, of an intended absence; or

(d) When the last remaining tenant of a dwelling unit is deceased, personal property remains on the premises, rent is unpaid, at least 60 days have elapsed following the date of death, and the landlord has not been notified in writing of the existence of a probate estate or of the name and address of a personal representative. This paragraph does not apply to a dwelling unit used in connection with a federally administered or regulated housing program, including programs under s. 202, s. 221(d)(3) and (4), s. 236, or s. 8 of the National Housing Act, as amended.

(4) The prevailing party is entitled to have judgment for costs and execution therefor.

History.—s. 2, ch. 73-330; s. 1, ch. 74-146; s. 24, ch. 82-66; s. 1, ch. 92-36; s. 447, ch. 95-147; s. 1, ch. 2007-136; s. 11, ch. 2013-136.

83.595 Choice of remedies upon breach or early termination by tenant.—If the tenant breaches the rental agreement for the dwelling unit and the landlord has obtained a writ of possession, or the tenant has surrendered possession of the dwelling unit to the landlord, or the tenant has abandoned the dwelling unit, the landlord may:

(1) Treat the rental agreement as terminated and retake possession for his or her own account, thereby terminating any further liability of the tenant;

(2) Retake possession of the dwelling unit for the account of the tenant, holding the tenant liable for the difference between the rent stipulated to be paid under the rental agreement and what the landlord is able to recover from a reletting. If the landlord retakes possession, the landlord has a duty to exercise good faith in attempting to relet the premises, and any rent received by the landlord as a result of the reletting must be deducted from the balance of rent due from the tenant. For purposes of this subsection, the term "good faith in attempting to relet the premises" means that the landlord uses at least the same efforts to relet the premises as were used in the initial rental or at least the same efforts as the landlord uses in attempting to rent other similar rental units but does not require the landlord to give a preference in renting the premises over other vacant dwelling units that the landlord owns or has the responsibility to rent;

(3) Stand by and do nothing, holding the lessee liable for the rent as it comes due; or

(4) Charge liquidated damages, as provided in the rental agreement, or an early termination fee to the tenant if the landlord and tenant have agreed to liquidated damages or an early termination fee, if the amount does not exceed 2 months' rent, and if, in the case of an early termination fee, the tenant is required to give no more than 60 days' notice, as provided in the rental agreement, prior to the proposed date of early termination. This remedy is available only if the tenant and the landlord, at the

time the rental agreement was made, indicated acceptance of liquidated damages or an early termination fee. The tenant must indicate acceptance of liquidated damages or an early termination fee by signing a separate addendum to the rental agreement containing a provision in substantially the following form:

☐ I agree, as provided in the rental agreement, to pay $ (an amount that does not exceed 2 months' rent) as liquidated damages or an early termination fee if I elect to terminate the rental agreement, and the landlord waives the right to seek additional rent beyond the month in which the landlord retakes possession.

☐ I do not agree to liquidated damages or an early termination fee, and I acknowledge that the landlord may seek damages as provided by law.

(a) In addition to liquidated damages or an early termination fee, the landlord is entitled to the rent and other charges accrued through the end of the month in which the landlord retakes possession of the dwelling unit and charges for damages to the dwelling unit.

(b) This subsection does not apply if the breach is failure to give notice as provided in s. 83.575.

History.—s. 2, ch. 87-369; s. 4, ch. 88-379; s. 448, ch. 95-147; s. 2, ch. 2008-131.

83.60 Defenses to action for rent or possession; procedure.—

(1)(a) In an action by the landlord for possession of a dwelling unit based upon nonpayment of rent or in an action by the landlord under s. 83.55 seeking to recover unpaid rent, the tenant may defend upon the ground of a material noncompliance with s. 83.51(1), or may raise any other defense, whether legal or equitable, that he or she may have, including the defense of retaliatory conduct in accordance with s. 83.64. The landlord must be given an opportunity to cure a deficiency in a notice or in the pleadings before dismissal of the action.

(b) The defense of a material noncompliance with s. 83.51(1) may be raised by the tenant if 7 days have elapsed after the delivery of written notice by the tenant to the landlord, specifying the noncompliance and indicating the intention of the tenant not to pay rent by reason thereof. Such notice by the tenant may be given to the landlord, the landlord's representative as designated pursuant to s. 83.50, a resident manager, or the person or entity who collects the rent on behalf of the landlord. A material noncompliance with s. 83.51(1) by the landlord is a complete defense to an action for possession based upon nonpayment of rent, and, upon hearing, the court or the jury, as the case may be, shall determine the amount, if any, by which the rent is to be reduced to reflect the diminution in value of the dwelling unit during the period of noncompliance with s. 83.51(1). After consideration of all other relevant issues, the court shall enter appropriate judgment.

(2) In an action by the landlord for possession of a dwelling unit, if the tenant interposes any defense other than payment, including, but not limited to, the defense of a defective 3-day notice, the tenant shall pay into the registry of the court the accrued rent as alleged in the complaint or as determined by the court and the rent that accrues during the pendency of the proceeding, when due. The clerk shall notify the tenant of such requirement in the summons. Failure of the tenant to pay the rent into the registry of the court or to file a motion to determine the amount of rent to be paid into the registry within 5 days, excluding Saturdays, Sundays, and legal holidays, after the date of service of process constitutes an absolute waiver of the tenant's defenses other than payment, and the landlord is entitled to an immediate default judgment for removal of the tenant with a writ of possession to issue without further notice or hearing thereon. If a motion to determine rent is filed, documentation in support of the allegation that the rent as alleged in the complaint is in error is required. Public housing tenants or tenants receiving rent subsidies are required to deposit only that portion of the full rent for

which they are responsible pursuant to the federal, state, or local program in which they are participating.

History.—s. 2, ch. 73-330; s. 7, ch. 83-151; s. 7, ch. 87-195; s. 7, ch. 93-255; s. 7, ch. 94-170; s. 1374, ch. 95-147; s. 12, ch. 2013-136.

83.61 Disbursement of funds in registry of court; prompt final hearing.—When the tenant has deposited funds into the registry of the court in accordance with the provisions of s. 83.60(2) and the landlord is in actual danger of loss of the premises or other personal hardship resulting from the loss of rental income from the premises, the landlord may apply to the court for disbursement of all or part of the funds or for prompt final hearing. The court shall advance the cause on the calendar. The court, after preliminary hearing, may award all or any portion of the funds on deposit to the landlord or may proceed immediately to a final resolution of the cause.

History.—s. 2, ch. 73-330; s. 2, ch. 74-146.

83.62 Restoration of possession to landlord.—

(1) In an action for possession, after entry of judgment in favor of the landlord, the clerk shall issue a writ to the sheriff describing the premises and commanding the sheriff to put the landlord in possession after 24 hours' notice conspicuously posted on the premises. Saturdays, Sundays, and legal holidays do not stay the 24-hour notice period.

(2) At the time the sheriff executes the writ of possession or at any time thereafter, the landlord or the landlord's agent may remove any personal property found on the premises to or near the property line. Subsequent to executing the writ of possession, the landlord may request the sheriff to stand by to keep the peace while the landlord changes the locks and removes the personal property from the premises. When such a request is made, the sheriff may charge a reasonable hourly rate, and the person requesting the sheriff to stand by to keep the peace shall be responsible for paying the reasonable hourly rate set by the sheriff. Neither the sheriff nor the landlord or the landlord's agent shall be liable to the tenant or any other party for the loss, destruction, or damage to the property after it has been removed.

History.—s. 2, ch. 73-330; s. 3, ch. 82-66; s. 5, ch. 88-379; s. 8, ch. 94-170; s. 1375, ch. 95-147; s. 2, ch. 96-146; s. 13, ch. 2013-136.

83.625 Power to award possession and enter money judgment.—In an action by the landlord for possession of a dwelling unit based upon nonpayment of rent, if the court finds the rent is due, owing, and unpaid and by reason thereof the landlord is entitled to possession of the premises, the court, in addition to awarding possession of the premises to the landlord, shall direct, in an amount which is within its jurisdictional limitations, the entry of a money judgment with costs in favor of the landlord and against the tenant for the amount of money found due, owing, and unpaid by the tenant to the landlord. However, no money judgment shall be entered unless service of process has been effected by personal service or, where authorized by law, by certified or registered mail, return receipt, or in any other manner prescribed by law or the rules of the court; and no money judgment may be entered except in compliance with the Florida Rules of Civil Procedure. The prevailing party in the action may also be awarded attorney's fees and costs.

History.—s. 1, ch. 75-147; s. 8, ch. 87-195; s. 6, ch. 88-379.

83.63 Casualty damage.—If the premises are damaged or destroyed other than by the wrongful or negligent acts of the tenant so that the enjoyment of the premises is substantially impaired, the tenant may terminate the rental agreement and immediately vacate the premises. The tenant may vacate the part of the premises rendered unusable by the casualty, in which case the tenant's liability for rent shall be reduced by the fair rental value of that part of the premises damaged or destroyed. If the rental agreement is terminated, the landlord shall comply with s. 83.49(3).

History.—s. 2, ch. 73-330; s. 449, ch. 95-147; s. 14, ch. 2013-136.

83.64 Retaliatory conduct.—

(1) It is unlawful for a landlord to discriminatorily increase a tenant's rent or decrease services to a tenant, or to bring or threaten to

bring an action for possession or other civil action, primarily because the landlord is retaliating against the tenant. In order for the tenant to raise the defense of retaliatory conduct, the tenant must have acted in good faith. Examples of conduct for which the landlord may not retaliate include, but are not limited to, situations where:

(a) The tenant has complained to a governmental agency charged with responsibility for enforcement of a building, housing, or health code of a suspected violation applicable to the premises;

(b) The tenant has organized, encouraged, or participated in a tenants' organization;

(c) The tenant has complained to the landlord pursuant to s. 83.56(1);

(d) The tenant is a servicemember who has terminated a rental agreement pursuant to s. 83.682;

(e) The tenant has paid rent to a condominium, cooperative, or homeowners' association after demand from the association in order to pay the landlord's obligation to the association; or

(f) The tenant has exercised his or her rights under local, state, or federal fair housing laws.

(2) Evidence of retaliatory conduct may be raised by the tenant as a defense in any action brought against him or her for possession.

(3) In any event, this section does not apply if the landlord proves that the eviction is for good cause. Examples of good cause include, but are not limited to, good faith actions for nonpayment of rent, violation of the rental agreement or of reasonable rules, or violation of the terms of this chapter.

(4) "Discrimination" under this section means that a tenant is being treated differently as to the rent charged, the services rendered, or the action being taken by the landlord, which shall be a prerequisite to a finding of retaliatory conduct.

History.—s. 8, ch. 83-151; s. 450, ch. 95-147; s. 3, ch. 2003-72; s. 15, ch. 2013-136.

83.67 Prohibited practices.—

(1) A landlord of any dwelling unit governed by this part shall not cause, directly or indirectly, the termination or interruption of any utility service furnished the tenant, including, but not limited to, water, heat, light, electricity, gas, elevator, garbage collection, or refrigeration, whether or not the utility service is under the control of, or payment is made by, the landlord.

(2) A landlord of any dwelling unit governed by this part shall not prevent the tenant from gaining reasonable access to the dwelling unit by any means, including, but not limited to, changing the locks or using any bootlock or similar device.

(3) A landlord of any dwelling unit governed by this part shall not discriminate against a servicemember in offering a dwelling unit for rent or in any of the terms of the rental agreement.

(4) A landlord shall not prohibit a tenant from displaying one portable, removable, cloth or plastic United States flag, not larger than 4 and 1/2 feet by 6 feet, in a respectful manner in or on the dwelling unit regardless of any provision in the rental agreement dealing with flags or decorations. The United States flag shall be displayed in accordance with s. 83.52(6). The landlord is not liable for damages caused by a United States flag displayed by a tenant. Any United States flag may not infringe upon the space rented by any other tenant.

(5) A landlord of any dwelling unit governed by this part shall not remove the outside doors, locks, roof, walls, or windows of the unit except for purposes of maintenance, repair, or replacement; and the landlord shall not remove the tenant's personal property from the dwelling unit unless such action is taken after surrender, abandonment, recovery of possession of the dwelling unit due to the death of the last remaining tenant in accordance with s. 83.59(3)(d), or a lawful eviction. If provided in the rental agreement or a written agreement

separate from the rental agreement, upon surrender or abandonment by the tenant, the landlord is not required to comply with s. 715.104 and is not liable or responsible for storage or disposition of the tenant's personal property; if provided in the rental agreement, there must be printed or clearly stamped on such rental agreement a legend in substantially the following form:

BY SIGNING THIS RENTAL AGREEMENT, THE TENANT AGREES THAT UPON SURRENDER, ABANDONMENT, OR RECOVERY OF POSSESSION OF THE DWELLING UNIT DUE TO THE DEATH OF THE LAST REMAINING TENANT, AS PROVIDED BY CHAPTER 83, FLORIDA STATUTES, THE LANDLORD SHALL NOT BE LIABLE OR RESPONSIBLE FOR STORAGE OR DISPOSITION OF THE TENANT'S PERSONAL PROPERTY.

For the purposes of this section, abandonment shall be as set forth in s. 83.59(3)(c).

(6) A landlord who violates any provision of this section shall be liable to the tenant for actual and consequential damages or 3 months' rent, whichever is greater, and costs, including attorney's fees. Subsequent or repeated violations that are not contemporaneous with the initial violation shall be subject to separate awards of damages.

(7) A violation of this section constitutes irreparable harm for the purposes of injunctive relief.

(8) The remedies provided by this section are not exclusive and do not preclude the tenant from pursuing any other remedy at law or equity that the tenant may have. The remedies provided by this section shall also apply to a servicemember who is a prospective tenant who has been discriminated against under subsection (3).

History.—s. 3, ch. 87-369; s. 7, ch. 88-379; s. 3, ch. 90-133; s. 3, ch. 96-146; s. 2, ch. 2001-179; s. 2, ch. 2003-30; s. 4, ch. 2003-72; s. 1, ch. 2004-236; s. 2, ch. 2007-136.

83.681 Orders to enjoin violations of this part.—

(1) A landlord who gives notice to a tenant of the landlord's intent to terminate the tenant's lease pursuant to s. 83.56(2)(a), due to the tenant's intentional destruction, damage, or misuse of the landlord's property may petition the county or circuit court for an injunction prohibiting the tenant from continuing to violate any of the provisions of that part.

(2) The court shall grant the relief requested pursuant to subsection (1) in conformity with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases.

(3) Evidence of a tenant's intentional destruction, damage, or misuse of the landlord's property in an amount greater than twice the value of money deposited with the landlord pursuant to s. 83.49 or $300, whichever is greater, shall constitute irreparable harm for the purposes of injunctive relief.

History.—s. 8, ch. 93-255; s. 451, ch. 95-147.

83.682 Termination of rental agreement by a servicemember.—

(1) Any servicemember may terminate his or her rental agreement by providing the landlord with a written notice of termination to be effective on the date stated in the notice which is at least 30 days after the landlord's receipt of the notice if any of the following criteria are met:

(a) The servicemember is required, pursuant to a permanent change of station orders, to move 35 miles or more from the location of the rental premises;

(b) The servicemember is prematurely or involuntarily discharged or released from active duty or state active duty;

(c) The servicemember is released from active duty or state active duty after having leased the rental premises while on active duty or state active duty status and the rental premises is 35 miles or more from the servicemember's home of record before entering active duty or state active duty;

(d) After entering into a rental agreement, the servicemember receives military orders requiring him or her to move into government quarters or the servicemember becomes eligible to live in and opts to move into government quarters. For purposes of this paragraph, the term "government quarters" means any military housing option that is available to a servicemember, including privatized military housing that is owned, operated, or managed by a private sector company;

(e) The servicemember receives temporary duty orders, temporary change of station orders, or state active duty orders to an area 35 miles or more from the location of the rental premises, provided such orders are for a period exceeding 60 days; or

(f) The servicemember has leased the property, but before taking possession of the rental premises, receives a change of orders to an area that is 35 miles or more from the location of the rental premises.

(2) The notice to the landlord must be accompanied by either a copy of the official military orders or a written verification signed by the servicemember's commanding officer.

(3) In the event a servicemember dies during active duty, an adult member of his or her immediate family may terminate the servicemember's rental agreement by providing the landlord with a written notice of termination to be effective on the date stated in the notice that is at least 30 days after the landlord's receipt of the notice. The notice to the landlord must be accompanied by either a copy of the official military orders showing the servicemember was on active duty or a written verification signed by the servicemember's commanding officer and a copy of the servicemember's death certificate.

(4) Upon termination of a rental agreement under this section, the tenant is liable for the rent due under the rental agreement prorated to the effective date of the termination payable at such time as would have otherwise been required by the terms of the rental agreement. The tenant is not liable for any other rent or damages due to the early termination of the tenancy as provided for in this section. Notwithstanding any provision of this section to the contrary, if a tenant terminates the rental agreement pursuant to this section 14 or more days prior to occupancy, no damages or penalties of any kind will be assessable.

(5) The provisions of this section may not be waived or modified by the agreement of the parties under any circumstances.

History.—s. 6, ch. 2001-179; s. 1, ch. 2002-4; s. 1, ch. 2003-30; s. 5, ch. 2003-72; s. 1, ch. 2023-159.

83.683. Rental application by a servicemember—

(1) If a landlord requires a prospective tenant to complete a rental application before residing in a rental unit, the landlord must complete processing of a rental application submitted by a prospective tenant who is a servicemember, as defined in s. 250.01, within 7 days after submission and must, within that 7-day period, notify the servicemember in writing of an application approval or denial and, if denied, the reason for denial. Absent a timely denial of the rental application, the landlord must lease the rental unit to the servicemember if all other terms of the application and lease are complied with.

(2) If a condominium association, as defined in chapter 718, a cooperative association, as defined in chapter 719, or a homeowners' association, as defined in chapter 720, requires a prospective tenant of a condominium unit, cooperative unit, or parcel within the association's control to complete a rental application before residing in a rental unit or parcel, the association must complete processing of a rental application submitted by a prospective tenant who is a servicemember, as defined in s. 250.01, within 7 days after submission and must, within that 7-day period, notify the servicemember in writing of an application approval or denial and, if denied, the reason for denial. Absent a

timely denial of the rental application, the association must allow the unit or parcel owner to lease the rental unit or parcel to the servicemember and the landlord must lease the rental unit or parcel to the servicemember if all other terms of the application and lease are complied with.

(3) The provisions of this section may not be waived or modified by the agreement of the parties under any circumstances.

History.--Added by Laws 2016, c. 2016-242, § 1, eff. July 1, 2016.

Miami-Dade County Tenants Bill of Rights (2022)

Miami-Dade Legislative Item
File Number: 221055

Clerk's Official Copy

File Number: 221055 **File Type:** Ordinance **Status:** Adopted as amended
Version: 0 **Reference:** 22-47 **Control:** County Commission
File Name: TENANTS BILLS OF RIGHTS **Introduced:** 5/5/2022
Requester: NONE **Cost:** **Final Action:** 5/3/2022
Agenda Date: 5/3/2022 **Agenda Item Number:** 7D

Notes: THIS FINAL VERSION AS ADOPTED; ALSO SEE 220263 AND 220904; 4-6 WEEKS REQUIRED

Title: ORDINANCE CREATING THE MIAMI-DADE COUNTY TENANT'S BILL OF RIGHTS; CREATING CHAPTER 17, ARTICLE XIII OF THE CODE OF MIAMI-DADE COUNTY, FLORIDA; PROVIDING INTENT, PURPOSE AND DEFINITIONS; CREATING OFFICE OF HOUSING ADVOCACY; ESTABLISHING UNLAWFUL PRACTICES; PROVIDING FOR A TENANT'S NOTICE OF RIGHTS; PROVIDING FOR A TENANT INFORMATION HELPLINE AND WEBSITE; ESTABLISHING ENFORCEMENT PROCEDURES; REQUIRING ANNUAL REPORTS; PROVIDING SEVERABILITY, INCLUSION IN THE CODE, AND AN EFFECTIVE DATE [SEE ORIGINAL ITEMS UNDER FILE NOS. 220263 AND 220904]

Indexes: BILL OF RIGHTS
TENANTS

Sponsors: Jean Monestime, Co-Prime Sponsor
Raquel A. Regalado, Co-Prime Sponsor
Oliver G. Gilbert, III, Co-Sponsor
Danielle Cohen Higgins, Co-Sponsor
Eileen Higgins, Co-Sponsor
Kionne L. McGhee, Co-Sponsor

Sunset Provision: No **Effective Date:** **Expiration Date:**
Registered Lobbyist: None Listed

Legislative History

Acting Body	Date	Agenda Item	Action	Sent To	Due Date	Returned	Pass/Fail
County Attorney	5/5/2022		Assigned	Terrence A. Smith		5/5/2022	
Board of County Commissioners	5/3/2022	7D AMENDED	Adopted as amended				P

REPORT: County Attorney Geri Bonzon-Keenan read into the record the title of the foregoing proposed ordinance. Commissioners Cohen Higgins and McGhee asked that they be shown as co-sponsors. Upon conclusion of an extensive discussion, Commissioner Monestime proffered the following amendments: (1) Revise the definition of adverse action located at the bottom of typewritten page 11 to add the following at the end of the sentence: "for the purpose of intimidating or retaliating against a tenant who exercises any of the rights conferred herein;" (2) Correct a scrivener's error located in section 17-166 at the top of typewritten page 14 in which the words "Office of Housing Advocacy" are repeated twice; (3) Revise section 17-167(1)(b) on typewritten page 14 to add a citation to section 83.64(1), Florida Statutes; (4) Further clarify within section

17-167(2)(d), located at the bottom of typewritten page 15, that a landlord cannot inquire about or require a tenant to disclose their eviction history on a rental application, but the landlord can still complete a prescreening of the tenant using other means; (5) Revise section 17-167(2)€ at the top of typewritten page 16 to limit repairs by tenants for health and safety reasons, to require tenants to send a seven-day notice to the landlord prior to making repairs to their units, and to require tenants to obtain a minimum of two (2) estimates from licensed professionals before making repairs; (6) Revise section 17-168(2) and (4) on typewritten page 17 to no longer require landlords to provide tenants with a signed copy of the notice of tenant's rights and to require tenants to acknowledge the notice of tenant's rights; (7) Delete the words "temporary restraining order" on typewritten page 19 under section 17-1170(b) and replace these words with the words "injunctive relief;" and (8) To amend section 17-164, handwritten page 11, to clarify that the ordinance applied to prospective tenancies as well as existing tenancies on or after its effective date. Commissioner Garcia also proffered an amendment relating to repairs made by tenants to require that the repairs shall be reasonable and a tenant cannot charge a landlord for repairs to the dwelling unit that were intentionally or inadvertently caused by the tenant, the tenant's family or other persons on the premises with the tenant's consent. Commissioners Monestime and Regalado accepted the proposed amendments proffered by Commissioner Garcia. Commissioner Sosa requested the item be amended to require the Mayor or Mayor's designee to submit a report to the Board every six (6) months. Commissioner Monestime also accepted the proposed amendment proffered by Commissioner Sosa. Upon conclusion of the foregoing discussion, the Board members proceeded to take a vote on the foregoing ordinance as amended to include the aforementioned proffered amendments.

Legislative Text

TITLE

ORDINANCE CREATING THE MIAMI-DADE COUNTY TENANT'S BILL OF RIGHTS; CREATING CHAPTER 17, ARTICLE XIII OF THE CODE OF MIAMI-DADE COUNTY, FLORIDA; PROVIDING INTENT, PURPOSE AND DEFINITIONS; CREATING OFFICE OF HOUSING ADVOCACY; ESTABLISHING UNLAWFUL PRACTICES; PROVIDING FOR A TENANT'S NOTICE OF RIGHTS; PROVIDING FOR A TENANT INFORMATION HELPLINE AND WEBSITE; ESTABLISHING ENFORCEMENT PROCEDURES; REQUIRING ANNUAL REPORTS; PROVIDING SEVERABILITY, INCLUSION IN THE CODE, AND AN EFFECTIVE DATE

BODY

WHEREAS, Miami-Dade County is experiencing a significant shortage of safe and stable affordable rental housing; and

WHEREAS, studies show that Miami-Dade County has the highest proportion of cost-burdened tenants in the nation by a significant margin, with more than half of tenants spending more than 30 percent or more of their income on rent; and

WHEREAS, the housing crisis has negative impacts on the health and safety of Miami-Dade County residents, including by increasing homelessness; and

WHEREAS, tenants may also be forced to live in housing with substandard conditions, including water leaks, poor ventilation, structural damage, or rodent infestation; and

WHEREAS, federal, state and local laws, including, the Code of Miami-Dade County (the "Code") afford tenants with certain protections and rights, including, but, not limited to, laws that: (1) ensure that dwelling units are free from blight and decay, and safeguard public health, safety, morals, and welfare by setting forth minimum housing standards; (2) establish processes related to residential evictions; and (3) protect tenants from discrimination based on certain classifications; and

WHEREAS, for example, tenants and landlords have certain rights and responsibilities set forth in chapter 83, part II, Florida Statutes, commonly known as the Florida Residential Landlord and Tenant Act; and

WHEREAS, additionally, section 17-2 et seq. of the Code establishes minimum standards governing the condition, occupancy, and maintenance of dwellings, dwelling units, rooming houses, rooming units and premises which are let to another for occupancy, and chapter 11A, article II of the Code prohibits discrimination in housing on the basis of race, color, religion, ancestry, national origin, sex, pregnancy, age, disability, marital status, familial status, gender identity, gender expression, sexual orientation, actual or perceived status as a victim of domestic violence, dating violence or stalking, or source of income; and

WHEREAS, various nonprofit entities and federal, state, and local government agencies, including the County's housing department, Miami-Dade County Department of Public Housing and Community Development, have resources to provide assistance to Miami-Dade County tenants facing challenges with their landlords; and

WHEREAS, despite these protections and rights and resources, many tenants in Miami-Dade County are unaware of the full extent of the laws that protect and afford rights to them, or the steps they can take to seek redress with other agencies or entities; and

WHEREAS, many tenants also lack the financial means to hire an attorney to seek redress in court or with such agencies or entities; and

WHEREAS, additionally, many tenants, who may wish to assert their rights may not do so due to fears that their landlord may unlawfully retaliate against them by increasing the rent, ending a tenancy, or engaging in prohibited housing practices, such as shutting off utilities or changing the locks; and

WHEREAS, in an effort to assist tenants, on March 3, 2021, Hillsborough County enacted a Tenant's Bill of Rights ordinance to provide additional protections to residential tenants in unincorporated Hillsborough County, including protection from income discrimination, and as a result are provided more affordable housing opportunities and offered more protection from homelessness; and

WHEREAS, additionally, on November 7, 2019, the City of St. Petersburg enacted a Tenant's Bill of Rights ordinance which prohibits discrimination in housing and makes it unlawful for a landlord to assess a late fee against a tenant without first providing written notice to the tenant(s), against whom the late fee is assessed, for each late fee assessed; and

WHEREAS, the Real Property Probate and Trust Law Section of The Florida Bar ("RPPTL Section") serves the citizens of the State of Florida, the legal community, and its section members with the highest levels of knowledge, experience and commitment to real property, probate, and trust law; and

WHEREAS, the RPPTL Section has created a Real Property Leasing Committee ("RPL Committee"), which is, in part, comprised of legal aid organizations and other representatives of landlords and tenants; and

WHEREAS, the RPL Committee provides information about legislative and case law developments in all areas of real estate leasing and landlord/tenant law, provides expertise and input regarding proposed legislation affecting real estate leasing areas of Florida law; acts as a resource to its members to discuss and share information about landlord/tenant and leasing practice matters; and cooperates with Continuing Legal Education Committee of The Florida Bar to educate members of The Florida Bar as to any developments in the area of real estate leasing law; and

WHEREAS, the RPL Committee recommends that local governments, such as the Miami-Dade County, when considering enacting a tenant's bill of rights, should ensure that such legislation provides residents with access to the resources necessary to exercise the tenant rights currently available under existing law, including the Florida Residential Landlord and Tenant Act and fair housing regulations; and

WHEREAS, the RPL Committee further recommends that one useful service could be guiding landlords and tenants to the proper forms for exercising their rights; and

WHEREAS, the Eleventh Judicial Circuit of Florida and legal organizations, such as the Florida Bar, have created forms that can be utilized by tenants to exercise their rights; and

WHEREAS, the RPL Committee further recommends the County should focus on establishing a website with the pre-existing resources and information available to landlords and tenants, that any office that is created should have dedicated staff with a broad understanding of landlord tenant issues that can help Miami-Dade residents maneuver such disputes, and that such office should also have the capacity to interface with legal aid organizations, building code enforcement departments, and fair housing groups, which all work on similar issues facing Miami-Dade County renters; and

WHEREAS, this Board agrees that by providing accurate information to Miami-Dade County residents concerning existing laws that protect tenants, the rights afforded under such laws, and connecting tenants to community agencies or other entities that can assist them to seek redress will enable tenants to address certain challenges and potentially assist them to avoid eviction and homelessness; and

WHEREAS, this Board also believes that promoting access to accurate information will also improve housing stability across Miami-Dade County; and

WHEREAS, in furtherance of these purposes and beliefs, this Board approved funding in Miami-Dade County's Fiscal Year 2021-2022 budget for the purpose of employing housing advocates, who will be assigned to the Department of Regulatory and Economic Resources, to assist individuals with obtaining housing-related resources; and

WHEREAS, in furtherance of these purposes, this Board wishes to adopt a Tenant's Bill of Rights in order to increase tenants' awareness of their rights and to provide guidance to tenants regarding available community resources; and

WHEREAS, this Board further wishes that an Office of Housing Advocacy or such other person or office be designated by the County Mayor to monitor the provisions of this ordinance,

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF MIAMI-DADE COUNTY, FLORIDA:

Section 1. Chapter 17, article XIII of the Code of Miami-Dade County, Florida, is hereby created to read as follows:

ARTICLE XIII.

MIAMI-DADE COUNTY TENANT'S BILL OF RIGHTS

Sec. 17-162. Short Title.

This article shall be known as the "Miami-Dade County Tenant's Bill of Rights."

Sec. 17-163. Legislative Intent and Purpose.
It is the intent of the Board of County Commissioners, in accordance with the Home Rule Amendment and Charter and its authority to exercise its police powers for the public safety, health, and general welfare, to create a Tenant's Bill of Rights to promote and further housing stability in Miami-Dade County. It is further the desire of this Board to ensure that an Office of Housing Advocacy or such other person or office be designated by the County Mayor to monitor the provisions herein.

This Board finds that Miami-Dade County is experiencing a significant demand for affordable rental housing units, and the availability of safe and affordable housing is an essential component of individual and community well-being. This Board further finds that protecting residential tenants from discrimination and unfair and illegal rental practices is fundamental to the health, safety and welfare of the community. However, this Board finds that tenants are often unaware of their rights or lack the financial resources to hire attorneys to seek redress in court or with other agencies and entities.

The purpose of this ordinance is to afford all Miami-Dade County tenants, regardless of race, color, religion, ancestry, national origin, sex, pregnancy, age, disability, marital status, familial status, gender identity, gender expression, sexual orientation, actual or perceived status as a victim of domestic violence, dating violence or stalking, or source of income, the right to have a place to call home, freedom from arbitrary eviction, retaliation and discrimination, safe and healthy living conditions, strong consumer protections, full and fair access to the courts, government policies that prioritize leveling the playing field between tenants and landlords, and respect and regard equal to that of homeowners. In furtherance of this purpose, this Board desires to make certain practices unlawful, to require landlords to provide tenants with a notice of their rights under federal, state, and local laws and regulations, to inform tenants of agencies and entities that may assist them in exercising those rights and potentially avoiding wrongful eviction and homelessness, and to promote and utilize policy advocacy to further housing stability in Miami-Dade County.

Sec. 17-164. Applicability and Exclusions.

This article shall be applicable to tenancies subject to chapter 83, part II, Florida Statutes, and which are in existence on or after the effective date of this ordinance, and any extensions of such tenancies. This article shall further apply to dwelling units located in the unincorporated and incorporated areas of Miami-Dade County with the monitoring of the provisions of this article being the responsibility of the County. The County Mayor or the County Mayor's designee shall designate an Office of Housing Advocacy or such other person or office designated by the County Mayor to monitor the provisions of this article.

In accordance with chapter 83, part II, Florida Statutes, this article or the rights conferred herein shall not apply to: (1) residency or detention in a facility, whether public or private, when residence or detention is incidental to the provision of medical, geriatric, educational, counseling, religious, or similar services; (2)?occupancy under a contract of sale of a dwelling unit or the property of which it is a part in which the buyer has paid at least 12 months' rent or in which the buyer has paid at least 1 month's rent and a deposit of at least 5 percent of the purchase price of the property; (3)?transient occupancy in a hotel, condominium, motel, rooming house, or similar public lodging, or transient occupancy in a mobile home park; (4)?occupancy by a holder of a proprietary lease in a cooperative apartment; (5) occupancy by an owner of a condominium unit; (6) occupancy of a dwelling unit by a squatter or any person who does not have a lawful right to occupy a dwelling unit; and (7) housing owned by the United States government, State of Florida, or Miami-Dade County.

Sec. 17-165. Definitions.

The following words and phrases, as used in this article, shall have the following meanings:

(1) The term adverse action means when a landlord brings or threatens to bring an action for possession of the tenant's

residential rental unit, unlawfully raises or threatens to raise the tenant's rent, or otherwise adversely alters the living conditions of the tenant's dwelling unit for the purpose of intimidating or retaliating against a tenant who exercises any of the rights conferred herein.

(2) The term dwelling means any building which is let, including, to the extent not inconsistent with federal, state, or local laws, and a manufactured home or mobile home, which is wholly or partly used or intended to be used for living, sleeping, cooking, and eating, provided that transient occupancy as hereinafter defined shall not be regarded as a dwelling.

(3) The term dwelling unit means any room or group of rooms located within a dwelling and forming a single habitable unit with facilities used or intended to be used for living, sleeping, cooking and eating.

(4) The term landlord means the owner or lessor of a dwelling unit, their agents and employees.

(5) The term Office of Housing Advocacy shall be the office, or such other person or office designated by the County Mayor to monitor this article.

(6) The term squatter means any individual who is occupying a dwelling unit without lawful consent from the property owner. This term does not apply to tenants.

(7) The term tenant means any person entitled to occupy a dwelling unit under a rental agreement, whether the agreement is written or oral.

(8) The term transient occupancy means occupancy when it is the intention of the parties that the occupancy will be temporary.

Sec. 17-166. Office of Housing Advocacy.

(1) The provisions of the Miami-Dade County Tenant's Bill of Rights shall be monitored by the Office of Housing Advocacy, or such other person or office designated by the County Mayor.

(2) ? The duties, functions, powers, and responsibilities of the Office of Housing Advocacy or such other designee of the County Mayor include but are not limited to:

(a) Coordinating with and referring matters and complaints to federal, state, and local agencies or organizations (including legal and other advocacy organizations) that may have the authority or expertise to address certain housing-related issues;

(b) Referring matters related to Section 8 programs and other federally subsidized housing to the Public Housing and Community Development Department or successor department;

(c) Publishing and disseminating information and educational materials relating to this article, including to landlords to promote their participation in existing affordable housing programs;

(d) Conducting trainings and outreach for tenants and landlords at a minimum of four times per year;

(e) Serving as an advisor to the County Mayor on housing related policy matters;

(f) Assisting the County Mayor to secure resources to support tenant legal advocacy, including grants;

(g) Developing resources for landlords and tenants to promote housing stability;

(h) Serving as liaison with community and professional groups representing tenants and landlords;

(i) Performing such other administrative duties related to the Miami-Dade County Tenant's Bill of Rights as may be assigned by the County Mayor or the County Mayor's designee; and

(j) Performing such other duties, functions, powers, and responsibilities to further the purposes of this article.

(3) County Attorney. The County Attorney's Office shall serve as legal counsel to the Office of Housing Advocacy, or such other person or office designated by the County Mayor. The Office of Housing Advocacy, or such other person or office designated by the County Mayor, shall consult with the County Attorney's Office regarding the interpretation of the provisions of this ordinance and the enforcement thereof, and shall be bound by any opinions issued by the County Attorney's Office regarding the provisions of this ordinance.

Sec. 17-167. Unlawful Practices

(1) Existing laws affording protections for tenants. It is the intent of this Board to restate and incorporate by reference the following unlawful practices, which are presently codified in the Code and state law, and it shall be unlawful for any landlord to:

(a) Terminate or interrupt any utility service in violation of section 83.67, Florida Statutes, whether the utility service is under the control of, or payment is made by, the landlord.

(b) Attempt to collect rent payments from a tenant or take any adverse action against such tenant in violation of section 83.64(1)(e), Florida Statutes, if:

(i) The tenant occupies a dwelling unit located in a condominium; and

(ii) The landlord is delinquent in paying any monetary obligation due to the condominium association, and a condominium association, in accordance with section 718.116(11), Florida Statutes, makes a written demand that the tenant pay to the association the subsequent rental payments and any other rental payments until all monetary obligations of the landlord related to the dwelling unit have been paid in full to the association or the association releases the tenant from making such payments, or the tenant discontinues tenancy in the dwelling unit.

(c) Engage in any prohibited acts as set forth in chapter 11A of the Code, including discrimination on the basis of a tenant's race, color, religion, ancestry, national origin, sex, pregnancy, age, disability, marital status, familial status, gender identity, gender expression, sexual orientation, actual or perceived status as a victim of domestic violence, dating violence or stalking, or stalking, or source of income. Any person aggrieved by this section may file a housing discrimination complaint as prescribed by section 11A-14 or may file a civil action in a court of competent jurisdiction in accordance with section 11A-15 of the Code. Notwithstanding the foregoing, it is not the intent of this subsection (c) to supersede the requirements or the remedies set forth in chapter 11A of the Code.

(d) Fail to comply with the fair notice requirements as set forth in section 17-03(a) of the Code, that requires that for a residential tenancy without a specific duration in which the rent is payable on a monthly basis may be terminated by either the landlord or tenant by giving not less than 60 days' written notice prior to the end of any monthly period.

(e) Fail to comply with the fair notice requirements as set forth in section 17-03(b) of the Code that requires that a landlord that proposes to increase the rental rate by more than five percent at the end of a lease for a specific term, or during a tenancy without a specific duration in which the rent is payable on a monthly basis, must provide a minimum of 60 days written fair notice to the tenant before the tenant must either:

(i) accept the proposed amendment;

(ii) reach an acceptable compromise; or

(iii) reject the proposed amendment to their tenancy.

(f) Fail to comply with the requirements as set forth in section 8-5(f)(2) of the Code that requires when the Building Official orders an occupied residential building, unit, or units to be vacated, and deems that the actual or immediate danger of the failure or collapse of a building, unit, or structure, or health, windstorm, or fire hazard, is a result of the negligent or intentional act or failure to act by the owner, the owner shall, within eight hours from the time of the order to

vacate, make, or cause to be made, all necessary arrangements to relocate the displaced residents into housing that is safe, sanitary, and secure until such time that the building, unit, or units are made safe for re-occupation, or for at least a three-month period, and further requires the owner to pay or cause to be paid all of the reasonable expenses involved in such relocation.

(2) Additional tenant rights. It is the intent of this Board to afford the following additional tenant rights, and it shall be unlawful for any landlord to:

(a) Fail to timely provide to each tenant the notice of tenant's rights as set forth in section 17-168 of this article.

(b) Fail to provide to each tenant a copy of the notice within 14 days of receipt of such notice from a government entity or from a condominium association that a residential building may be unsafe as defined by chapter 8, section 8-5 of the Code or other applicable state or local laws.

(c) Fail to provide a tenant who occupies a dwelling unit on a month-to-month basis a written notice of a change in ownership of such dwelling unit where such change in ownership may result in the tenant's tenancy being terminated. Notice must be provided at least 60-days prior to or simultaneously with change in ownership.

(d) Inquire about or require disclosure from a prospective or current tenant regarding their eviction history on an application for admission to, or continuing occupancy of, a dwelling unit until the prospective tenant or current tenant has been determined qualified for admission to, or continuing occupancy of, a dwelling unit. However, nothing herein prohibits a landlord from conducting residential screening pursuant to applicable laws.

(e) Take an adverse action against a tenant who makes necessary reasonable repairs on their own for health and safety reasons and deducts the cost from their rental payment, if:

(i) The tenant provides the landlord with seven days' written notice that such repairs are needed;
(ii) The landlord has failed to make the repairs to the dwelling unit in accordance with section 83.51, Florida Statutes, and chapter 17, article II of the Code;
(iii) The tenant has obtained a minimum of two estimates from licensed professionals;
(iv) The tenant has evidence of such repairs, including, but not limited to, receipts, before and after photographs of the area of the dwelling unit that was repaired, and other similar documentation; and
(v) The tenant has withheld rent or any portion thereof and provided a seven-day notice of the landlord's failure to maintain the dwelling unit in accordance with sections 83.56 or 83.60, Florida Statutes.
(vi) Notwithstanding the foregoing, the tenant may not make repairs to the dwelling unit, at the landlord's expense, if the tenant, a member of tenant's family, or other persons on the premises with the tenant's consent intentionally or inadvertently causes damage to the dwelling unit.

(f) Take any adverse action against a tenant in retaliation for the tenant's use of the Tenant Information Helpline established in accordance with section 17-169 of this article, or any agency or entity to which they are referred pursuant to using the helpline. There will be a rebuttable presumption that an adverse action is retaliatory if it occurs within 60 days after a tenant utilizes the Tenant Information Helpline, and no other reasonable basis for the adverse action exists between the tenant utilizing the Tenant Information Helpline and the landlord's adverse action.

(g) Retaliate, coerce, intimidate, make threats, or harass a tenant or any other person, who aides, or assist such tenant, in the exercise or enjoyment of any right granted or protected by this article.

(h) Fail to comply with any future rights that may be established by the Board.

(3) The provisions of this section 17-167 and the rights conferred herein shall apply to lease extensions and/or renewals of such leases.

Sec. 17-168. Notice of Tenants' Rights.

(1) A landlord of a dwelling unit shall provide to each tenant, no later than 10 days after the commencement or renewal of

a tenancy, a Notice of Tenant Rights ("tenant's rights notice"), published by the Office of Housing Advocacy, as outlined in subsection (6) of this section.

(2) The tenant shall review, acknowledge, sign and date the tenant's rights notice. The tenant must return the tenants' rights notice to the landlord within 7 days of receipt and be provided with a copy for the tenant's records.

(3) The landlord of a dwelling unit shall maintain the most recent tenants' rights notice in the tenant's file until at least 60 days after the end of the tenant's tenancy.

(4) A tenant shall be provided with a new tenant's rights notice within 10 days after the renewal date of the tenant's lease. The tenant must review, acknowledge, sign and date the tenant's rights notice. The tenant must return the tenant's rights notice to the landlord within 7 days of receipt and be provided with a copy for the tenant's records.

(5) The Office of Housing Advocacy shall publish the tenant's rights notice that can be downloaded or printed for distribution by landlords. The tenant's rights notice and any updates thereto shall be in plain language and translated into English, Spanish and Creole. The tenant's rights notice shall be approved by the County Attorney's Office and shall contain the following:

(a) Information regarding existing rights for tenants under federal, state, and local laws, including, but not limited to, those provided for in the following: the Federal Fair Housing Act (42 U.S.C. § 3601), Florida Fair Housing Act (Fla. Stat. § 760.20), Florida Residential Landlord and Tenant Act (chapter 83, Florida Statutes), and section 17-27 and chapter 11A, including, section 11A-2 of the Miami-Dade County Code.

(b) Information regarding the tenant information helpline as provided set forth in section 17-169.

(c) A web address to a list of federal, state, and local governmental and private agencies that may have the authority or expertise to address certain housing-related issues.

(d) A printed name block and a signature block for the tenant.

(6) Notwithstanding the foregoing, in the event the tenant does not timely sign the tenant's rights notice, the landlord shall make two attempts to acquire the tenant's signature and document the attempts in the tenant's file. A tenant's failure to sign the tenant's rights notice shall not be deemed to constitute a waiver of the tenant's right to file a civil action in a court of competent jurisdiction.

Sec. 17-169. Tenant Information Helpline and Website.

(1) The County Mayor or the County Mayor's designee shall establish, or contract to establish, a Tenant Information Helpline and to publicly post its phone number and hours of availability on the County website. The Tenant Information Helpline shall refer tenants to any agency or entity that can render assistance to the tenant for their particular issue. The Tenant Information Helpline shall be available in English, Spanish, and Creole.

(2) Information about the Tenant Information Helpline shall be included in the tenant's rights notice to be provided to tenants pursuant to section 17-168 of this article.

(3) In addition to the information related to the Tenant Information Helpline, the County Mayor or County Mayor's designee shall include on the website additional resource information that includes weblinks to such sources, including but not limited to legal services programs, and court and other related self-help programs for tenants. Additionally, the County Mayor or the County Mayor's designee shall include on such website downloadable forms approved by the Florida Bar. Such forms shall be available in English, Spanish, and Creole.

Sec. 17-170. Enforcement by private persons.

(1) A tenant may file a civil action in a court of competent jurisdiction no later than two years after the alleged violation of this article.

(2) In a private enforcement proceeding under this article, the court may issue an order prohibiting the unlawful practice and providing affirmative relief from the effects of the practice, including equitable relief, injunctive relief, actual damages, reasonable attorney's fees, interest, costs, or other relief, upon a finding that a violation of section 17-167 has occurred or is about to occur.

Sec. 17-171. Reports to the Board of County Commissioners.

The County Mayor or the County Mayor's designee shall prepare and submit reports to the Board of County commissioners every six months summarizing the activities undertaken pursuant to this article. The report shall include, but is not limited to: (1) the number of complaints that were referred to other federal, state or local agencies; (2) the outreach and training activities undertaken by the Office of Housing Advocacy, including the dates and location of such outreach and training activities; and (3) any housing policy recommendations for the Board's consideration. The reports shall be placed on the agenda of the committee of the Board of jurisdiction in accordance with Ordinance No. 14-65.

Section 2. If any section, subsection, sentence, clause or provision of this ordinance is held invalid, the remainder of this ordinance shall not be affected by such invalidity.
Section 3. It is the intention of the Board of County Commissioners, and it is hereby ordained that the provisions of this ordinance, including any sunset provision, shall become and be made a part of the Code of Miami-Dade County, Florida. The sections of this ordinance may be renumbered or relettered to accomplish such intention, and the word "ordinance" may be changed to "section," "article," or other appropriate word.
Section 4. This ordinance shall become effective ten (10) days after the date of enactment unless vetoed by the Mayor, and if vetoed, shall become effective only upon an override by this Board.

Questions on the Florida Residential Landlord-Tenant Statute

Consider the following questions in light of the Florida residential landlord-tenant statute. Assume that there is no local housing code. (This is not the most realistic assumption, but it simplifies the analysis.[17]) If there is other information (legal or factual) you might you need to answer the question, what is it?

1. A client comes in and says that the bedroom ceiling in his apartment is leaking so badly that he's had to move his bed to the living room. Also, he's got a water heater in his apartment, and it's not working. He's lived in the apartment for 6 months (he signed a one-year lease). The lease says that it's the tenant's responsibility to make all repairs. The tenant says that he doesn't want to move out because this is the only place he can afford. He wants to know whether he can force the landlord to repair the ceiling and the water heater. Failing that, can he just make the repairs himself and deduct them from his rent?

    a. Does the landlord-tenant statute apply?

        i. Which Part applies? Part I or Part II? What is the difference?

        ii. Within the correct Part, what specific sections tell you that it applies to your client's situation?

            Fla. Stat. §§ 83.41, 83.42, 83.43

    b. What are the landlord's obligations here under the statute?

        Fla. Stat. § 83.51

        Keep in mind that we are assuming there are no applicable local housing, building, and health codes? What does "structural" mean in Fla. Stat. § 83.51(1)? How would the analysis differ for the hot water heater and the leak in the ceiling?

    c. What is the effect under the statute of the provision in the lease stating that it's the tenant's obligation to do all repairs?

        Fla. Stat. §§ 83.51(l), 83.51(2), 83.51(3), 83.47

    d. What are the remedies available to the tenant under the Statute?

        i. Damages, injunctive relief, casualty damage:

            Fla. Stat. §§ 83.54, 83.55, 83.63

        ii. Repair and deduct: Does the statute provide for it?

            Consider the significance of Uniform Residential Landlord Tenant Act (URLTA) § 4.103.

§ 4.103. [Self-Help for Minor Defects]

[17] If you want to check the Miami-Dade County Housing Code, you can find it here: https://library.municode.com/fl/miami_-_dade_county/codes/code_of_ordinances?nodeId=PTIIICOOR_CH17HO_ARTIIMIDECOMIHOST

(a) If the landlord fails to comply with the rental agreement or Section 2.104, and the reasonable cost of compliance is less than [$100], or an amount equal to [one-half] the periodic rent, whichever amount is greater, the tenant may recover damages for the breach under Section 4.101(b) or may notify the landlord of his intention to correct the condition at the landlord's expense. If the landlord fails to comply within [14] days after being notified by the tenant in writing or as promptly as conditions require in case of emergency, the tenant may cause the work to be done in a workmanlike manner and, after submitting to the landlord an itemized statement, deduct from his rent the actual and reasonable cost or the fair and reasonable value of the work, not exceeding the amount specified in this subsection.

(b) A tenant may not repair at the landlord's expense if the condition was caused by the deliberate or negligent act or omission of the tenant, a member of his family, or other person on the premises with his consent.

There is no parallel provision in the Florida statute. The URLTA is not law in Florida, but the Florida legislature generally modeled the Florida statute on the URLTA.

iii. What notice to the landlord is your client required to give?

Fla. Stat. §§ 83.56(l), 83.59 (for the landlord's action against the tenant), 83.60

When must the notice be given? What must it specify?

Assume the landlord brings an action under Fla. Stat. § 83.59 to evict the tenant, who has stopped paying rent. Exactly what defenses does Fla. Stat. § 83.60(l) permit the tenant to raise? Suppose the tenant's only complaint were that the landlord had failed to do anything to exterminate the roaches. Could that be raised as a defense under Fla. Stat. § 83.60(l)?

What happens to the rental payments during the time when the tenant is defending against eviction based on material non- compliance with Fla. Stat. § 83.5 1 (1)? What happens at the end of the lawsuit if the court finds that the landlord has not complied with Fla. Stat. § 83.51 (1)?

2. Suppose the client lives in Miami-Dade County. What difference might that make to your answer to 1?

3. Suppose you represent a landlord. She tells you that her tenant bought a house and moved out only 5 months into a one-year lease. The landlord wants to know what her options and responsibilities are under the statute. What do you tell her?

See Fla. Stat. §§ 83.59, 83.595

4. Tony Tenant rents an apartment in Linda Landlord's building. The lease forbids keeping any pets. Tony soon discovers that the hallways are dangerous because the front door lock is broken and anyone can get in the building. Tony suspects that several of the other residents in the building are drug dealers. When he raises the issue with Linda, she refuses to have the lock repaired. "It'll stay fixed about two days before someone else breaks it," she claims. Fearing for his safety, Tony buys a pit bull.

Linda finds out about the dog when one of the other tenants complains about its barking. The next time she's around the building, she stops by Tony's apartment and tells him to get rid of the dog or she'll evict him immediately.

Can Linda force Tony to get rid of the dog? How? Who should prevail, in your view?

a. Landlord's remedies:

   i. Damages, injunctive relief. Fla. Stat. §§ 83.54, 83.55
   ii. Eviction: Fla. Stat. § 83.56(2), 83.59

   Under what circumstances would the landlord have to give an opportunity to cure?

b. Tenant's defenses:

   i. Could the tenant defend against eviction on the ground that, in light of the safety problems, the landlord was failing to meet her obligations under Fla. Stat. § 83.51? See Fla. Stat. § 83.60(l), 83.51(2).
   ii. Suppose the walls and foundations were collapsing. Could the tenant defend against eviction on the ground that, in light of the structural problems, the landlord was failing to meet her obligations under Fla. Stat. § 83.5 1 ? See Fla. Stat. § 83.60(l).

6. On September 1, 2024, Tara Tenant enters into a one-year lease with Luis Landlord for a studio apartment in Dade County, Florida. Section 5 of the lease provides that "Tenant hereby waives all rights to the extent permitted by Florida law."

Tara is generally very pleased with the apartment. She has a house in nearby suburban Canedall, and uses the apartment mainly as a place to write novels. Occasionally she's held parties at the apartment, and she's spent the night there once or twice.

One thing bothers her a lot, though. She was distressed to learn, after she moved in, that the front door to the apartment building -- which was made to swing shut on its own after someone goes through -- no longer closes tightly about the half the time because the lock is old and stiff. To make matters worse, she has heard that there have been several muggings in the neighborhood. She's called Luis many times about getting the front door fixed. Luis, however, merely says that there's no problem; everyone who goes in or out of the apartment building should just make a point of pulling the door shut behind them, and it's not his problem if the tenants won't do that.

In late October 2024, Tara comes to you for advice. She tells you she has very little money to pay for your time, and therefore wants you to answer just one question for her: Does Luis have a legal obligation to fix the problem with the lock on the front door?

7. Do you think that Emma Easterling would prevail on her claim of retaliatory eviction? (See attached articles, focusing especially on "Woman Sues to Prevent Eviction," The Miami Herald, Neighbors Section, 10/16/88, at 2.) Should she?

a. Does the landlord's conduct fall within Fla. Stat. § 83.64?

   i. The landlord must "increase a tenant's rent or decrease services to a tenant, or threaten to bring an action for possession." Fla. Stat. § 83.64(l).
   ii. It must be "primarily because the landlord is retaliating against the tenant." Fla. Stat. § 83.64(l).

iii. The landlord's action must be "discriminatory." Fla. Stat. § § 83.64(l), (4).

b. Is the tenant's conduct protected against retaliation?
   i. The tenant's conduct must satisfy the requirements of Fla. Stat. § 83.64(l).
   ii. The tenant must have acted in good faith. Fla. Stat. §§ 83.64(l), 83.43.
   iii. Consider Fla. Stat. § 83.60

c. Does the landlord have a defense to the claim of retaliatory conduct?

Fla. Stat. § 83.64(3). Note the similarity to the similarity of this provision to Fla. Stat. § 381.00895 (Supp. 45). This is the one respect in which the legislature adopted the model of landlord-tenant law in providing for the rights of migrant farmworkers.

8. Tricia Tenant signs a one-year lease to an apartment in Miami-Dade County on March 1, 2024. On August 2, 2024, the light switch for the ceiling light in her second bedroom, which she uses as a home office, makes a loud pop and stops working. Replacing the bulb does nothing. This makes the room very dark even during the day, because the window in that bedroom faces the wall of a tall apartment building next door to hers.

She asks the landlord, Levon, to get it fixed. He admits it's his responsibility under the lease, which specifically provides for a working ceiling light in each bedroom, but says he's too busy to take care of it. "You'll just have to be patient," he says. "Anyway, why don't you just get a floor lamp or a desk lamp?" "Not gonna help," she shoots back. "When the ceiling light blew out, the wall sockets went dead, too."

Instead, Tricia sends him a formal notice of the problem, in writing, on August 5, 2023, demanding that the repairs be done within seven days. The letter says he has failed to make repairs in accordance with section 83.51 of the Florida statutes, and Chapter 17, article II of the Miami-Dade County Code. (Section 17-24(6) requires every habitable room to have at least either (a) two wall sockets or (b) one wall socket and ceiling light fixture.)

When Levon fails to respond, she gets two estimates from licensed electricians, and hires the cheaper one to do the repairs. She takes before and after photos and gets detailed receipts from the electrician. The cost comes out to $547.00. The electrician mentions to her that the wiring was obviously very old and bad, and he's not surprised that it failed, even with her normal use.

On August 23, 2024, Tricia sends Levon a 7-day notice pursuant to Fla. Stat. § 83.60. When she pays the rent that is due on September 1, she withholds $547.00 from it.

Levon then sends her a notice that complies with § 83.56(3), demanding payment of full rent. She tells him, "no way, I had a right to repair and deduct. This is Miami-Dade County and I'm just exercising my rights under the Miami-Dade County Tenants Bill of Rights."

Levon hires an attorney and brings an action to evict her for non-payment of rent. Who do you think would win? Suppose Levon won and got the right to evict her as well as an award of the $547.00 in rent she deducted. Why might she be on the hook for much more than that? (You may assume that she has kept the apartment in perfect shape and that there is no basis for Levon to claim damages to the apartment.)

Articles on the Marshall Williamson Apartments

The Miami Herald, Neighbors Section, September 29, 1988, at 3.

MARY LOU FOY / Miami Herald Staff

Emma Easterling lives at the Marshall Williamson Apartments with Antwain, 11 months, and Lulu, 2.

City says filthy complex must clean up or be razed

By GEOFFREY BIDDULPH
Herald Staff Writer

The Marshall Williamson Apartments, site of hundreds of code violations since 1977, remains a rat-infested, sewer-spewing eyesore despite assurances from South Miami officials that the complex will be fixed up or torn down.

"Either the landlords bring the buildings up to standard or they will be torn down and the tenants will be relocated," vowed City Commissioner Cathy McCann. "It's about time something was done."

City Manager Bill Hampton, Mayor Bill Porter and other members of the City Commission said this week that the city is working with county and state officials to improve the buildings, at 6580 SW 60th Ave. They said the city has the power to destroy the blighted structures if improvements are not made.

But county and state representatives say the process of taking any legal action, which must be completed before any demolition can take place, could take months. They say they have had difficulty notifying the buildings' owners because ownership details have not been disclosed by the trustees who manage the property.

Meanwhile, Jack Taffer, the new trustee, promised Tuesday to clean up the buildings. Juan Carbajal, the manager, blamed the buildings' filth on the tenants but said improvements will be made.

A reporter visiting the 44-apartment complex this week saw raw sewage flowing behind a building, dilapidated second-story railings and rotting ceilings that threatened to fall on tenants. The entire area is covered with garbage.

Tenants, all of whom are low-income, say the plumbing is so poor that sewage flows into their bathtubs when they flush their toilets. They say the owners make little effort to repair or clean up their apartments.

"The owners are here every week to collect the rent, but they don't care about cleaning up the apartment," said Emma Easterling, one tenant. Easterling said she pays $55 a week for the one-bedroom apartment where she lives with her five children.

Carbajal said the owners spend thousands of dollars a month repairing stoves, refrigerators, doors and screens broken by the tenants.

"It's not the apartments, it's the people. These people do not know how to live. They dump their garbage everywhere. When a sink is plugged up it's usually because they have stuffed chicken bones or towels or something else down the drain. Then they call me up with complaints you could hear in China," Carbajal said.

Police Chief Perry Turner said the apartment complex is a center of operations for local crack dealers and has one of the worst levels of crime in the city. Carbajal said he has been mugged while trying to collect the rent and said he now carries a pistol when visiting the area.

City officials say they have never taken firm action against the owners because the owners have continually made minimal repairs at the last minute.

"It's a game for these people," said Theresa Pickett, a county housing inspector.

Government officials say they do not know who the owners are because the apartments are managed by trustees who will not reveal the identity of the owners.

Taffer, a lawyer, became the new trustee this summer. He refused to disclose the identity of the owners. Carbajal said he reports to Phil Sassoon, a lawyer. Sassoon said Tuesday the buildings are being brought up to standard but he also refused to say who the owners are.

Articles on the Marshall Williamson Apartments

THE MIAMI HERALD, Neighbors Section, Page 1

Sunday, October 16, 1988.

Woman sues to prevent her eviction

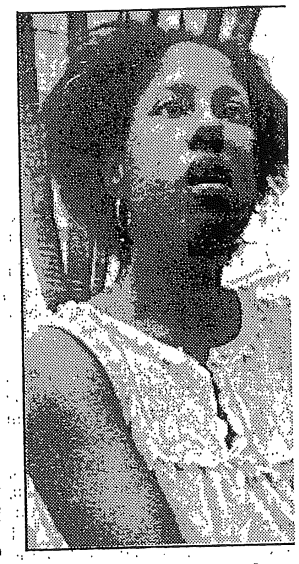
By GEOFFREY BIDDULPH
Herald Staff Writer

Emma Easterling, a tenant in the rundown Marshall Williamson Apartments, is suing the property's former trustees for trying to evict her.

In a suit filed in Dade County court, Easterling says the owners of the buildings are trying to evict her because she criticized the management in a Miami Herald article published Sept. 29. She also says the apartments, located at 6850 SW 60th Ave., are not maintained to minimum housing standards.

Easterling's suit does not ask for a specific amount of damages. She is suing Pan American Bank, former trustees of the apartments. Jay Fabrikant, attorney for the bank, said he could not comment on the suit because he had not consulted his clients.

Easterling, eight months pregnant and the single mother of four children, received the eviction notice several days after her comments were published in The Herald. In the article, she said the owners of the buildings are lax in fixing problems in the apartments.



Emma Easterling: Not alone in owing rent.

Juan Carvajal, manager of the apartments, said Easterling was given an eviction notice after she asked for one.

"She said it would help her get welfare money," Carvajal said. He said she is being evicted because she has failed to pay rent for almost two

Turn to TENANT / *11*

Tenant charges complaint led to eviction notice

TENANT / *from 2*

months.

Jack Taffer, current trustee of the apartments, declined to comment Friday.

Easterling denied asking Carvajal for an eviction notice. She said she owes $710 in back rent but said most of the tenants in the apartment complex owe more money than she does. She said she is being singled out for eviction because she talked to The Herald.

Easterling, who said she quit her job as a maid Aug. 29 because of her pregnancy, said she has been granted $480 in emergency housing money. She said the money is being sent directly to Carvajal. She said she recently applied for other government assistance so she will be able to pay the rest of her rent.

THE MIAMI HERALD, Neighbors Section, Page 3, Sunday, October 23, 1988.

Building Owners Face Fines From City

By GEOFFREY BIDDULPH
Herald Staff Writer

South Miami officials have fined the owners of the Marshall Williamson Apartments at least $ 670 for working on the run-down buildings without permits.

Acting City Manager, Bill Hampton said the owners of the apartments have done minor repairs on the buildings without pulling electrical, plumbing and building permits. He said they will be fined $500, plus an $80 fee for the electrical permit and $90 for the building permit. He said the city will not known what the fee will be for the plumbing permit until the owners detail what kind of plumbing work they would like to do.

Juan Carvajal, manager of the apartments, 6580 S.W. 60th Ave., said the owners are scrambling to clean up hundreds of code violations. Hampton said the city will not consider any of the violations taken care of until permits are pulled.

City officials acknowledge it may be difficult to collect the fines because the ownership is hidden behind a blind trust. The city will put a lien on the apartments if the fines aren't paid, Hampton said.

Carvajal said the owners have not taken out permits because they believe them unnecessary.

"We can't take out a permit for small things like putting an electrical switch on the wall," Carvajal said.

Lincoln Benedicto, South Miami's code enforcement supervisor, said the city has informed Carvajal several times that permits are necessary.

The now-decrepit buildings were named after Marshall Williamson, a black pioneer of South Miami who died in 1972. The case has attracted the attention of county officials, who have recorded hundreds of code violations, and the state attorney's office, which is trying to identify the owners.

Meanwhile, the city sent a notice Friday to Jack Taffer, trustee of the apartments, notifying him to appear Nov. 10 before the city's code enforcement board, Benedicto said.

Taffer did not return several phone calls Friday from the Miami Herald to his Miami office.

Benedicto said the building's owners have five outstanding code violations for broken second-story railings, junked cars, doing electrical work without permits, plumbing problems and failure to clean up garbage. If the owners have not cleared up the violations by Nov. 10, the code enforcement board could levy fines up to $250 per day per violation.

"We will start levying the fines Nov. 11, regardless of whether the owners show up at the hearing, until the violations are taken care of," Benedicto said.

Carvajal said the owners have paved the poorly surfaced driveways inside the apartment complex and have cleaned up one of the two junked cars dumped on the property. He said one of the apartment residents threatened him when he tried to tow away the other car Wednesday. On Friday, the car was still there.

"We're doing everything humanly possible to clean up the apartments," Carvajal said.

Building worker Carmi Hadani shows county environmental health specialist Bernadette Bullard the screens he says he is ready to install, if tenants would allow him into their apartments.

Officials issue cleanup deadline

By GEOFFREY BIDDULPH
Herald Staff Writer

City and county officials, in an often-tense confrontation Monday, told a manager of the Marshall Williamson Apartments he has until Friday to clean up the run-down buildings or face criminal charges from the state attorney's office.

Phillip Sassoon, visiting the decrepit apartments he manages, told the officials he would have dozens of violations fixed by Friday. He also promised to take out building, electrical and plumbing permits from the city of South Miami so he could do work on the buildings.

As of Monday, Sassoon had pulled the building and electrical permits, according to Lincoln Benedicto, South Miami's code enforcement supervisor.

Sassoon ran through mine fields of scolding and criticism Monday when he arrived at the apartments at 6580 SW 60th Ave. Walter Livingstone, environmental administrator for the county, told him he could face misdemeanor fines of up to $500 a day or 60 days in jail if he does not clean up the buildings by Friday.

The apartments, built in 1955, are named for Marshall Williamson, a black community leader in South Miami who died in 1972. The buildings have been cited for hundreds of code violations since 1977. Black community leaders say the apartments have become a symbol for official neglect of the area.

Kathy Fernandez Rundle, chief assistant state attorney for community affairs, said her office is working with city and county government to pressure the owners of the apartments to clean up the buildings. City officials say they are unsure who the owners are. But Rundle said she is subpoenaing the trustee of the apartments to uncover that information.

Meanwhile, angry tenants told Sassoon to fix their broken doors, sinks, toilets and bathtubs.

"My door keeps on falling off. I had to put it up myself. I have the

Turn to **APARTMENTS** */ 36*

Thursday, October 27, 1988 K The MIAMI HERALD 3

Building manager gets warning

APARTMENTS / *from 3*

money to pay the rent, but I'm not paying anything until things are fixed up," said Linda McKelvin, 36, who said she has been living in the apartment for two years.

Sassoon listened patiently to some complaints and asked Carmi Hadani, a worker, to attend to them.

"We keep on asking these people to clean things up, and they never do. I'm getting tired of this," said Fay Williams, another tenant.

Hadani complained that the tenants won't let him into their apartments to complete repairs. Angry, Hadani picked up a stack of screens from his work room and hurled them at Bernadette Bullard, a county environmental health specialist who was inspecting the buildings.

"You want screens? Look at all the screens we have! They won't let me into their apartments to put them up!" Hadani yelled.

None of the screens hit Bullard.

Bullard said the owners have cleaned up stagnant pools of sewage, fixed plumbing problems and replaced broken jalousie windows. But she said scores of violations, ranging from broken second-story railings to missing screens, remain.

Apartments pass city's inspection

South Miami officials will monitor buildings

By GEOFFREY BIDDULPH
Herald Staff Writer

The South Miami Code Enforcement Board gave the Marshall Williamson Apartments a clean bill of health Thursday after city officials reported that weeks of hectic activity by the management had sufficiently improved the once sewage-strewn buildings.

Lincoln Benedicto told board members the owners had fixed loose second-story railings, repaired faulty electrical and sewer systems and cleaned up junked cars and garbage.

"It seems the owners have complied relative to the violations," said Christopher Cooke-Yarborough, chairman of the code enforcement board.

If the violations had not been cleared up, the owners of the buildings at 6580 SW 60th Ave. could have been fined $250 a day per violation, Benedicto said. Benedicto warned he will visit the apartments on a weekly basis to ensure that the owners keep them clean.

After several inspections, the Dade Department of Public Health decided Oct. 28 that the managers had sufficiently cleaned up the buildings. Dade County enforcement officers have yet to report on their analysis of the apartments' status.

The apartments, built in 1955, are named after Marshall Williamson, a black community leader in South Miami who died in 1972. The buildings have been cited with hundreds of code violations since 1977. Black community leaders say the apartments have become a symbol for official neglect of the area.

Residents say plumbers, electricians and carpenters have pored over the buildings for the last few weeks to clear up the violations in time for the inspections. Phil Sassoon, a manager of the apartments, said the owners also are trying to clean up the buildings in order to sell them.

Darlene Dandridge, a tenant, said her home looks significantly better than it did two months ago.

"They've fixed up the railings and cleaned a lot of things," Dandridge said. "I hope they stay clean."

Sunday, November 13, 1988 The MIAMI HERALD

NEWS FEATURE

Although the complex is a sad legacy to a community hero, glimmers of hope and determination brighten the future of the

MARSHALL WILLIAMSON APARTMENTS

Story by GEOFFREY BIDDULPH
Herald Staff Writer
Photos by RAUL RUBIERA
Miami Herald Staff

Darlene Dandridge and her neighbor, Darren White, often go outside to talk to other neighbors before work.

The sound of South Miami's Marshall Williamson Apartments in the morning is the sound of young children.

Youngsters totter on untried legs, exploring the corners of the concrete parking lot near the buildings. Some of them are old enough to talk, and they do, loudly. Others are only old enough to cry, and this they do, even louder.

"This here is baby city," says Linda McKelvin, one of the residents, surveying the scene from her second-story balcony. "We did a count the other day and came up with 64 children. Sixty-four children in 37 apartments. That's a lot of children."

The children are crowded into one and two-bedroom apartments that are infamous among South Miami and Dade County officials for their decrepit state. The city and the county have cited the apartments for hundreds of housing code violations. But for years the owners either ignored the complaints or did just enough repairs to satisfy the requirements, housing inspectors say.

In a sad twist of fate, the apartments are named after one of South Miami's most lauded men: Marshall Williamson. A revered black leader, Williamson is remembered as the man who donated land for a church and a school in South Miami. A park there bears his name.

Williamson, who died in 1972, did not live to see the apartments at 6580 SW 60th Ave. fall into disrepair or the 3.2-acre park named after him become a haven for drug transactions and other crime. Police say the shady corners of the park, near Southwest 61st Avenue and 68th Street, are ideal for drug dealers, who sell crack cocaine and other illegal substances to passers-by.

Black community leaders have long complained that the rest of South Miami has chosen to ignore the problems of the largely black, largely poor area of the city.

"Many people from outside the area say that if it doesn't involve you it doesn't concern you. These people did not become aware of the problems there," said Danny Brown, a South Miami commissioner.

Police Chief Perry Turner said the park and nearby areas are his No. 1 enforcement problem in South Miami. He said he began walking beats and canine patrols in the past few years.

Mayor Bill Porter said, "We're spending more time and more money and more effort on that area of the city than anywhere else and we should because that's where it's needed." But he said the community needs to address its own problems because too much government will hurt rather than help.

For now, many say Marshall Williamson's legacy may be improving. The apartments have a new owner who has significantly cleaned up the buildings. And the state is building a health clinic in a corner of the park.

But a daylong visit to the park and the apartments shows there is still much to be done.

■ ■ ■

You can always tell when the plumbing has backed up at the Marshall Williamson Apartments because the residents take out their carpets and pile them outside their doors. Sodden with sewage, the carpets are left dry.

Emma Easterling's toilet started spewing sludge i her bedroom on New Year's Eve. Until that happened she was pretty pleased with the new owner, John Landers, a Coral Gables real estate agent. Landers g turkeys to every family for Christmas and has promis improvements.

Landers, who bought the apartments in Novembe says he plans to clean them up gradually. A businessn who says he likes to buy and sell real estate, Landers says he can make money on the buildings if he treats people right and they treat their apartments right. H said he eventually will make major improvements in t plumbing system.

But the apartments, built in 1955, have suffered years of neglect, and systemic problems are rampant

"These apartments are just like an addict. They c be healed, but they can't be cured," says Darren Whi a 23-year-old resident who has lived off and c e apartments since he was 12.

White says the apartments look like they w painted by somebody who was color-blind.

"They're brown and beige. And the doors are

Turn to APARTMENTS

'Little mayor' stood tall as South Miami leader

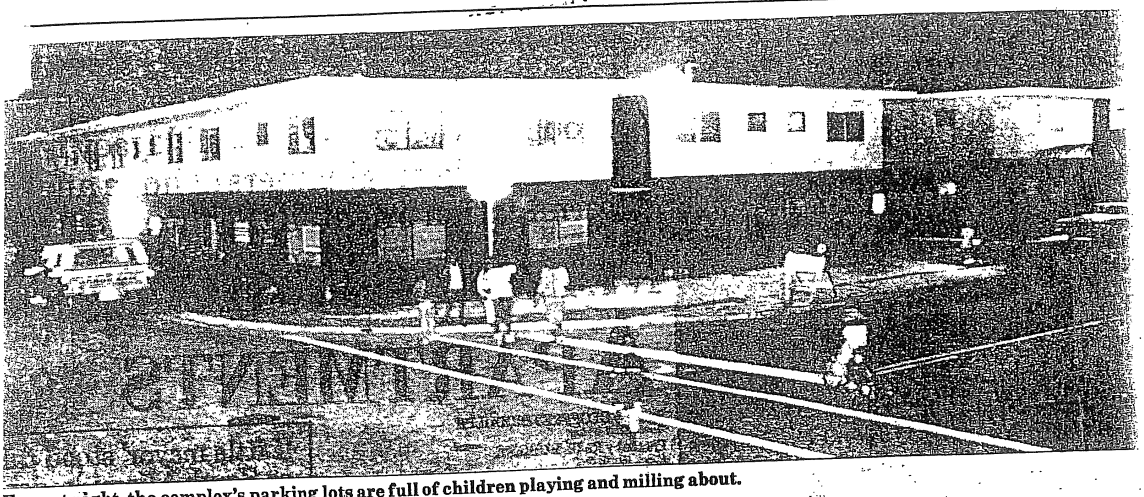
Marshall Williamson, the "little mayor" of South Miami, was born in Madison, Fla., in 1890. He learned carpentry at George State College in Savannah and moved to South Miami in 1912.

Williamson was called the little mayor because of his small stature — 5 feet, 4 inches and 145 pounds — and his leadership of the black community in South Miami. He built two homes for his wife Elnora and his eig dren and constructed the houses in the nei hood.

Williamson

Residents and his three living children remember him as a man who would gather them together to vote on election days and would lead them to church on Sundays. He donated land for the St. John's AME Church in South Miami and JRE Lee Elementary school.

Two of his daughters, Ruth Williams and Theresa Perry, still live in South Miami near the Williamson home, which is just 50 feet away from the run-down apartments that bear his name. His children still own the land on which the apartments sit, although they have no ownership role in the buildings themselves.



Even at night, the complex's parking lots are full of children playing and milling about.

Hope for hero's tarnished legacy

New owner brings promise decrepit apartments

APARTMENTS / *from 21*

orange. That's ridiculous," he says.

The apartments are a vast playground for David Holton, 19 months. David lives on the second floor with his mother, who refuses to give her name because she doesn't want her co-workers to know she lives there.

David is fascinated with a marble-like piece of green candy. First it's in his mouth, then he's bouncing it like a basketball. He rolls it — and it falls over the second-story ledge to the asphalt 15 feet below.

David watches the candy's path. He stands up and walks to the second-story railing. He leans on the railing, reaching toward the candy far below. After several minutes, he gives up and runs back to his mother.

Three months ago the railing was so loose that David Holton would have fallen through.

■ ■ ■

Marshall Williamson Park in the morning is quiet. The only children in sight are in a small playground watched over by two big men.

Junior Walker sits near the playground watching his friend, Billy Bob Williams, play with the two children, ages 9 months and 2½ years.

"Even in the afternoon, not too kids will play here. They're d of the shooting," says Walker. "This place can get dangerous."

Walker remembers Marshall Williamson as "something of a saint" around South Miami.

"It's too bad to see the park run down," Walker says.

In the 10 minutes Walker is talking, police cars cruise through the park three times.

The police are not the best friends of a group of young men who stand near the curb, drinking beer in paper bags and talking.

"They're always harassing us," says Wayne Scavella, nicknamed Scrambler, a good-looking youth with gold front teeth and a love of motorcycles. Others refused to give their names.

"They're always arresting us for petty things," says another of the young men.

Police Chief Turner said his officers do not make arrests lightly.

"If you are violating the law you will be arrested. Some of these people have adopted a life of crime. From their perspective, we're picking on them. But other members of the community say they want these people off the streets," Turner said.

The department does not keep statistics on the amount of crime at the apartments or park, Turner said. But he said there have been five large-scale drug busts in the neighborhood in the past two years.

John McCoe, a 29-year-old, longtime South Miami resident, agrees with Turner. McCoe, who sits in the park near where the young men were drinking and talking, says the police sometimes get rough, but he says some people deserve it.

"A whole lot of people saying bad things about the police are doing things they shouldn't be doing," McCoe says.

■ ■ ■

The Marshall Williamson Apartments at night are a cacophony of sound. Music blasts out of various apartments, intermingling in the courtyard. Children play, running and yelling. Faulty smoke alarms, recently installed, go off as people cook their dinners.

Dorothy St. Fleur just moved into the apartments from Liberty City. They are inexpensive, but she's not pleased with the quality. People pay $55 a week for a single and $65 for a double.

Vincent Lane, the new manager of the buildings who has lived there for years, said the apartments are nothing more than a pit stop for people trying to get ahead in life.

Indeed, just about everybody talks about leaving the Marshall Williamson buildings.

The key to getting out, according to Linda McKelvin, is education. She never graduated from high school herself, but her son Dwight, a junior at Northwestern High School, is going to graduate if she has to strap him to the desk chair.

"I used to treat him rough, but he comes back to me and says, 'Mama, you were right,' " McKelvin says.

"I tell him that maybe one day he can come back and help me get a diploma," she says.

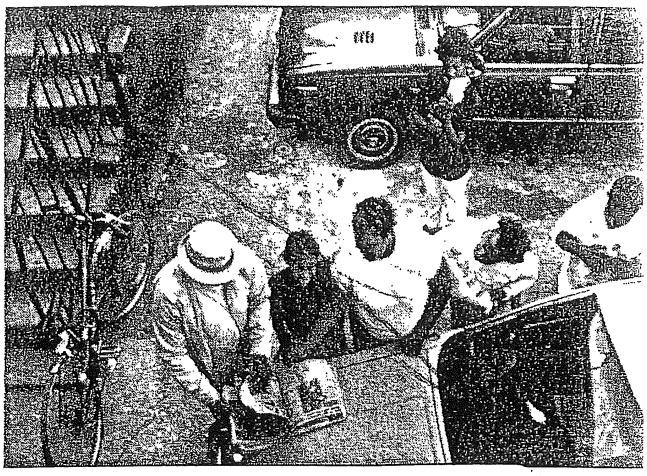
Lane, the manager, says the neighborhood near the apartmen is getting worse every day. A gu nearby sells crack out of his shot shack, Lane says. Thieves, in ne of money to buy more drugs, oft raid the buildings.

Lane, a former football player South Miami High School, lives i two-bedroom apartment with hi wife and five children. But he's working overtime, saving mone and planning to buy his own hom

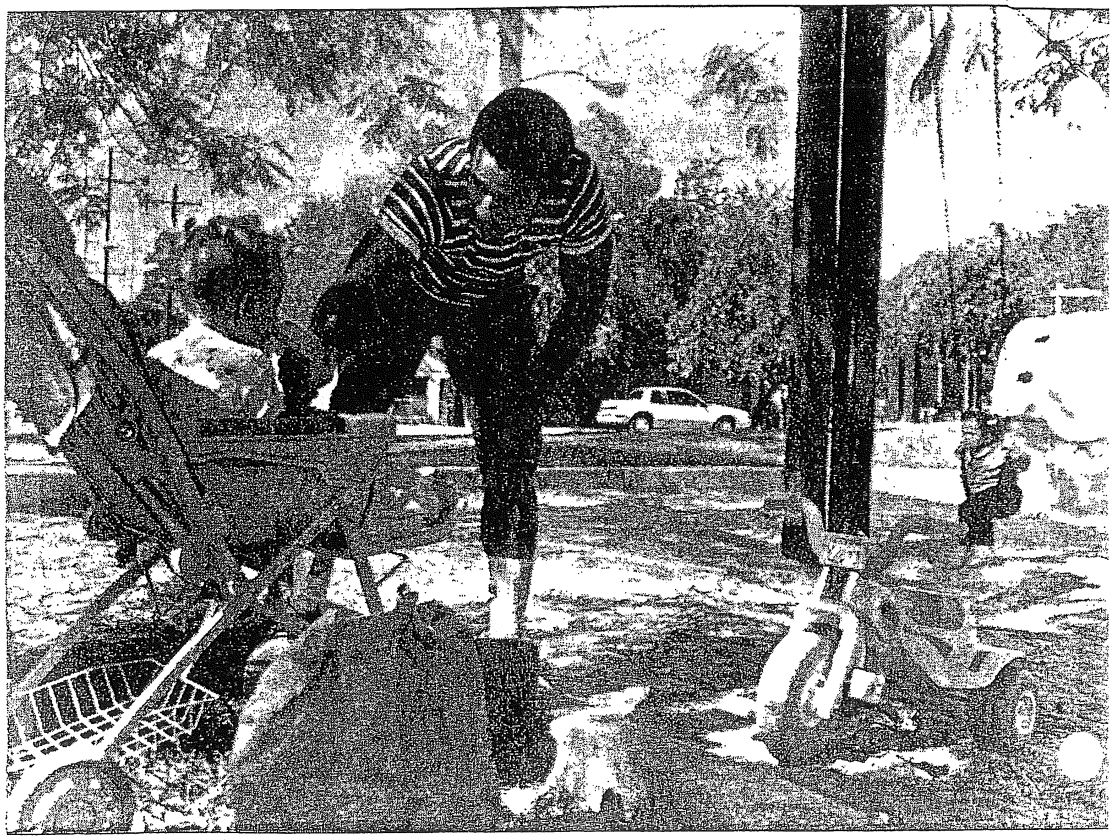
"Right now, this is the cheape place you can go. But I'm intend to get a home, and there's nothi that's going to stop me," Lane s

Play time finds Sheranda Hadley following Akia Hadley as she pushes Jackie Fleur around in a shopping cart.

HERALD Thursday, January 22



Reading a magazine in the parking lot are Ernest Mathis, wearing a hat, and his neighbors Jamia Mack, 10, Francis Stringer, Tamesha Williams, 11, Latangle Williams, 9, and Lakesha Mack, 11, in back.



Billy Bob Williams plays with son Billy Bob III, 9 months, and daughter Shawntika, 2½, at Marshall Williamson Park.

Geoffrey Biddulph, Owner Gets Deadline to Fix Apartments; Officials Encouraged by Effort Thus Far, MIAMI HERALD, March 12, 1989

Metro's housing inspectors have given the new owner of the Marshall Williamson Apartments in South Miami until May 12 to clean up a list of 220 violations at the dilapidated apartments.

Theresa Pickett, assistant compliance officer for the county's minimum housing office, said she is encouraged because new owner John Landers has made an effort to improve the apartments.

She said, however, that a February inspection by her office revealed that regular maintenance problems -- such as wall and ceiling deterioration -- continue to plague the buildings at 6580 SW 60th Ave. She gave Landers a two-month warning last week.

The apartments are named after Marshall Williamson, a leader of the black community in South Miami, who died in 1972. Black leaders say the buildings, cited with hundreds of code violations since 1977, are a symbol of official neglect of the area.

If Landers does not take care of the violations by May 12, he could face fines of $500 and/or 60 days in jail, Pickett said.

Landers said he is working diligently at improving the buildings, but said he has been frustrated by problems with some tenants. He said the sewer system backed up recently because somebody had put a tennis ball into the pipes.

"Some tenants tear a screen out, and then I put it back in, and they tear the screen out again," Landers said.

Landers said the majority of the tenants take care of their apartments. He said he has managed to fill several empty apartments with new tenants.

Landers bought the apartments Nov. 30, pledging to clean them up and treat the low-income tenants more fairly.

Articles on the Marshall Williamson Apartments

Marathon Investor May Buy Complex, The Miami Herald, Neighbors Section, April 12, 1990, at 3

By IAN KATZ
Herald Staff Writer

An out-of-town investor says he is close to buying the Marshall Williamson Apartments, a South Miami complex that has been cited for dozens of code violations.

Delton Leigh, who is part owner of a low-income complex in Marathon, where he lives, said he wants to improve the 44 one- and two-bedroom apartments and fill the approximately 10 vacancies.

"This is like buying an extremely mean-tempered horse for a low price," said Leigh, who also owns an office building in Marathon. "I'd clean it up. Whoever owns it doesn't have any choice."

Leigh, 50, said he is about two weeks away from buying the apartments for about $400,000 from John Landers, who bought the complex in November 1988.

Landers would not comment Tuesday, but said previously that he was becoming frustrated managing the apartments at 6580 SW 60th Ave. He said he had spent thousands of dollars on repairs, but it was difficult to improve the apartments because a small number of tenants caused trouble, throwing garbage into the courtyard and blocking up the sewer with shoes and tennis balls.

Last year, Dade County housing officers cited 220 violations, including sewer backup problems, dangerous hand railings, hazardous ceilings, litter, broken windows and doors and abandoned vehicles. Many of the violations were remedied, but an official at Dade's minimum housing office said Tuesday that several violations still stand.

Miami lawyer Phil Sassoon, who owned the apartments before Landers bought them, has talked with Leigh about the complex.

"He seems to have a genuine interest in it and seems straightforward," Sassoon said. "But what he plans to do with it is up to him."

"He sounded serious about wanting to purchase the place and making improvements in it," said South Miami City Manager Bill Hampton, who discussed the apartments with Leigh. "The city doesn't care who operates it as long as they keep it cleaned up, keep the crack users out and keep up the maintenance."

Leigh said he would have a partner in the purchase, Paul Owen Jr., a 65-year-old jewelry salesman from Kansas. He said many people have asked him why he would want to take over a troubled housing complex, but he sees opportunity.

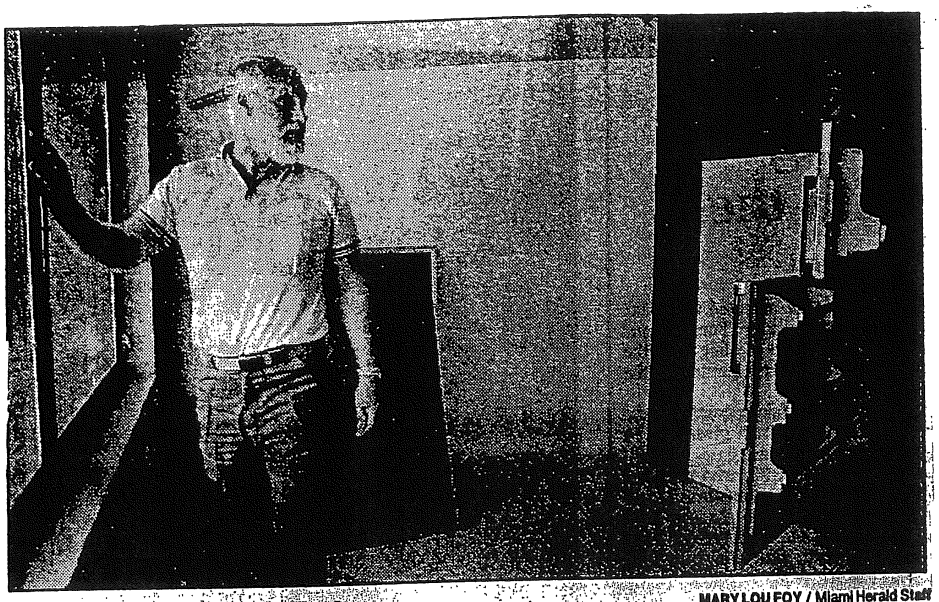
"I like this general area, South Florida, and I like South Miami. It's a wonderful little city," he said. "I think I can fill up the units and really make it work. But it will take a while. It won't happen right away."

Leigh said he would live in one of the apartments until the complex is "up to snuff."

Asked if he would object to living in an area known for its crime problems, he said, "The people there are nice people, for the most part. You've got a few stinkers, but you've got a few stinkers everywhere."

The apartments are named after one of South Miami's most celebrated men, Marshall Williamson. A revered black leader, Williamson is known as the person who donated land for a church and a school in South Miami. Williamson died in 1972.

The Miami Herald, Neighbors Section, May 17, 1990, at 12



MARY LOU FOY / Miami Herald Staff

MOVING IN: Delton Leigh says he'll move into the Marshall Williamson Apartments and fix them up.

New owner of apartments promises to clean them up

By NANCY KLINGENER
Herald Staff Writer

Delton Leigh's new apartment in South Miami has a hole in the bedroom ceiling, charred where a previous resident tried to start a fire. The linoleum floor is torn and stained. The kitchen sink is filthy.

Leigh, 50, is leaving a waterfront home in the Keys for this.

"We're going to take this bad penny and shine it up like a bright new penny," Leigh said. "Most opportunities come disguised as work."

Leigh, the part owner of a low-income apartment complex in Marathon, is putting the finishing touches this week on a $400,000 deal to buy the Marshall Williamson Apartments, 6580 SW 60th Ave.

The apartments, 40 units in two buildings, have been cited by the county for code violations for years. Garbage scattered about the complex and stopped-up plumbing have contributed to the tarnished image.

In one apartment this week, Leigh discovered two mats on the floor where uninvited residents were staying. In the bedroom, they left behind a crack pipe.

Although he would be the building's third owner in two years, Leigh said he will be different. He is going to live at the complex, at least for awhile.

"I can't ask anybody to live here if I'm not going to live here myself," he said. "If you're there living with the problem, you learn the people."

The county minimum housing office now has 175 code violations outstanding against the Marshall Williamson Apartments.

The county is working with Leigh on a consent agreement — a contract in which he would agree to clean up the violations in a certain amount of time.

That's an old story for this complex. The last owner, too, had agreed to clean up the apartments. But Grisel Rodriguez, code administrator for minimum housing, said she hopes this time will be different.

"He appears to be very motivated to make the repairs so he can get good tenants in there," Rodriguez said. "I'm hopeful Mr. Leigh will succeed where others have failed in the past."

South Miami City Manager Bill Hampton said Leigh will need tenants who can afford to pay the rent — now $60 a week for a one-bedroom apartment — if he's going to make it there.

"If the cash flow is not there, then how do you take this money and repair it and keep it up?" Hampton said.

Leigh knows that — and he knows the job won't be easy, or quick.

"I think it will take about two years to get a total turnaround of the physical plant and the right people," he said. "I'm not going to do this by myself. There's a lot of people who live here who are going to help clean this up."

GREEN THUMB: Stanley Walker plants flowers at the apartments.

Delton Leigh knew his work was cut out for him when he bought the Marshall Williamson Apartments. He's still hard at it.

OWNER'S TASK: BRINGING UP A 'PROBLEM CHILD'

BY NANCY KLINGENER
Herald Staff Writer
Photos by Raul Rubiera
Herald Staff Photographer

Delton Leigh tries to stop himself, but he keeps referring to the Marshall Williamson Apartments as a living being.

"This is a real problem child," he says, then hesitates. "Building, not child."

But he does the same thing again, when he talks about why he decided to take over - and take on - the South Miami apartment complex, which came complete with hundreds of code violations, crack users camping out in apartments and problem plumbing.

"If you're going to try and create the Pygmalion effect, you don't take someone who's pretty cool and sophisticated," said Leigh, who bought the apartments in June. "Your effort's not going to show."

Leigh's efforts already shows in subtle but significant ways. The courtyard is still dirt and cracked pavement, but now it's raked regularly. Some apartments are still boarded up, but there is active work to make them habitable. Plumbing still breaks down, but now it's fixed regularly.

The difference, tenants say, occurred because Leigh lives at the apartments with them. When the apartments stink from stopped-up sewage, it smells in his home, too. When he first moved into his one-bedroom unit, the floor was covered with broken linoleum, and stained with human feces.

SPRUCING UP: Apartment manager Gloria Jean Kinson sweeps up while kits hang out on the stairs. From bottom up at Vincent Lane, 9; Carlethia Lane, 4; Travis Lane; and Shawn Lane, 10

Unusual landlord

Now that apartment is a functional office with a rose-colored carpet and a six-foot sailfish on the wall. A bookcase in the corner holds Leigh's personal guides to life: *High Leverage Real Estate Investments, How to be Rich, Aesop's Fables, The Story of Philosophy,* two copies of *Muscle and Fitness* magazine.

They help describe the life of an unusual landlord.

Leigh, 50, was born in Kentucky and joined the U.S. Army out of high school. In civilian life, he tried to make it as a sculptor, and found the housing industry more to his liking. He made a living in Marathon developing a resort complex and rehabilitating public housing.

Five months ago, Leigh closed out his business in Monroe County and headed for Dade, looking for a project that was affordable - but with a lot of potential.

He found the Marshall Williamson Apartments, a run-down pair of buildings with 44 apartments, named after South Miami's most famous black activist.

The apartments, at 6850 S.W. 60th St., were built in 1955 by Leah and Harry Weider, who got a long-term lease on the land from Williamson. The Weiders owned the complex, which borders land still owned by the Williamson family, until 1969. A group of investors hidden behind a blind trust then bought the buildings. Lawyer Philip Sassoon acted as manager of the apartments.

Years of Deterioration

In 1977, the apartments started receiving scores of code violations from the county. Residents complained that the plumbing was unsanitary and the neighborhood unsafe.

"Apparently, at a certain point a decision was made not to reinvest in the apartments," said Bill Hampton,

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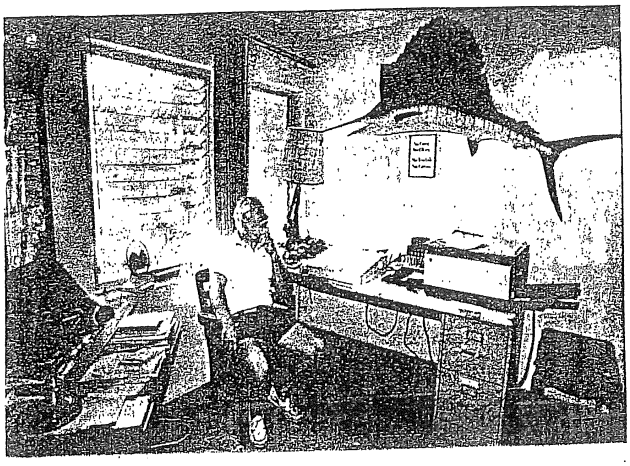


PUTTING IT ON THE LINE: 'I feel an enormous, enormous responsibility to these people, to the city, and to the people who hold the mortgages here to make this work,' says Delton Leigh, new owner of the Marshall Williamson Apartments. 'Not to mention my pride.'

EYE-OPENER: The Marshall Williamson Apartments are reflected in the sunglasses of Ernest Mathis, a 15-year resident of the complex. After years of neglect, the 44-unit, two-building complex is showing signs of recovery under the care of a new owner.

city manager of South Miami. "If you do that long enough, the holes in the ceiling caused by leaking roofs will get bigger. The railings on the outside will get looser and looser."

The buildings deteriorated so badly that when Hampton became city manager in 1987, he organized a task force with members from the state attorney's office, the county health and minimum housing departments, the South Miami police department and city code enforcers.

Gloria Jean Kinson, a 15-year resident and now a manager at the apartments, said it was hard to get responses from the owners during that time.

"You had to almost beg them to do something," Kinson said. "You had to call the inspectors, and the inspectors had to make them do it."

After Hampton threatened to close the apartments as a health hazard, Sassoon started responding to the requests for maintenance. In November 1988, he sold to Coral Gables real estate agent John Landers.

"John tried. He did make some improvements," Hampton said. "He tried and he didn't make it."

And then came Leigh

The code violations continued. Landers found that whenever he fixed a problem, another took its place. He fixed stopped-up plumbing only to find new problems, including tennis balls and sneakers being shoved down the old pipes.

When Leigh showed up, nobody in South Miami could quite believe the 50-year-old sculptor-turned-housing reclaimer with the little red sports car was going to buy the troubled complex. Then he announced he was going to move in.

"I looked at a lot of different apartment buildings. This place had a great deal of potential," Leigh said. "It's basically a nice neighborhood, basically nice people around here, basically a solid building."

The neighborhood was a major factor in his decision to buy the apartments, Leigh said. Surrounding the apartments are middle-class homes with trim lawns. Leigh walks around the neighborhood occasionally, looking at the neat homes. Then he heads back to Marshall Williamson.

"This thing can be brought up and made to fit into the average around here instead of being the anchor at the bottom," he said.

When he first bought the complex from Landers for about $400,000, Leigh figured it would take about two years to rehabilitate. He's budgeted about $87,000 for repair work. Right now, upkeep and upgrade on the apartments take most of his time. Leigh describes his daily schedule like this: "Get up at 9, respond to crises until midnight. Go to sleep."

Late rent, high maintenance

But two factors took him by surprise. First was the incredible amount of maintenance required just to stay even.

Leigh likens his progress on the project to swimming upstream in a rapid river. Progress is slow and hard, but it's there. A $100 fire extinguisher is stolen from its glass case, but it will be replaced. Fuses are daily expenses. So are screens. Slowly, the plywood boards are coming off apartments and the former crack addict crash pads are being rented to paying tenants.

The second factor Leigh didn't count on was the slowness of rent collection. He is owed about $20,000 in unpaid rent, and about $8,000 of that has accumulated since he bought the apartments. Several of the nonpaying tenants have moved out since Leigh moved in.

A one-bedroom unit rents for $240 a month, and all but seven are rented. Leigh said he gets potential tenants faster than he can get the apartments ready for them.

And the residents can now find their landlord any time they want to — even, as has happened, at 3 a.m. on Sunday.

"It's better now than it has been," said 14-year resident Paul Lumpkin, who once managed the apartments. He said Leigh is the best owner the building has had.

"He don't bug nobody. He don't bother nobody. He's a nice-going guy," Lumpkin said. "He'll listen to you if you've got a problem. That's all I can say about him."

Leigh, for his part, has come to see the apartments as a small village, with its own cycles and structure. He is invited into apartments when the residents make food, and he knows the children who wheel bikes around the courtyard in the afternoon.

"It's an enormous challenge, and I'm not sure that I'm going to succeed. I may go under, emotionally and financially, on this," Leigh said.

"I feel an enormous, enormous responsibility to these people, to the city, and to the people who hold the mortgages here to make this work," he said. "Not to mention my pride."

Articles on the Marshall Williamson Apartments

The Miami Herald, Neighbor's Section, Page 3, September 12, 1991

Scavengers hunt for loot at apartments

By ANTHONY FAIOLA
Herald Staff Writer

Scavengers are picking apart the almost-abandoned Marshall Williamson Apartments in South Miami.

With city demolition scheduled for Monday, individuals — some with the owner's permission, others without — have carted off aluminum window frames, copper electrical wiring and anything else they could swap for money.

"We've seen the results of scavenging and vandalism," said William Hampton, South Miami city manager. "The buildings look like they've gone through a few days in Beirut."

The three-building, 36-year-old complex was condemned by the city Aug. 14, after the South Miami Zoning Department declared it unfit for human habitation. Among the 29 code violations found on the site were periodic raw sewage back ups, exposed electrical wiring and rancid puddles of water that attracted hordes of mosquitoes.

What remains now after two weeks of salvage is a ravaged shell. And though most of the 43 tenants who occupied the building a month ago have found shelter elsewhere, a few remain in the complex on the 6500 block of Southwest 60th Avenue. Any tenants still in the apartments Monday will be physically removed.

"It seems like every time I get into some line for assistance, I'm either too late or too early," said Rosa Boswell, 32, who hopes to move into a Coconut Grove apartment before the deadline. "I don't even want to think about not being out of here by Monday. I just don't want to see people toting out my things onto the street so they can knock this place down."

The city will pay $25,800 to a company to demolish the complex Monday, then put a lien on the property for that amount, Hampton said.

For owner Delton Leigh, the former Florida Keys sculptor who bought the apartments for $400,000 a year ago, it will be one more expense he will probably never be able to pay.

To date, Leigh has been fined $210,000 for allowing the building to remain in disrepair. Leigh, who lived in the apartments himself for almost a year, says he simply has no more money.

"I think the fines are a way for the city to drive a nail in the coffin lid," said Leigh. "The city knows we don't even have the money to pay for the repairs."

THE MIAMI HERALD, Neighbors Section, Page 2, Col. 2, September 19, 1991

Troubled Apartments Are History

Crime, code problems had beset complex

By ANTHONY FAIOLA
Herald Staff Writer

Under the crushing blows of the bulldozer, the Marshall Williamson Apartments in South Miami fell Monday.

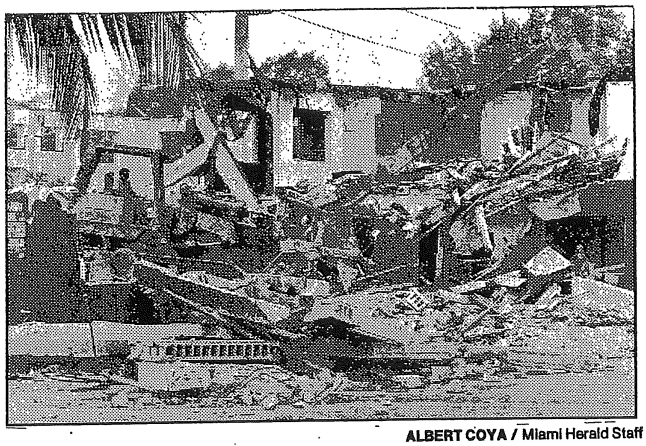
The 36-year-old apartments were condemned by the city a month ago for multiple code violations ranging from raw sewage backups to exposed electrical wiring. Neighbors said drug dealers also hung out around the units.

"I feel it's going to be a lot safer around here from now on," said the Rev. Rudolph Orjuna, assistant pastor of the Church of God and Christ across the street from Marshall Williamson. Orjuna, also chairman of the South Miami Code Enforcement Board, said his church had been robbed several times — with the culprits disappearing into the dark halls of the dilapidated apartments next door.

"I'm hoping that many of the bad elements who lived in the apartments will be gone from the neighborhood forever," he said.

The city had promised to remove any tenants or squatters occupying the 44-unit complex before demolition, and the only residents requiring removal Monday were three gray kittens who had made a home in an abandoned unit.

The last of the residents left the apartments at 9:15 p.m. Sunday, according to police. All previous residents of the three-building complex in the 6500 block of 60th Avenue either relocated on their own or with the help of county agencies.



ALBERT COYA / Miami Herald Staff

BULLDOZER REIGNS: The walls came tumbling down Monday at the Marshall Williamson Apartments in South Miami.

Watching the action Monday along with a crowd of locals, politicians and county officials was Delton Leigh, the apartments' owner.

"This is not one of the happiest moments of my life," said Leigh, who bought the apartments a year ago for $400,000. "But, you know, it's like being a boat owner. The best moments are the day you buy it and the day you get rid of it."

Leigh, who said his corporation ran out of money months ago, has been fined more than $240,000 in code violations from the city. South Miami will also place a lien on the property for $28,800 — the cost of demolition.

"I think the fines especially send a message to everyone who is not going to keep their properties up to code," said William Hampton, South Miami city manager. "The city is just not going to put up with it."

Alison Bell et al., Prohibiting Discrimination Against Renters Using Housing Vouchers Improves Results: Lessons from Cities and States that Have Enacted Source of Income Laws (Center on Budget and Policy Priorities Dec. 20, 2018)

The Housing Choice Voucher (HCV) program — the nation's largest rental housing program, which serves over 2.2 million households — is the quintessential public-private partnership. The federal government provides funds to state and local agencies to fill the gap between what families can afford to pay and local rents, and to administer the program.[2] But the program only works if private landlords are willing to accept the subsidies and rent to voucher holders. Federal law does not prevent landlords from rejecting all housing vouchers, with limited exceptions.[3] A growing number of states and localities have enacted laws, known as source of income protection laws, that can increase voucher acceptance. These laws prohibit discrimination based on income sources such as alimony and disability benefits, and frequently also prohibit discrimination against families that use housing vouchers to help pay their rent.[4] Yet only 1 in 3 voucher households are protected by non-discrimination laws.

Voucher non-discrimination laws appear to be associated with substantial reductions in the share of landlords that refuse to accept vouchers, a recent U.S. Department of Housing and Urban Development (HUD) study has found, consistent with earlier analyses. In addition, these laws may improve voucher holders' ability to successfully use their vouchers in higher-opportunity areas.

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[1] Becky Koepnick, formerly of Koepnick Consulting, has 15 years of experience working on affordable housing policy at the local and national levels.

[2] Center on Budget and Policy Priorities, "Policy Basics: The Housing Choice Voucher Program," updated May 3, 2017, http://www.cbpp.org/research/housing/policy-basics-the-housing-choice-voucher-program.

[3] Units funded under certain federally funded housing programs, such as the Low Income Housing Tax Credit, HUD's HOME block grant, and the National Housing Trust Fund, are prohibited from discriminating against voucher holders. See Poverty & Race Research Action Council, "Expanding Choice: Practical Strategies for Building a Successful Housing Mobility Program Appendix B: State, Local, and Federal Laws Barring Source-of Income Discrimination," September 14, 2018, pp. 92-95, http://www.prrac.org/pdf/AppendixB.pdf.

[4] Some jurisdictions have source of income protections that do not cover voucher holders. Four states have source of income laws that either specifically exclude housing vouchers or have been interpreted by final state court decisions to not cover vouchers (California, Delaware, Minnesota, and Wisconsin).

Although the research outcomes on voucher non-discrimination protections are encouraging, state and local laws could be more effective. Our interviews with voucher policy experts and practitioners at the national, state, and local levels identified recommendations for strengthening existing voucher non-discrimination laws and building support for such laws. Experts stressed that existing laws need adequate enforcement, and that policymakers are more likely to support new voucher non-discrimination laws if the proposals have broad-based support, including from landlords and housing agencies.

While there is currently no general *federal* voucher non-discrimination law, support for such a policy is likely to rise as state and local laws become more widespread. Enactment of a federal source of income law would ensure more consistent tenant protections, particularly in states that are unlikely to adopt one of their own.

Voucher Non-Discrimination Laws Improve Program's Effectiveness

Tenant-based rental assistance, created during the 1970s, was intended to be a less expensive, private-market-based alternative to government-run affordable housing programs, such as public housing, and has now grown to be the largest federal rental assistance program.[5] The HCV program has the added potential to deconcentrate poverty by letting families choose a unit in a broad set of neighborhoods without the locational constraints of place-based programs.

In practice, however, voucher holders find that their housing opportunities can be limited. They must find a landlord that is willing to rent to them, but landlords in most areas of the country are not required to accept vouchers. The program largely relies on willing private landlords that opt to work with housing agencies and voucher holders. If only a small share of rental units is potentially available to voucher holders, it can be an ongoing challenge for families to find a unit to rent, particularly in a low-poverty community.[6] Landlords' refusal to accept vouchers is likely a significant contributor to the fact that only 14 percent of families with children in the HCV program live in low-poverty neighborhoods (where fewer than 10 percent of residents have incomes below the poverty line).[7]

To address this challenge and make the voucher program work more effectively, 11 states, including Washington, D.C., and over 50 cities and counties have enacted laws that prohibit

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[5] Congress enacted the Section 8 Housing Certificate program in 1974. After experimentation with a more flexible "voucher" model beginning in the 1980s, Congress adopted the current Housing Choice Voucher program in 1998.

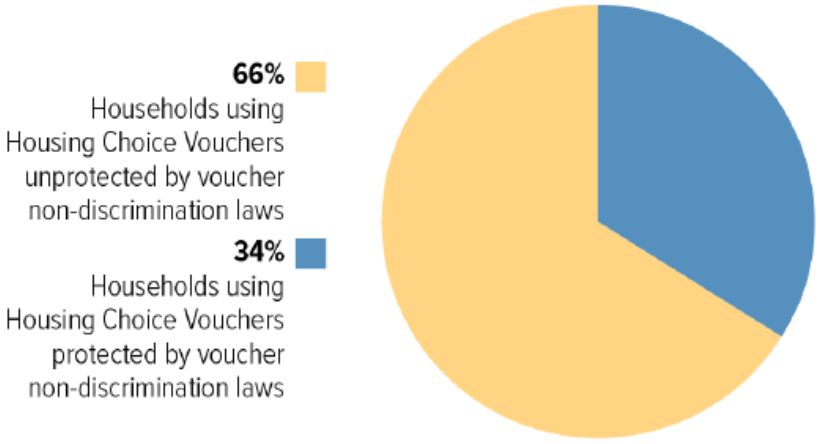
[6] Some research shows that voucher discrimination may be a proxy for racial discrimination, although a recent HUD study on landlord acceptance drew inconclusive results due to sample size. Mary Cunningham *et al.*, "A Pilot Study of Landlord Acceptance of Housing Choice Vouchers," U.S. Department of Housing and Urban Development, September 2018, https://www.huduser.gov/portal//portal/sites/default/files/pdf/Landlord-Acceptance-of-Housing-Choice-Vouchers.pdf, and J. Rosie Tighe, Megan E. Hatch, and Joseph Mead, "Source of Income Discrimination and Fair Housing Policy," *Journal of Planning Literature*, 2017.

[7] Barbara Sard *et al.*, "Federal Policy Changes Can Help More Families with Housing Vouchers Live in Higher-Opportunity Areas," Center on Budget and Policy Priorities, September 4, 2018, https://www.cbpp.org/research/housing/federal-policy-changes-can-help-more-families-with-housing-vouchers-live-in-higher.

landlords from refusing to rent to voucher holders solely because of their source of income (often called SOI laws). As Figure 1 shows, we estimate that only about one-third of families with vouchers (34 percent) live in jurisdictions with voucher non-discrimination protections, while two-thirds of voucher holders lack such protection. Figure 2 illustrates the geographic reach of these laws.[8]

FIGURE 1

Non-Discrimination Laws Cover Only 1 in 3 Households Using Housing Vouchers



Source: CBPP analysis of anti-discrimination laws in Poverty & Race Research Action Council, "Expanding Choice: Practical Strategies for Building a Successful Housing Mobility Program, Appendix B: State, Local, and Federal Laws Barring Source-of-Income Discrimination," September 14, 2018. Data on vouchers in use from Department of Housing and Urban Development 2017 Picture of Subsidized Households.

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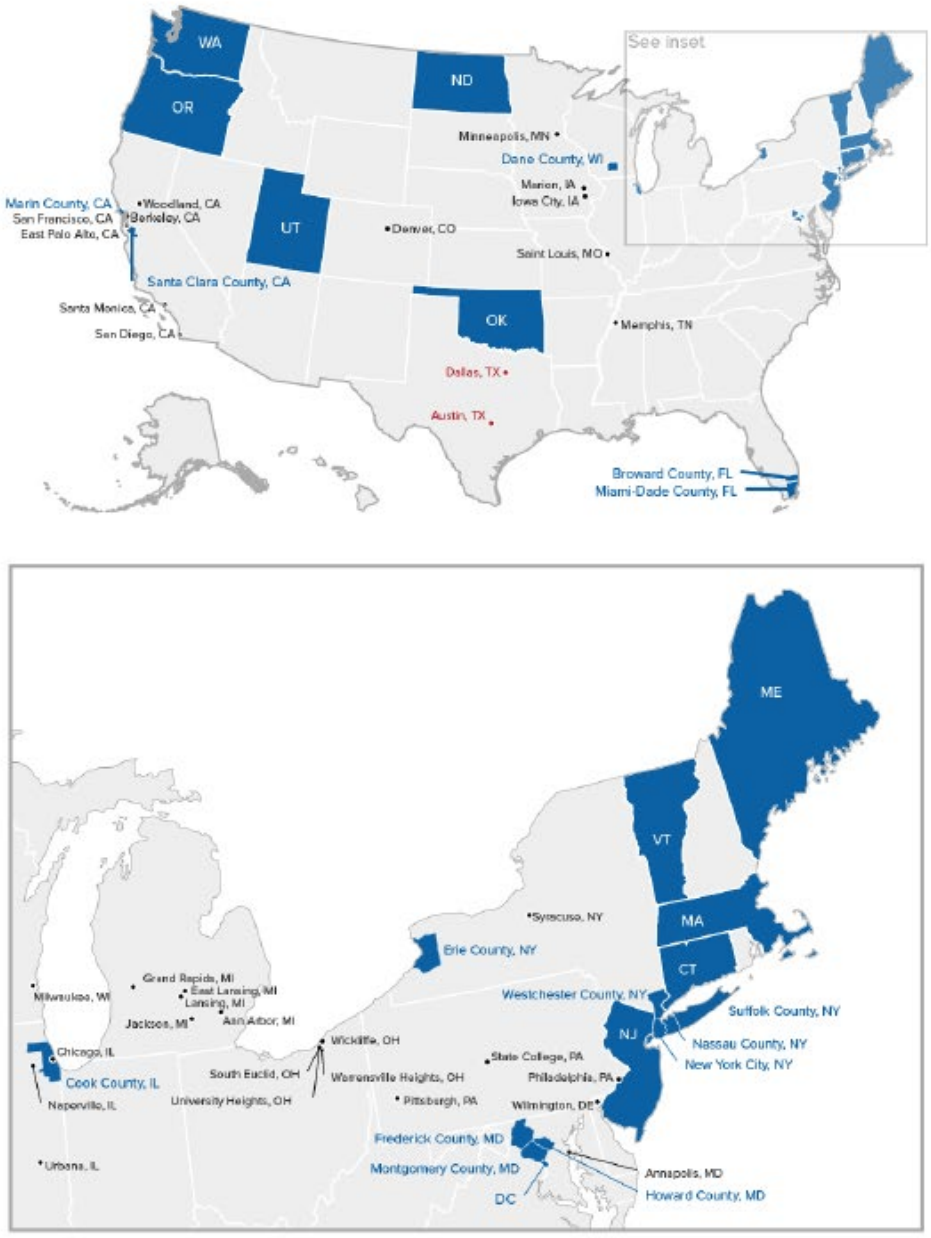
[8] See our interactive graphic for additional data on jurisdictions with voucher non-discrimination protections, including the number of voucher households they cover, at https://www.cbpp.org/research/housing/prohibiting-discrimination-against-renters-using-housing-vouchers-improves-results#hous9-12-18.

FIGURE 2

Laws Prohibiting Discrimination Against Voucher Households



Source: CBPP analysis of anti-discrimination laws in Poverty & Race Research Action Council, "Expanding Choice: Practical Strategies for Building a Successful Housing Mobility Program, Appendix B: State, Local, and Federal Laws Barring Source-of-Income Discrimination," September 14, 2018. Data on vouchers in use from Department of Housing and Urban Development 2017 Picture of Subsidized Households.

Massachusetts enacted the first voucher non-discrimination law in 1971 (as part of a general SOI law).[9] Soon after, five more jurisdictions enacted SOI laws, followed by an additional 20 between 1980 and 2000. SOI laws have surged since 2001, with 50 jurisdictions adding them. Most but not all of these laws include protections for families using vouchers to help pay their rent.[10] (See Appendix A for a list of jurisdictions with current SOI laws that protect voucher holders and Appendix B for all jurisdictions that have ever adopted voucher non-discrimination laws and their date of enactment.)[11] Supported by research and local experiences, momentum for SOI laws appears to be building to help voucher holders access more housing throughout their rental markets. New research from HUD, discussed below, will likely accelerate this trend.

Efforts on a national level to adopt source of income protections have not gained traction in past years.[12] Last year, the American Bar Association adopted a resolution that "urges federal, state, local, tribal, and territorial governments to enact legislation prohibiting discrimination in housing on the basis of lawful source of income."[13] This resolution may help persuade policymakers and also can guide bill drafting. For example, it includes a definition of "lawful sources of income" that specifically includes voucher holders. Although no current federal laws generally prohibit landlords from discriminating against families that want to use a voucher to help pay the rent, multiple bills recently have been introduced in Congress that would provide protections to all voucher holders.[14]

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[9] Massachusetts amended its law in 1989 to strengthen the voucher non-discrimination protections after a court ruling limited the scope of the original law.

[10] Often these general laws are interpreted to apply to housing vouchers, but courts have rejected this argument in several cases. The absence of state-level protection in most states, as well as the variation in language across statutes, can minimize the laws' effectiveness. Tighe, Hatch, and Mead, 2017.

[11] More jurisdictions have adopted source of income laws but are not included in these counts because state or county-level laws superseded them. See Appendix B.

[12] See, e.g., Landlord Accountability Act of 2017 (H.R. 202), introduced by Rep. Velazquez, https://www.congress.gov/bill/115th-congress/house-bill/202 and Housing Opportunities Made Equal (HOME) Act of 2013 (S. 1242), introduced by Senators Brown, Merkley, Gillibrand, Coons, Harkin, Murray, Blumenthal, Whitehouse, and Boxer, https://www.congress.gov/bill/113th-congress/senate-bill/1242.

[13] American Bar Association, "Resolution, August 14-15, 2017."

[14] Fair Housing Improvement Act of 2018 (S. 3612), introduced by Senators Hatch and Kaine, https://www.congress.gov/bill/115th-congress/senate-bill/3612, American Housing and Economic Mobility Act (S. 3503), introduced by Senator Warren, https://www.congress.gov/bill/115th-congress/senate-bill/3503, and a companion bill (H.R. 7262) introduced in the House by Reps. Richmond, Cummings, Lee, and Moore https://www.congress.gov/bill/115th-congress/house-bill/7262

Fla. Stat. ch. 689. Conveyances of Land and Declarations of Trust

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689.19 Variances of names in recorded instruments.
689.20 Limitation on use of word "minerals."
689.225 Statutory rule against perpetuities.
689.25 Failure to disclose homicide, suicide, deaths, or diagnosis of HIV or AIDS infection in an occupant of real property.
689.261 Sale of residential property; disclosure of ad valorem taxes to prospective purchaser.
689.27 Termination by servicemember of agreement to purchase real property.
689.28 Prohibition against transfer fee covenants.
689.29 Disclosure of subsurface rights to prospective purchaser.
689.301 Disclosure of known defects in sanitary sewer laterals to prospective purchaser.

689.01 How real estate conveyed.—

(1) No estate or interest of freehold, or for a term of more than 1 year, or any uncertain interest of, in, or out of any messuages, lands, tenements, or hereditaments shall be created, made, granted, transferred, or released in any manner other than by instrument in writing, signed in the presence of two subscribing witnesses by the party creating, making, granting, conveying, transferring, or releasing such estate, interest, or term of more than 1 year, or by the party's lawfully authorized agent, unless by will and testament, or other testamentary appointment, duly made according to law; and no estate or interest, either of freehold, or of term of more than 1 year, or any uncertain interest of, in, to, or out of any messuages, lands, tenements, or hereditaments, shall be assigned or surrendered unless it be by instrument signed in the presence of two

subscribing witnesses by the party so assigning or surrendering, or by the party's lawfully authorized agent, or by the act and operation of law; provided, however, that no subscribing witnesses shall be required for a lease of real property or any such instrument pertaining to a lease of real property. No seal shall be necessary to give validity to any instrument executed in conformity with this section. Corporations may execute any and all conveyances in accordance with the provisions of this section or ss. 692.01 and 692.02.

(2) For purposes of this chapter:

(a) Any requirement that an instrument be signed in the presence of two subscribing witnesses may be satisfied by witnesses being present and electronically signing by means of audio-video communication technology, as defined in s. 117.201.

(b) The act of witnessing an electronic signature is satisfied if a witness is in the physical presence of the principal or present through audio-video communication technology at the time the principal affixes his or her electronic signature and the witness hears the principal make a statement acknowledging that the principal has signed the electronic record.

(c) The terms used in this subsection have the same meanings as the terms defined in s. 117.201.

(3) All acts of witnessing made or taken in the manner described in subsection (2) are validated and, upon recording, may not be denied to have provided constructive notice based on any alleged failure to have strictly complied with this section or the laws governing notarization of instruments, including online notarization. This subsection does not preclude a challenge to the validity or enforceability of an instrument or electronic record based upon fraud, forgery, impersonation, duress, incapacity, undue influence, minority, illegality, unconscionability, or any other basis not related to the act of witnessing.

History.—s. 1, Nov. 15, 1828; RS 1950; GS 2448; RGS 3787; CGL 5660; s. 4, ch. 20954, 1941; s. 751, ch. 97-102; s. 2, ch. 2008-35; s. 21, ch. 2019-71; s. 1, ch. 2020-102.

689.02 Form of warranty deed prescribed.—

(1) Warranty deeds of conveyance to land may be in the following form, viz.:

"This indenture, made this day of A.D. , between , of the County of in the State of , party of the first part, and , of the County of , in the State of , party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of dollars, to her or him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained and sold to the said party of the second part, her or his heirs and assigns forever, the following described land, to wit:

And the said party of the first part does hereby fully warrant the title to said land, and will defend the same against the lawful claims of all persons whomsoever."

(2) The form for warranty deeds of conveyance to land shall include a blank space for the property appraiser's parcel identification number describing the property conveyed, which number, if available, shall be entered on the deed before it is presented for recording. The failure to include such blank space or the parcel identification number, or the inclusion of an incorrect parcel identification number, does not affect the validity of the conveyance or the recordability of the deed. Such parcel identification number is not a part of the legal description of the property otherwise set forth in the deed and may not be used as a substitute for the legal description of the property being conveyed.

History.—s. 1, ch. 4038, 1891; GS 2449; RGS 3788; CGL 5661; s. 1, ch. 87-66; s. 17, ch. 88-176; s. 60, ch. 89-356; s. 752, ch. 97-102; s. 1, ch. 2013-241.

689.025 Form of quitclaim deed prescribed.—A quitclaim deed of conveyance to real property or an interest therein must:

(1) Be in substantially the following form:

This Quitclaim Deed, executed this (date) day of (month, year) , by first party, Grantor (name) , whose post office address is (address) , to second party, Grantee (name) , whose post office address is (address) .

Witnesseth, that the said first party, for the sum of $ (amount) , and other good and valuable consideration paid by the second party, the receipt whereof is hereby acknowledged, does hereby remise, release, and quitclaim unto the said second party forever, all the right, title, interest, claim, and demand which the said first party has in and to the following described parcel of land, and all improvements and appurtenances thereto, in (county) , Florida:

(Legal description)

(2) Include the legal description of the real property the instrument purports to convey, or in which the instrument purports to convey an interest, which description must be legibly printed, typewritten, or stamped thereon.

(3) Include a blank space for the parcel identification number assigned to the real property the instrument purports to convey, or in which the instrument purports to convey an interest, which number, if available, must be entered on the deed before it is presented for recording. The failure to include such blank space or the parcel identification number does not affect the validity of the conveyance or the recordability of the deed. Such parcel identification number is not a part of the legal description of the property otherwise set forth in the instrument and may not be used as a substitute for the legal description required by this section.

History.—s. 4, ch. 2023-238.

689.03 Effect of such deed.—A conveyance executed substantially in the foregoing form shall be held to be a warranty deed with full common-law covenants, and shall just as effectually bind the grantor, and the grantor's heirs, as if said covenants were specifically set out therein. And this form of conveyance when signed by a married woman shall be held to convey whatever interest in the property conveyed which she may possess.

History.—s. 2, ch. 4038, 1891; GS 2450; RGS 3789; CGL 5662; s. 5, ch. 20954, 1941; s. 753, ch. 97-102.

689.04 How executed.—Such deeds shall be executed and acknowledged as is now or may hereafter be provided by the law regulating conveyances of realty by deed.

History.—s. 3, ch. 4038, 1891; GS 2451; RGS 3790; CGL 5663.

689.041 Curative procedure for scrivener's errors in deeds.—

(1) As used in this section, the term:

(a) "Erroneous deed" means any deed, other than a quitclaim deed, which contains a scrivener's error.

(b) "Intended real property" means the real property vested in the grantor and intended to be conveyed by the grantor in the erroneous deed.

(c) "Scrivener's error" means a single error or omission in the legal description of the intended real property in no more than one of the following categories:

1. An error or omission in no more than one of the lot or block identifications of a recorded platted lot; however, the transposition of the lot and block identifications is considered one error for the purposes of this subparagraph;

2. An error or omission in no more than one of the unit, building, or phase identifications of a condominium or cooperative unit; or

3. An error or omission in no more than one directional designation or numerical fraction of a tract of land that is described as a fractional portion of a section, township, or range; however, an error or omission in the directional description and numerical fraction of the same call is considered one error for the purposes of this subparagraph.

The term "scrivener's error" does not include any error in a document that contains multiple errors.

(2) A deed that contains a scrivener's error conveys title to the intended real property as if there had been no scrivener's error, and likewise, each subsequent erroneous deed containing the identical scrivener's error conveys title to the intended real property as if there had been no such error if all of the following apply:

(a) Record title to the intended real property was held by the grantor of the first erroneous deed at the time the first erroneous deed was executed.

(b) Within the 5 years before the record date of the erroneous deed, the grantor of any erroneous deed did not hold title to any other real property in the same subdivision, condominium, or cooperative development or in the same section, township, and range, described in the erroneous deed.

(c) The intended real property is not described exclusively by a metes and bounds legal description.

(d) A curative notice is recorded in the official records of the county in which the intended real property is located which evidences the intended real property to be conveyed by the grantor.

(3) A curative notice must be in substantially the following form:

Curative Notice, Per Sec. 689.041, F.S.
Scrivener's Error in Legal Description

The undersigned does hereby swear and affirm:

1. The deed which transferred title from (Insert Name) to (Insert Name) on (Date) and recorded on (Record Date) in O.R. Book , Page , and/or Instrument No. , of the official records of (Name of County) , Florida, (hereinafter referred to as "first erroneous deed") contained the following erroneous legal description:

(Insert Erroneous Legal Description)

2. The deed transferring title from (Insert Name) to (Insert Name) and recorded on (Record Date) in O.R. Book , Page , and/or Instrument No. , of the official records of (Name of County) , Florida, contains the same erroneous legal description described in the first erroneous deed.

(Insert and repeat paragraph 2. as necessary to include each subsequent erroneous deed in the chain of title containing the same erroneous legal description)

3. I have examined the official records of the county in which the intended real property is located and have determined that the deed dated (Date) , and recorded on (Record Date) in O.R. Book , Page , and/or Instrument No. , official records of (Name of County) , Florida, establishes that record title to the intended real property was held by the grantor of the first erroneous deed at the time the first erroneous deed was executed.

4. I have examined or have had someone else examine the official records of (Name of County) , Florida, and certify that:

a. Record title to the intended real property was held by the grantor of the first erroneous deed, (Insert Name) , at the time that deed was executed.

b. The grantor of the first erroneous deed and the grantors of any subsequent er-

roneous deeds listed above did not hold record title to any property other than the intended real property in either the same subdivision, condominium, or cooperative or the same section, township, and range, if described in this manner, at any time within the 5 years before the date that the erroneous deed was executed.

c. The intended real property is not described by a metes and bounds legal description.

5. This notice is made to establish that the real property described as (insert legal description of the intended real property) (hereinafter referred to as the "intended real property") was the real property that was intended to be conveyed in the first erroneous deed and all subsequent erroneous deeds.

(Signature)

(Printed Name)

Sworn to (or affirmed) and subscribed before me this day of , (year) , by (name of person making statement) .

(Signature of Notary Public - State of Florida)

(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known OR Produced Identification

Type of Identification Produced

(4) The clerk of the circuit court where the intended real property is located shall accept and record curative notices in the form described in subsection (3) as evidence of the intent of the grantor in the erroneous deed to convey the intended real property to the grantee in the erroneous deed.

(5) A curative notice recorded pursuant to this section operates as a correction of the first erroneous deed and all subsequent erroneous deeds containing the same scrivener's error described in the curative notice and releases any cloud or encumbrance that any of the erroneous deeds may have created as to any property other than the intended real property. The correction relates back to the record date of the first erroneous deed.

(6) The remedies under this section are not exclusive and do not abrogate any right or remedy under the laws of this state other than this section.

History.—s. 1, ch. 2020-33.

689.045 Conveyances to or by partnership.—

(1) Any estate in real property may be acquired in the name of a limited partnership. Title so acquired must be conveyed or encumbered in the partnership name. Unless otherwise provided in the certificate of limited partnership, a conveyance or encumbrance of real property held in the partnership name, and any other instrument affecting title to real property in which the partnership has an interest, must be executed in the partnership name by one of the general partners.

(2) Every conveyance to a limited partnership in its name recorded before January 1, 1972, as required by law while the limited partnership was in existence is validated and is deemed to convey the title to the real property described in the conveyance to the partnership named as grantee.

(3) When title to real property is held in the name of a limited partnership or a general partnership, one of the general partners may execute and record, in the public records of the county in which such partnership's real property is located, an affidavit stating the names of the general partners then existing and the authority of any general partner to execute a conveyance, encumbrance, or other instrument affecting such partnership's real property. The affidavit shall be conclusive as to the facts therein stated as to purchasers without notice.

History.—s. 2, ch. 71-9; s. 71, ch. 86-263; s. 23, ch. 95-242.

Note.—Former s. 620.081.

689.05 How declarations of trust proved.—All declarations and creations of trust and confidence of or in any messuages, lands, tenements or hereditaments shall be manifested and proved by some writing, signed by the party authorized by law to declare or create such trust or confidence, or by the party's last will and testament, or else they shall be utterly void and of none effect; provided, always, that where any conveyance shall be made of any lands, messuages or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by the act and operation of law, then, and in every such case, such trust or confidence shall be of the like force and effect as the same would have been if this section had not been made, anything herein contained to the contrary in anywise notwithstanding.

History.—s. 2, Nov. 15, 1828; RS 1951; GS 2452; RGS 3791; CGL 5664; s. 754, ch. 97-102.

689.06 How trust estate conveyed.—All grants, conveyances, or assignments of trust or confidence of or in any lands, tenements, or hereditaments, or of any estate or interest therein, shall be by deed signed and delivered, in the presence of two subscribing witnesses, by the party granting, conveying, or assigning, or by the party's attorney or agent thereunto lawfully authorized, or by last will and testament duly made and executed, or else the same shall be void and of no effect.

History.—s. 3, Nov. 15, 1828; RS 1952; GS 2453; RGS 3792; CGL 5665; s. 1, ch. 80-219; s. 755, ch. 97-102.

689.07 "Trustee" or "as trustee" added to name of grantee, transferee, assignee, or mortgagee transfers interest or creates lien as if additional word or words not used.—

(1) Every deed or conveyance of real estate heretofore or hereafter made or executed in which the words "trustee" or "as trustee" are added to the name of the grantee, and in which no beneficiaries are named, the nature and purposes of the trust, if any, are not set forth, and the trust is not identified by title or date, shall grant and is hereby declared to have granted a fee simple estate with full power and authority in and to the grantee in such deed to sell, convey, and grant and encumber both the legal and beneficial interest in the real estate conveyed, unless a contrary intention shall appear in the deed or conveyance; provided, that there shall not appear of record among the public records of the county in which the real property is situate at the time of recording of such deed or conveyance, a declaration of trust by the grantee so described declaring the purposes of such trust, if any, declaring that the real estate is held other than for the benefit of the grantee.

(2) Every instrument heretofore or hereafter made or executed transferring or assigning an interest in real property in which the words "trustee" or "as trustee" are added to the name of the transferee or assignee, and in which no beneficiaries are named, the nature and purposes of the trust, if any, are not set forth, and the trust is not identified by title or date, shall transfer and assign, and is hereby declared to have transferred and assigned, the interest of the transferor or assign or to the transferee or assignee with full power and authority to transfer, assign, and encumber such interest, unless a contrary intention shall appear in the instrument; provided that there shall not appear of record among the public records of the county in which the real property is situate at the time of the recording of such instrument, a declaration of trust by the assignee or transferee so described declaring the purposes of such trust, if any, or declaring that the interest in real property is held other than for the benefit of the transferee or assignee.

(3) Every mortgage of any interest in real estate or assignment thereof heretofore

or hereafter made or executed in which the words "trustee" or "as trustee" are added to the name of the mortgagee or assignee, and in which no beneficiaries are named, the nature and purposes of the trust, if any, are not set forth, and the trust is not identified by title or date, shall vest and is hereby declared to have vested full rights of ownership to such mortgage or assignment and the lien created thereby with full power in such mortgagee or assignee to assign, hypothecate, release, satisfy, or foreclose such mortgage unless a contrary intention shall appear in the mortgage or assignment; provided that there shall not appear of record among the public records of the county in which the property constituting security is situate at the time of recording of such mortgage or assignment, a declaration of trust by such mortgagee or assignee declaring the purposes of such trust, if any, or declaring that such mortgage is held other than for the benefit of the mortgagee or assignee.

(4) Nothing herein contained shall prevent any person from causing any declaration of trust to be recorded before or after the recordation of the instrument evidencing title or ownership of property in a trustee; nor shall this section be construed as preventing any beneficiary under an unrecorded declaration of trust from enforcing the terms thereof against the trustee; provided, however, that any grantee, transferee, assignee, or mortgagee, or person obtaining a release or satisfaction of mortgage from such trustee for value prior to the placing of record of such declaration of trust among the public records of the county in which such real property is situate, shall take such interest or hold such previously mortgaged property free and clear of the claims of the beneficiaries of such declaration of trust and of anyone claiming by, through or under such beneficiaries, and such person need not see to the application of funds furnished to obtain such transfer of interest in property or assignment or release or satisfaction of mortgage thereon.

(5) In all cases in which tangible personal property is or has been sold, transferred, or mortgaged in a transaction in conjunction with and subordinate to the transfer or mortgage of real property, and the personal property so transferred or mortgaged is physically located on and used in conjunction with such real property, the prior provisions of this section are applicable to the transfer or mortgage of such personal property, and, where the prior provisions of this section in fact apply to a transfer or mortgage of personal property, then any transferee or mortgagee of such tangible personal property shall take such personal property free and clear of the claims of the beneficiaries under such declaration of trust (if any), and of the claims of anyone claiming by, through, or under such beneficiaries, and the release or satisfaction of a mortgage on such personal property by such trustee shall release or satisfy such personal property from the claims of the beneficiaries under such declaration of trust, if any, and from the claims of anyone claiming by, through, or under such beneficiaries.

History.—s. 1, ch. 6925, 1915; s. 10, ch. 7838, 1919; RGS 3793; CGL 5666; s. 1, ch. 59-251; s. 1, ch. 2004-19.

689.071 Florida Land Trust Act.—

(1) SHORT TITLE.—This section may be cited as the "Florida Land Trust Act."

(2) DEFINITIONS.—As used in this section, the term:

(a) "Beneficial interest" means any interest, vested or contingent and regardless of how small or minimal such interest may be, in a land trust which is held by a beneficiary.

(b) "Beneficiary" means any person or entity having a beneficial interest in a land trust. A trustee may be a beneficiary of the

land trust for which such trustee serves as trustee.

(c) "Land trust" means any express written agreement or arrangement by which a use, confidence, or trust is declared of any land, or of any charge upon land, under which the title to real property, including, but not limited to, a leasehold or mortgagee interest, is vested in a trustee by a recorded instrument that confers on the trustee the power and authority prescribed in s. 689.073(1) and under which the trustee has no duties other than the following:

1. The duty to convey, sell, lease, mortgage, or deal with the trust property, or to exercise such other powers concerning the trust property as may be provided in the recorded instrument, in each case as directed by the beneficiaries or by the holder of the power of direction;

2. The duty to sell or dispose of the trust property at the termination of the trust;

3. The duty to perform ministerial and administrative functions delegated to the trustee in the trust agreement or by the beneficiaries or the holder of the power of direction; or

4. The duties required of a trustee under chapter 721, if the trust is a timeshare estate trust complying with s. 721.08(2)(c)4. or a vacation club trust complying with s. 721.53(1)(e).

However, the duties of the trustee of a land trust created before June 28, 2013, may exceed the limited duties listed in this paragraph to the extent authorized in subsection (12).

(d) "Power of direction" means the authority of a person, as provided in the trust agreement, to direct the trustee of a land trust to convey property or interests, execute a lease or mortgage, distribute proceeds of a sale or financing, and execute documents incidental to the administration of a land trust.

(e) "Recorded instrument" has the same meaning as provided in s. 689.073(1).

(f) "Trust agreement" means the written agreement governing a land trust or other trust, including any amendments.

(g) "Trust property" means any interest in real property, including, but not limited to, a leasehold or mortgagee interest, conveyed by a recorded instrument to a trustee of a land trust or other trust.

(h) "Trustee" means the person designated in a recorded instrument or trust agreement to hold title to the trust property of a land trust or other trust.

(3) OWNERSHIP VESTS IN TRUSTEE.—Every recorded instrument transferring any interest in real property to the trustee of a land trust and conferring upon the trustee the power and authority prescribed in s. 689.073(1), whether or not reference is made in the recorded instrument to the beneficiaries of such land trust or to the trust agreement or any separate collateral unrecorded declarations or agreements, is effective to vest, and is hereby declared to have vested, in such trustee both legal and equitable title, and full rights of ownership, over the trust property or interest therein, with full power and authority as granted and provided in the recorded instrument to deal in and with the trust property or interest therein or any part thereof. The recorded instrument does not itself create an entity, regardless of whether the relationship among the beneficiaries and the trustee is deemed to be an entity under other applicable law.

(4) STATUTE OF USES INAPPLICABLE.—Section 689.09 and the statute of uses do not execute a land trust or vest the trust property in the beneficiary or beneficiaries of the land trust, notwithstanding any lack of duties on the part of the trustee or the otherwise passive nature of the land trust.

(5) DOCTRINE OF MERGER INAPPLICABLE.—The doctrine of merger does

not extinguish a land trust or vest the trust property in the beneficiary or beneficiaries of the land trust, regardless of whether the trustee is the sole beneficiary of the land trust.

(6) PERSONAL PROPERTY.—In all cases in which the recorded instrument or the trust agreement, as hereinabove provided, contains a provision defining and declaring the interests of beneficiaries of a land trust to be personal property only, such provision is controlling for all purposes when such determination becomes an issue under the laws or in the courts of this state. If no such personal property designation appears in the recorded instrument or in the trust agreement, the interests of the land trust beneficiaries are real property.

(7) TRUSTEE LIABILITY.—In addition to any other limitation on personal liability existing pursuant to statute or otherwise, the provisions of ss. 736.08125 and 736.1013 apply to the trustee of a land trust created pursuant to this section.

(8) LAND TRUST BENEFICIARIES.—

(a) Except as provided in this section, the beneficiaries of a land trust are not liable, solely by being beneficiaries, under a judgment, decree, or order of court or in any other manner for a debt, obligation, or liability of the land trust. Any beneficiary acting under the trust agreement of a land trust is not liable to the land trust's trustee or to any other beneficiary for the beneficiary's good faith reliance on the provisions of the trust agreement. A beneficiary's duties and liabilities under a land trust may be expanded or restricted in a trust agreement or beneficiary agreement.

(b)1. If provided in the recorded instrument, in the trust agreement, or in a beneficiary agreement:

a. A particular beneficiary may own the beneficial interest in a particular portion or parcel of the trust property of a land trust;

b. A particular person may be the holder of the power of direction with respect to the trustee's actions concerning a particular portion or parcel of the trust property of a land trust; and

c. The beneficiaries may own specified proportions or percentages of the beneficial interest in the trust property or in particular portions or parcels of the trust property of a land trust.

2. Multiple beneficiaries may own a beneficial interest in a land trust as tenants in common, joint tenants with right of survivorship, or tenants by the entireties.

(c) If a beneficial interest in a land trust is determined to be personal property as provided in subsection (6), chapter 679 applies to the perfection of any security interest in that beneficial interest. If a beneficial interest in a land trust is determined to be real property as provided in subsection (6), then to perfect a lien or security interest against that beneficial interest, the mortgage, deed of trust, security agreement, or other similar security document must be recorded in the public records of the county that is specified for such security documents in the recorded instrument or in a declaration of trust or memorandum of such declaration of trust recorded in the public records of the same county as the recorded instrument. If no county is so specified for recording such security documents, the proper county for recording such a security document against a beneficiary's interest in any trust property is the county where the trust property is located. The perfection of a lien or security interest in a beneficial interest in a land trust does not affect, attach to, or encumber the legal or equitable title of the trustee in the trust property and does not impair or diminish the authority of the trustee under the recorded instrument, and parties dealing with the trustee are not required to inquire into the terms of the unre-

corded trust agreement or any lien or security interest against a beneficial interest in the land trust.

(d) The trustee's legal and equitable title to the trust property of a land trust is separate and distinct from the beneficial interest of a beneficiary in the land trust and in the trust property. A lien, judgment, mortgage, security interest, or other encumbrance attaching to the trustee's legal and equitable title to the trust property of a land trust does not attach to the beneficial interest of any beneficiary; and any lien, judgment, mortgage, security interest, or other encumbrance against a beneficiary or beneficial interest does not attach to the legal or equitable title of the trustee to the trust property held under a land trust, unless the lien, judgment, mortgage, security interest, or other encumbrance by its terms or by operation of other law attaches to both the interest of the trustee and the interest of such beneficiary.

(e) Any subsequent document appearing of record in which a beneficiary of a land trust transfers or encumbers any beneficial interest in the land trust does not transfer or encumber the legal or equitable title of the trustee to the trust property and does not diminish or impair the authority of the trustee under the terms of the recorded instrument. Parties dealing with the trustee of a land trust are not required to inquire into the terms of the unrecorded trust agreement.

(f) The trust agreement for a land trust may provide that one or more persons have the power to direct the trustee to convey property or interests, execute a mortgage, distribute proceeds of a sale or financing, and execute documents incidental to administration of the land trust. The power of direction, unless provided otherwise in the trust agreement of the land trust, is conferred upon the holders of the power for the use and benefit of all holders of any beneficial interest in the land trust. In the absence of a provision in the trust agreement of a land trust to the contrary, the power of direction shall be in accordance with the percentage of individual ownership. In exercising the power of direction, the holders of the power of direction are presumed to act in a fiduciary capacity for the benefit of all holders of any beneficial interest in the land trust, unless otherwise provided in the trust agreement. A beneficial interest in a land trust is indefeasible, and the power of direction may not be exercised so as to alter, amend, revoke, terminate, defeat, or otherwise affect or change the enjoyment of any beneficial interest in a land trust.

(g) A land trust does not fail, and any use relating to the trust property may not be defeated, because beneficiaries are not specified by name in the recorded instrument to the trustee or because duties are not imposed upon the trustee. The power conferred by any recorded instrument on a trustee of a land trust to sell, lease, encumber, or otherwise dispose of property described in the recorded instrument is effective, and a person dealing with the trustee of a land trust is not required to inquire any further into the right of the trustee to act or the disposition of any proceeds.

(h) The principal residence of a beneficiary shall be entitled to the homestead tax exemption even if the homestead is held by a trustee in a land trust, provided the beneficiary qualifies for the homestead exemption under chapter 196.

(i) In a foreclosure against trust property or other litigation affecting the title to trust property of a land trust, the appointment of a guardian ad litem is not necessary to represent the interest of any beneficiary.

(9) SUCCESSOR TRUSTEE.—

(a) If the recorded instrument and the unrecorded trust agreement are silent as to the appointment of a successor trustee of a

land trust in the event of the death, incapacity, resignation, or termination due to dissolution of a trustee or if a trustee is unable to serve as trustee of a land trust, one or more persons having the power of direction may appoint a successor trustee or trustees of the land trust by filing a declaration of appointment of a successor trustee or trustees in the public records of the county in which the trust property is located. The declaration must be signed by a beneficiary or beneficiaries of the land trust and by the successor trustee or trustees, must be acknowledged in the manner provided for acknowledgment of deeds, and must contain:

1. The legal description of the trust property.
2. The name and address of the former trustee.
3. The name and address of the successor trustee or trustees.
4. A statement that one or more persons having the power of direction of the land trust appointed the successor trustee or trustees, together with an acceptance of appointment by the successor trustee or trustees.

(b) If the recorded instrument is silent as to the appointment of a successor trustee or trustees of a land trust but an unrecorded trust agreement provides for the appointment of a successor trustee or trustees in the event of the death, incapacity, resignation, or termination due to dissolution of the trustee of a land trust, then upon the appointment of any successor trustee pursuant to the terms of the unrecorded trust agreement, the successor trustee or trustees shall file a declaration of appointment of a successor trustee in the public records of the county in which the trust property is located. The declaration must be signed by both the former trustee and the successor trustee or trustees, must be acknowledged in the manner provided for acknowledgment of deeds, and must contain:

1. The legal description of the trust property.
2. The name and address of the former trustee.
3. The name and address of the successor trustee or trustees.
4. A statement of resignation by the former trustee and a statement of acceptance of appointment by the successor trustee or trustees.
5. A statement that the successor trustee or trustees were duly appointed under the terms of the unrecorded trust agreement.

If the appointment of any successor trustee of a land trust is due to the death or incapacity of the former trustee, the declaration need not be signed by the former trustee and a copy of the death certificate or a statement that the former trustee is incapacitated or unable to serve must be attached to or included in the declaration, as applicable.

(c) If the recorded instrument provides for the appointment of any successor trustee of a land trust and any successor trustee is appointed in accordance with the recorded instrument, no additional declarations of appointment of any successor trustee are required under this section.

(d) Each successor trustee appointed with respect to a land trust is fully vested with all the estate, properties, rights, powers, trusts, duties, and obligations of the predecessor trustee, except that any successor trustee of a land trust is not under any duty to inquire into the acts or omissions of a predecessor trustee and is not liable for any act or failure to act of a predecessor trustee. A person dealing with any successor trustee of a land trust pursuant to a declaration filed under this section is not obligated to inquire into or ascertain the authority of the successor trustee to act within or

exercise the powers granted under the recorded instruments or any unrecorded trust agreement.

(e) A trust agreement may provide that the trustee of a land trust, when directed to do so by the holder of the power of direction or by the beneficiaries of the land trust or legal representatives of the beneficiaries, may convey the trust property directly to another trustee on behalf of the beneficiaries or to another representative named in such directive.

(10) TRUSTEE AS CREDITOR.—

(a) If a debt is secured by a security interest or mortgage against a beneficial interest in a land trust or by a mortgage on trust property of a land trust, the validity or enforceability of the debt, security interest, or mortgage and the rights, remedies, powers, and duties of the creditor with respect to the debt or the security are not affected by the fact that the creditor and the trustee are the same person, and the creditor may extend credit, obtain any necessary security interest or mortgage, and acquire and deal with the property comprising the security as though the creditor were not the trustee.

(b) A trustee of a land trust does not breach a fiduciary duty to the beneficiaries, and it is not evidence of a breach of any fiduciary duty owed by the trustee to the beneficiaries for a trustee to be or become a secured or unsecured creditor of the land trust, the beneficiary of the land trust, or a third party whose debt to such creditor is guaranteed by a beneficiary of the land trust.

(11) NOTICES TO TRUSTEE.—Any notice required to be given to a trustee of a land trust regarding trust property by a person who is not a party to the trust agreement must identify the trust property to which the notice pertains or include the name and date of the land trust to which the notice pertains, if such information is shown on the recorded instrument for such trust property.

(12) DETERMINATION OF APPLICABLE LAW.—Except as otherwise provided in this section, chapter 736 does not apply to a land trust governed by this section.

(a) A trust is not a land trust governed by this section if there is no recorded instrument that confers on the trustee the power and authority prescribed in s. 689.073(1).

(b) For a trust created before June 28, 2013:

1. The trust is a land trust governed by this section if a recorded instrument confers on the trustee the power and authority described in s. 689.073(1) and if:

a. The recorded instrument or the trust agreement expressly provides that the trust is a land trust; or

b. The intent of the parties that the trust be a land trust is discerned from the trust agreement or the recorded instrument,

without regard to whether the trustee's duties under the trust agreement are greater than those limited duties described in paragraph (2)(c).

2. The trust is not a land trust governed by this section if:

a. The recorded instrument or the trust agreement expressly provides that the trust is to be governed by chapter 736, or by any predecessor trust code or other trust law other than this section; or

b. The intent of the parties that the trust be governed by chapter 736, or by any predecessor trust code or other trust law other than this section, is discerned from the trust agreement or the recorded instrument,

without regard to whether the trustee's duties under the trust agreement are greater than those limited duties listed in paragraph (2)(c), and without consideration of any references in the trust agreement to provisions of chapter 736 made applicable to the trust by chapter 721, if the trust is a timeshare estate trust complying with s.

721.08(2)(c)4. or a vacation club trust complying with s. 721.53(1)(e).

3. Solely for the purpose of determining the law governing a trust under subparagraph 1. or subparagraph 2., the determination shall be made without consideration of any amendment to the trust agreement made on or after June 28, 2013, except as provided in paragraph (d).

4. If the determination of whether a trust is a land trust governed by this section cannot be made under either subparagraph 1. or subparagraph 2., the determination shall be made under paragraph (c) as if the trust was created on or after June 28, 2013.

(c) If a recorded instrument confers on the trustee the power and authority described in s. 689.073(1) and the trust was created on or after June 28, 2013, the trust shall be determined to be a land trust governed by this section only if the trustee's duties under the trust agreement, including any amendment made on or after such date, are no greater than those limited duties described in paragraph (2)(c).

(d) If the trust agreement for a land trust created before June 28, 2013, is amended on or after such date to add to or increase the duties of the trustee beyond the duties provided in the trust agreement as of June 28, 2013, the trust shall remain a land trust governed by this section only if the additional or increased duties of the trustee implemented by the amendment are no greater than those limited duties described in paragraph (2)(c).

(13) UNIFORM COMMERCIAL CODE TRANSITION RULE.—This section does not render ineffective any effective Uniform Commercial Code financing statement filed before July 1, 2014, to perfect a security interest in a beneficial interest in a land trust that is determined to be real property as provided in subsection (6), but such a financing statement ceases to be effective at the earlier of July 1, 2019, or the time the financing statement would have ceased to be effective under the law of the jurisdiction in which it is filed, and the filing of a Uniform Commercial Code continuation statement after July 1, 2014, does not continue the effectiveness of such a financing statement. The recording of a mortgage, deed of trust, security agreement, or other similar security document against such a beneficial interest that is real property in the public records specified in paragraph (8)(c) continues the effectiveness and priority of a financing statement filed against such a beneficial interest before July 1, 2014, if:

(a) The recording of the security document in that county is effective to perfect a lien on such beneficial interest under paragraph (8)(c);

(b) The recorded security document identifies a financing statement filed before July 1, 2014, by indicating the office in which the financing statement was filed and providing the dates of filing and the file numbers, if any, of the financing statement and of the most recent continuation statement filed with respect to the financing statement; and

(c) The recorded security document indicates that such financing statement filed before July 1, 2014, remains effective.

If no original security document bearing the debtor's signature is readily available for recording in the public records, a secured party may proceed under this subsection with such financing statement filed before July 1, 2014, by recording a copy of a security document verified by the secured party as being a true and correct copy of an original authenticated by the debtor. This subsection does not apply to the perfection of a security interest in any beneficial interest in a land trust that is determined to be personal property under subsection (6).

(14) REMEDIAL ACT.—This act is remedial in nature and shall be given a liberal interpretation to effectuate the intent and purposes hereinabove expressed.

(15) EXCLUSION.—This act does not apply to any deed, mortgage, or other instrument to which s. 689.07 applies.

History.—ss. 1, 2, 3, 4, 5, 6, ch. 63-468; s. 1, ch. 84-31; s. 2, ch. 2002-233; s. 21, ch. 2006-217; s. 1, ch. 2006-274; s. 7, ch. 2007-153; ss. 1, 2, 4, ch. 2013-240.

689.072 Real estate interests transferred to or by a custodian or trustee of an individual retirement account or qualified plan.—

(1)(a) A conveyance, deed, mortgage, lease assignment, or other recorded instrument that transfers an interest in real property in this state, including a leasehold or mortgagee interest, to a person who is qualified to act as a custodian or trustee for an individual retirement account under 26 U.S.C. s. 408(a)(2), as amended, in which instrument the transferee is designated "custodian," "as custodian," "trustee," or "as trustee" and the account owner or beneficiary of the custodianship in the individual retirement account is named, creates custodial property and transfers title to the custodian or trustee when an interest in real property is recorded in the name of the custodian or trustee, followed by the words "as custodian or trustee for the benefit of (name of individual retirement account owner or beneficiary) individual retirement account."

(b) This section also applies to a qualified stock bonus, pension, or profit-sharing plan created under 26 U.S.C. s. 401(a), as amended, in which instrument a person is designated "custodian," "as custodian," "trustee," or "as trustee" and the plan, plan participant, or plan beneficiary of the custodianship in the plan also creates custodial property and transfers title to the custodian or trustee when an interest in real property is recorded in the name of the custodian or trustee, followed by the words "as custodian, or trustee of the (name of plan) for the benefit of (name of plan participant or beneficiary) ."

(2) A transfer to a custodian or trustee of an individual retirement account or qualified plan pursuant to this section incorporates the provisions of this section into the disposition and grants to the custodian or trustee the power to protect, conserve, sell, lease, encumber, or otherwise manage and dispose of the real property described in the recorded instrument without joinder of the named individual retirement account owner, plan participant, or beneficiary, except as provided in subsection (5).

(3) A person dealing with the custodian or trustee does not have a duty to inquire as to the qualifications of the custodian or trustee and may rely on the powers of the custodian or trustee for the custodial property created under this section regardless of whether such powers are specified in the recorded instrument. A grantee, mortgagee, lessee, transferee, assignee, or person obtaining a satisfaction or release or otherwise dealing with the custodian or trustee regarding such custodial property is not required to inquire into:

(a) The identification or status of any named individual retirement account owner, plan participant, or beneficiary of the individual retirement account or qualified plan or his or her heirs or assigns to whom a custodian or trustee may be accountable under the terms of the individual retirement account agreement or qualified plan document;

(b) The authority of the custodian or trustee to act within and exercise the powers granted under the individual retirement account agreement or qualified plan document;

(c) The adequacy or disposition or any consideration provided to the custodian or

trustee in connection with any interest acquired from such custodian or trustee; or

(d) Any provision of an individual retirement account agreement or qualified plan document.

(4) A person dealing with the custodian or trustee under the recorded instrument takes any interest transferred by such custodian or trustee, within the authority provided under this section, free of claims of the named owner, plan participant, or beneficiary of the individual retirement account or qualified plan or of anyone claiming by, through, or under such owner, plan participant, or beneficiary.

(5) If notice of the revocation or termination of the individual retirement account agreement, qualified plan, or custodianship established under such individual retirement account agreement or qualified plan is recorded, any disposition or encumbrance of the custodial property must be by an instrument executed by the custodian or trustee or the successor and the respective owner, plan participant, or beneficiary of the individual retirement account or qualified plan.

(6) In dealing with custodial property created under this section, a custodian or trustee shall observe the standard of care of a prudent person dealing with property of another person. This section does not relieve the custodian or trustee from liability for breach of the individual retirement account agreement, custodial agreement, or qualified plan document.

(7) A provision of the recorded instrument that defines and declares the interest of the owner, plan participant, or beneficiary of the individual retirement account or qualified plan to be personal property controls only if a determination becomes an issue in any legal proceeding.

(8) As used in this section, the term "beneficiary" applies only when the individual retirement account owner or qualified plan participant is deceased.

(9)(a) This section does not apply to any deed, mortgage, or instrument to which s. 689.071 applies.

(b) Section 689.09 does not apply to transfers of real property interests to a custodian or trustee under this section.

(10) This section is remedial and shall be liberally construed to effectively carry out its purposes.

History.—s. 1, ch. 2006-147.

689.073 Powers conferred on trustee in recorded instrument.—

(1) OWNERSHIP VESTS IN TRUSTEE.—Every conveyance, deed, mortgage, lease assignment, or other instrument heretofore or hereafter made, hereinafter referred to as the "recorded instrument," transferring any interest in real property, including, but not limited to, a leasehold or mortgagee interest, to any person or any corporation, bank, trust company, or other entity duly formed under the laws of its state of qualification, which recorded instrument designates the person, corporation, bank, trust company, or other entity "trustee" or "as trustee" and confers on the trustee the power and authority to protect, to conserve, to sell, to lease, to encumber, or otherwise to manage and dispose of the real property described in the recorded instrument, is effective to vest, and is declared to have vested, in such trustee full power and authority as granted and provided in the recorded instrument to deal in and with such property, or interest therein or any part thereof, held in trust under the recorded instrument.

(2) NO DUTY TO INQUIRE.—Any grantee, mortgagee, lessee, transferee, assignee, or person obtaining satisfactions or releases or otherwise in any way dealing with the trustee with respect to the real

property or any interest in such property held in trust under the recorded instrument, as hereinabove provided for, is not obligated to inquire into the identification or status of any named or unnamed beneficiaries, or their heirs or assigns to whom a trustee may be accountable under the terms of the recorded instrument, or under any unrecorded separate declarations or agreements collateral to the recorded instrument, whether or not such declarations or agreements are referred to therein; or to inquire into or ascertain the authority of such trustee to act within and exercise the powers granted under the recorded instrument; or to inquire into the adequacy or disposition of any consideration, if any is paid or delivered to such trustee in connection with any interest so acquired from such trustee; or to inquire into any of the provisions of any such unrecorded declarations or agreements.

(3) BENEFICIARY CLAIMS.—All persons dealing with the trustee under the recorded instrument as hereinabove provided take any interest transferred by the trustee thereunder, within the power and authority as granted and provided therein, free and clear of the claims of all the named or unnamed beneficiaries of such trust, and of any unrecorded declarations or agreements collateral thereto whether referred to in the recorded instrument or not, and of anyone claiming by, through, or under such beneficiaries. However, this section does not prevent a beneficiary of any such unrecorded collateral declarations or agreements from enforcing the terms thereof against the trustee.

(4) EXCLUSION.—This section does not apply to any deed, mortgage, or other instrument to which s. 689.07 applies.

(5) APPLICABILITY.—The section applies without regard to whether any reference is made in the recorded instrument to the beneficiaries of such trust or to any separate collateral unrecorded declarations or agreements, without regard to the provisions of any unrecorded trust agreement or declaration of trust, and without regard to whether the trust is governed by s. 689.071 or chapter 736. This section applies both to recorded instruments that are recorded after June 28, 2013, and to recorded instruments that were previously recorded and governed by similar provisions contained in s. 689.071(3), Florida Statutes 2012, and any such recorded instrument purporting to confer power and authority on a trustee under such provisions of s. 689.071(3), Florida Statutes 2012, is valid and has the effect of vesting full power and authority in such trustee as provided in this section.

History.—ss. 2, 3, ch. 63-468; s. 21, ch. 2006-217; ss. 1, 4, ch. 2013-240.

689.075 Inter vivos trusts; powers retained by settlor.—

(1) A trust which is otherwise valid and which complies with s. 736.0403, including, but not limited to, a trust the principal of which is composed of real property, intangible personal property, tangible personal property, the possible expectancy of receiving as a named beneficiary death benefits as described in s. 733.808, or any combination thereof, and which has been created by a written instrument shall not be held invalid or an attempted testamentary disposition for any one or more of the following reasons:

(a) Because the settlor or another person or both possess the power to revoke, amend, alter, or modify the trust in whole or in part;

(b) Because the settlor or another person or both possess the power to appoint by deed or will the persons and organizations to whom the income shall be paid or the principal distributed;

(c) Because the settlor or another person or both possess the power to add to, or withdraw from, the trust all or any part of

the principal or income at one time or at different times;

(d) Because the settlor or another person or both possess the power to remove the trustee or trustees and appoint a successor trustee or trustees;

(e) Because the settlor or another person or both possess the power to control the trustee or trustees in the administration of the trust;

(f) Because the settlor has retained the right to receive all or part of the income of the trust during her or his life or for any part thereof; or

(g) Because the settlor is, at the time of the execution of the instrument, or thereafter becomes, sole trustee.

(2) Nothing contained herein shall affect the validity of those accounts, including but not limited to bank accounts, share accounts, deposits, certificates of deposit, savings certificates, and other similar arrangements, heretofore or hereafter established at any bank, savings and loan association, or credit union by one or more persons, in trust for one or more other persons, which arrangements are, by their terms, revocable by the person making the same until her or his death or incompetency.

(3) The fact that any one or more of the powers specified in subsection (1) are in fact exercised once, or more than once, shall not affect the validity of the trust or its nontestamentary character.

(4) This section shall be applicable to trusts executed before or after July 1, 1969, by persons who are living on or after said date.

(5) The amendment of this section, by chapter 75-74, Laws of Florida, is intended to clarify the legislative intent of this section at the time of its original enactment that it apply to all otherwise valid trusts which are created by written instrument and which are not expressly excluded by the terms of this section and that no such trust shall be declared invalid for any of the reasons stated in subsections (1) and (3) regardless of whether the trust involves or relates to an interest in real property.

History.—ss. 1, 2, ch. 69-192; s. 1, ch. 69-1747; ss. 1, 2, ch. 71-126; s. 169, ch. 73-333; s. 1, ch. 74-78; ss. 1, 2, ch. 75-74; s. 5, ch. 95-401; s. 756, ch. 97-102; s. 22, ch. 2006-217.

689.08 Fines and common recoveries.—Conveyance by fine or by common recovery shall never be used in this state.

History.—s. 2, Feb. 4, 1835; RS 1953; GS 2454; RGS 3794; CGL 5667.

689.09 Deeds under statute of uses.—By deed of bargain and sale, or by deed of lease and release, or of covenant to stand seized to the use of any other person, or by deed operating by way of covenant to stand seized to the use of another person, of or in any lands or tenements in this state, the possession of the bargainor, releasor or covenantor shall be deemed and adjudged to be transferred to the bargainee, releasee or person entitled to the use as perfectly as if such bargainee, releasee or person entitled to the use had been enfeoffed by livery of seizin of the land conveyed by such deed of bargain and sale, release or covenant to stand seized; provided, that livery of seizin can be lawfully made of the lands or tenements at the time of the execution of the said deeds or any of them.

History.—s. 12, Nov. 15, 1828; RS 1954; GS 2455; RGS 3795; CGL 5668.

689.10 Words of limitation and the words "fee simple" dispensed with.—Where any real estate has heretofore been conveyed or granted or shall hereafter be conveyed or granted without there being used in the said deed or conveyance or grant any words of limitation, such as heirs or successors, or similar words, such conveyance or grant, whether heretofore made or hereafter made, shall be construed to vest the fee simple title or other whole estate or interest which the grantor had power to dispose of at that time in the real estate con-

veyed or granted, unless a contrary intention shall appear in the deed, conveyance or grant.

History.—s. 1, ch. 5145, 1903; GS 2456; RGS 3796; s. 1, ch. 10170, 1925; CGL 5669.

689.11 Conveyances between husband and wife direct; homestead.—

(1) A conveyance of real estate, including homestead, made by one spouse to the other shall convey the legal title to the grantee spouse in all cases in which it would be effectual if the parties were not married, and the grantee need not execute the conveyance. An estate by the entirety may be created by the action of the spouse holding title:

(a) Conveying to the other by a deed in which the purpose to create the estate is stated; or

(b) Conveying to both spouses.

(2) All deeds heretofore made by a husband direct to his wife or by a wife direct to her husband are hereby validated and made as effectual to convey the title as they would have been were the parties not married;

(3) Provided, that nothing herein shall be construed as validating any deed made for the purpose, or that operates to defraud any creditor or to avoid payment of any legal debt or claim; and

(4) Provided further that this section shall not apply to any conveyance heretofore made, the validity of which shall be contested by suit commenced within 1 year of the effective date of this law.

History.—s. 1, ch. 5147, 1903; GS 2457; RGS 3797; CGL 5670; s. 6, ch. 20954, 1941; s. 1, ch. 23964, 1947; s. 1, ch. 71-54.

689.111 Conveyances of homestead; power of attorney.—

(1) A deed or mortgage of homestead realty owned by an unmarried person may be executed by virtue of a power of attorney executed in the same manner as a deed.

(2) A deed or mortgage of homestead realty owned by a married person, or owned as an estate by the entirety, may be executed by virtue of a power of attorney executed solely by one spouse to the other, or solely by one spouse or both spouses to a third party, provided the power of attorney is executed in the same manner as a deed. Nothing in this section shall be construed as dispensing with the requirement that husband and wife join in the conveyance or mortgage of homestead realty, but the joinder may be accomplished through the exercise of a power of attorney.

History.—s. 1, ch. 71-27.

689.115 Estate by the entirety in mortgage made or assigned to husband and wife.—Any mortgage encumbering real property, or any assignment of a mortgage encumbering real property, made to two persons who are husband and wife, heretofore or hereafter made, creates an estate by the entirety in such mortgage and the obligation secured thereby unless a contrary intention appears in such mortgage or assignment.

History.—s. 1, ch. 86-29; s. 21, ch. 91-110.

689.12 How state lands conveyed for educational purposes.—

(1) The title to all lands granted to or held by the state for educational purposes shall be conveyed by deed executed by the members of the State Board of Education, with an impression of the seal of the Board of Trustees of the Internal Improvement Trust Fund of the state thereon and when so impressed by this seal deeds shall be entitled to be recorded in the public records and to be received in evidence in all courts and judicial proceedings.

(2) Lands held for any tuberculosis hospital and declared to be surplus to the needs of such hospital may be conveyed to the district school board in which said lands are located for educational purposes.

History.—s. 1, ch. 4999, 1901; GS 2458; RGS 3798; CGL 5671; ss. 1, 2, ch. 67-191; ss. 27, 35, ch. 69-106; s. 1, ch. 69-300.

689.13 Rule against perpetuities not applicable to dispositions of property for private cemeteries, etc.—No disposition of property, or the income thereof, hereafter made for the maintenance or care of any public or private burying ground, churchyard, or other place for the burial of the dead, or any portion thereof, or grave therein, or monument or other erection in or about the same, shall fail by reason of such disposition having been made in perpetuity; but such disposition shall be held to be made for a charitable purpose or purposes.

History.—s. 1, ch. 14655, 1931; CGL 1936 Supp. 5671(1).

689.14 Entailed estates.—No property, real or personal, shall be entailed in this state. Any instrument purporting to create an estate tail, express or implied, shall be deemed to create an estate for life in the first taker with remainder per stirpes to the lineal descendants of the first taker in being at the time of her or his death. If the remainder fails for want of such remainderman, then it shall vest in any other remaindermen designated in such instrument, or, if there is no such designation, then it shall revert to the original donor or to her or his heirs.

History.—s. 20, Nov. 17, 1829; RS 1818; GS 2293; RGS 3616; CGL 5481; s. 2, ch. 20954, 1941; s. 1, ch. 23126, 1945; s. 757, ch. 97-102.

689.15 Estates by survivorship.—The doctrine of the right of survivorship in cases of real estate and personal property held by joint tenants shall not prevail in this state; that is to say, except in cases of estates by entirety, a devise, transfer or conveyance heretofore or hereafter made to two or more shall create a tenancy in common, unless the instrument creating the estate shall expressly provide for the right of survivorship; and in cases of estates by entirety, the tenants, upon dissolution of marriage, shall become tenants in common.

History.—s. 20, Nov. 17, 1829; RS 1819; GS 2294; RGS 3617; CGL 5482; s. 3, ch. 20954, 1941; s. 1, ch. 73-300.

689.17 Rule in Shelley's Case abolished.—The rule in Shelley's Case is hereby abolished. Any instrument purporting to create an estate for life in a person with remainder to her or his heirs, lawful heirs, heirs of her or his body or to her or his heirs described by words of similar import, shall be deemed to create an estate for life with remainder per stirpes to the life tenant's lineal descendants in being at the time said life estate commences, but said remainder shall be subject to open and to take in per stirpes other lineal descendants of the life tenant who come into being during the continuance of said life estate.

History.—s. 2, ch. 23126, 1945; s. 758, ch. 97-102.

689.175 Worthier title doctrine abolished.—The doctrine of worthier title is abolished as a rule of law and as a rule of construction. Language in a governing instrument describing the beneficiaries of a disposition as the transferor's "heirs," "heirs at law," "next of kin," "distributees," "relatives," or "family," or language of similar import, does not create or presumptively create a reversionary interest in the transferor.

History.—s. 23, ch. 2006-217.

689.18 Reverter or forfeiture provisions, limitations; exceptions.—

(1) It is hereby declared by the Legislature of the state that reverter or forfeiture provisions of unlimited duration in the conveyance of real estate or any interest therein in the state constitute an unreasonable restraint on alienation and are contrary to the public policy of the state.

(2) All reverter or forfeiture provisions of unlimited duration embodied in any plat or deed executed more than 21 years prior to the passage of this law conveying real estate or any interest therein in the state, be and the same are hereby canceled and annulled and declared to be of no further force and effect.

(3) All reverter provisions in any conveyance of real estate or any interest therein in the state, now in force, shall cease and terminate and become null, void, and unenforceable 21 years from the date of the conveyance embodying such reverter or forfeiture provision.

(4) No reverter or forfeiture provision contained in any deed conveying real estate or any interest therein in the state, executed on and after July 1, 1951, shall be valid and binding more than 21 years from the date of such deed, and upon the expiration of such period of 21 years, the reverter or forfeiture provision shall become null, void, and unenforceable.

(5) Any and all conveyances of real property in this state heretofore or hereafter made to any governmental, educational, literary, scientific, religious, public utility, public transportation, charitable or nonprofit corporation or association are hereby excepted from the provisions of this section.

(6) Any holder of a possibility of reverter who claims title to any real property in the state, or any interest therein by reason of a reversion or forfeiture under the terms or provisions of any deed heretofore executed and delivered containing such reverter or forfeiture provision shall have 1 year from July 1, 1951, to institute suit in a court of competent jurisdiction in this state to establish or enforce such right, and failure to institute such action within said time shall be conclusive evidence of the abandonment of any such right, title, or interest, and all right of forfeiture or reversion shall thereupon cease and determine, and become null, void, and unenforceable.

(7) This section shall not vary, alter, or terminate the restrictions placed upon said real estate, contained either in restrictive covenants or reverter or forfeiture clauses, and all said restrictions may be enforced and violations thereof restrained by a court of competent jurisdiction whenever any one of said restrictions or conditions shall be violated, or threat to violate the same be made by owners or parties in possession or control of said real estate, by an injunction which may be issued upon petition of any person adversely affected, mandatorily requiring the abatement of such violations or threatened violation and restraining any future violation of said restrictions and conditions.

History.—ss. 1, 2, 3, 4, 5, 6, 7, ch. 26927, 1951; s. 218, ch. 77-104.

689.19 Variances of names in recorded instruments.—

(1) The word "instrument" as used in this section shall be construed to mean and include not only instruments voluntarily executed but also papers filed or issued in or in connection with actions and other proceedings in court and orders, judgments and decrees entered therein and transcripts of such judgments and proceedings in foreclosure of mortgage or other liens.

(2) Variances between any two instruments affecting the title to the same real property both of which shall have been spread on the record for the period of more than 10 years among the public records of the county in which such real property is situated, with respect to the names of persons named in the respective instruments or in acknowledgments thereto arising from the full Christian name appearing in one and only the initial letter of that Christian name appearing in the other or from a full middle name appearing in one and only the initial letter of that middle name appearing in the other or from the initial letter of a middle name appearing in one and not appearing in the other, irrespective of which one of the two instruments in which any such variance occurred was prior in point of time to the other and irrespective of whether the instruments were executed or originated before or after August 5, 1953, shall not destroy or impair the presumption

that the person so named in one of said instruments was the same person as the one so named in the other of said instruments which would exist if the names in the two instruments were identical; and, in spite of any such variance, the person so named in one of said instruments shall be presumed to be the same person as the one so named in the other until such time as the contrary appears and, until such time, either or both of such instruments or the record thereof or certified copy or copies of the record thereof shall be admissible in evidence in the same manner as though the names in the two instruments were identical.

History.—s. 1, ch. 28208, 1953.

689.20 Limitation on use of word "minerals."—Whenever the word "minerals" is hereafter used in any deed, lease, or other contract in writing, said word or term shall not include any of the following: topsoil, muck, peat, humus, sand, and common clay, unless expressly provided in said deed, lease, or other contract in writing.

History.—s. 1, ch. 59-375.

689.225 Statutory rule against perpetuities.—

(1) SHORT TITLE.—This section may be cited as the "Florida Uniform Statutory Rule Against Perpetuities."

(2) STATEMENT OF THE RULE.—

(a) A nonvested property interest in real or personal property is invalid unless:

1. When the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or

2. The interest either vests or terminates within 90 years after its creation.

(b) A general power of appointment not presently exercisable because of a condition precedent is invalid unless:

1. When the power is created, the condition precedent is certain to be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then alive; or

2. The condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation.

(c) A nongeneral power of appointment or a general testamentary power of appointment is invalid unless:

1. When the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive; or

2. The power is irrevocably exercised or otherwise terminates within 90 years after its creation.

(d) In determining whether a nonvested property interest or a power of appointment is valid under subparagraph (a)1., subparagraph (b)1., or subparagraph (c)1., the possibility that a child will be born to an individual after the individual's death is disregarded.

(e) If, in measuring a period from the creation of a trust or other property arrangement, language in a governing instrument (i) seeks to disallow the vesting or termination of any interest or trust beyond, (ii) seeks to postpone the vesting or termination of any interest or trust until, or (iii) seeks to operate in effect in any similar fashion upon, the later of:

1. The expiration of a period of time not exceeding 21 years after the death of a specified life or the survivor of specified lives, or upon the death of a specified life or the death of the survivor of specified lives in being at the creation of the trust or other property arrangement, or

2. The expiration of a period of time that exceeds or might exceed 21 years after the death of the survivor of lives in being at the creation of the trust or other property arrangement,

that language is inoperative to the extent it produces a period of time that exceeds 21

years after the death of the survivor of the specified lives.

(f) As to any trust created after December 31, 2000, through June 30, 2022, this section shall apply to a nonvested property interest or power of appointment contained in a trust by substituting 360 years in place of "90 years" in each place such term appears in this section unless the terms of the trust require that all beneficial interests in the trust vest or terminate within a lesser period.

(g) As to any trust created on or after July 1, 2022, this section shall apply to a nonvested property interest or power of appointment contained in a trust by substituting 1,000 years in place of "90 years" in each place such term appears in this section unless the terms of the trust require that all beneficial interests in the trust vest or terminate within a lesser period.

(3) WHEN NONVESTED PROPERTY INTEREST OR POWER OF APPOINTMENT CREATED.—

(a) Except as provided in paragraphs (b), (d), and (e) of this subsection and in paragraph (a) of subsection (6), the time of creation of a nonvested property interest or a power of appointment is determined under general principles of property law.

(b) For purposes of this section, if there is a person who alone can exercise a power created by a governing instrument to become the unqualified beneficial owner of a nonvested property interest or a property interest subject to a power of appointment described in paragraph (b) or paragraph (c) of subsection (2), the nonvested property interest or power of appointment is created when the power to become the unqualified beneficial owner terminates.

(c) For purposes of this section, a joint power with respect to community property or to marital property under the Uniform Marital Property Act held by individuals married to each other is a power exercisable by one person alone.

(d) For purposes of this section, a nonvested property interest or a power of appointment arising from a transfer of property to a previously funded trust or other existing property arrangement is created when the nonvested property interest or power of appointment in the original contribution was created.

(e) For purposes of this section, if a nongeneral or testamentary power of appointment is exercised to create another nongeneral or testamentary power of appointment, every nonvested property interest or power of appointment created through the exercise of such other nongeneral or testamentary power is considered to have been created at the time of the creation of the first nongeneral or testamentary power of appointment.

(4) REFORMATION.—Upon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the 90 years allowed by subparagraph (2)(a)2., subparagraph (2)(b)2., or subparagraph (2)(c)2. if:

(a) A nonvested property interest or a power of appointment becomes invalid under subsection (2);

(b) A class gift is not but might become invalid under subsection (2) and the time has arrived when the share of any class member is to take effect in possession or enjoyment; or

(c) A nonvested property interest that is not validated by subparagraph (2)(a)1. can vest but not within 90 years after its creation.

(5) EXCLUSIONS FROM STATUTORY RULE AGAINST PERPETUITIES.—Subsection (2) does not apply to:

(a) A nonvested property interest or a power of appointment arising out of a nondonative transfer, except a nonvested property interest or a power of appointment arising out of:

1. A premarital or postmarital agreement;

2. A separation or divorce settlement;

3. A spouse's election;

4. A similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties;

5. A contract to make or not to revoke a will or trust;

6. A contract to exercise or not to exercise a power of appointment;

7. A transfer in satisfaction of a duty of support; or

8. A reciprocal transfer;

(b) A fiduciary's power relating to the administration or management of assets, including the power of a fiduciary to sell, lease, or mortgage property, and the power of a fiduciary to determine principal and income;

(c) A power to appoint a fiduciary;

(d) A discretionary power of a trustee to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in the income and principal;

(e) A nonvested property interest held by a charity, government, or governmental agency or subdivision, if the nonvested property interest is preceded by an interest held by another charity, government, or governmental agency or subdivision;

(f) A nonvested property interest in, or a power of appointment with respect to, a trust or other property arrangement forming part of a pension, profit-sharing, stock bonus, health, disability, death benefit, income deferral, or other current or deferred benefit plan for one or more employees, independent contractors, or their beneficiaries or spouses, to which contributions are made for the purpose of distributing to or for the benefit of the participants, or their beneficiaries or spouses, the property, income, or principal in the trust or other property arrangement, except a nonvested property interest or a power of appointment that is created by an election of a participant or a beneficiary or spouse; or

(g) A property interest, power of appointment, or arrangement that was not subject to the common-law rule against perpetuities or is excluded by another statute of this state.

(6) APPLICATION.—

(a) Except as extended by paragraph (c), this section applies to a nonvested property interest or a power of appointment that is created on or after October 1, 1988. For purposes of this subsection, a nonvested property interest or a power of appointment created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

(b) This section also applies to a power of appointment that was created before October 1, 1988, but only to the extent that it remains unexercised on October 1, 1988.

(c) If a nonvested property interest or a power of appointment was created before October 1, 1988, and is determined in a judicial proceeding commenced on or after October 1, 1988, to violate this state's rule against perpetuities as that rule existed before October 1, 1988, a court, upon the petition of an interested person, may reform the disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created.

(7) RULE OF CONSTRUCTION.—With respect to any matter relating to the validity of an interest within the rule against perpetuities, unless a contrary intent

appears, it shall be presumed that the transferor of the interest intended that the interest be valid. This section is the sole expression of any rule against perpetuities or remoteness in vesting in this state. No common-law rule against perpetuities or remoteness in vesting shall exist with respect to any interest or power regardless of whether such interest or power is governed by this section.

(8) UNIFORMITY OF APPLICATION AND CONSTRUCTION.—This section shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this act among states enacting it.

History.—s. 1, ch. 88-40; s. 1, ch. 97-240; s. 1, ch. 2000-245; s. 1, ch. 2022-96.

689.25 Failure to disclose homicide, suicide, deaths, or diagnosis of HIV or AIDS infection in an occupant of real property.—

(1)(a) The fact that an occupant of real property is infected or has been infected with human immunodeficiency virus or diagnosed with acquired immune deficiency syndrome is not a material fact that must be disclosed in a real estate transaction.

(b) The fact that a property was, or was at any time suspected to have been, the site of a homicide, suicide, or death is not a material fact that must be disclosed in a real estate transaction.

(2) A cause of action shall not arise against an owner of real property, his or her agent, an agent of a transferee of real property, or a person licensed under chapter 475 for the failure to disclose to the transferee that the property was or was suspected to have been the site of a homicide, suicide, or death or that an occupant of that property was infected with human immunodeficiency virus or diagnosed with acquired immune deficiency syndrome.

History.—s. 46, ch. 88-380; s. 51, ch. 2003-164.

689.261 Sale of residential property; disclosure of ad valorem taxes to prospective purchaser.—

(1) A prospective purchaser of residential property must be presented a disclosure summary at or before execution of the contract for sale. Unless a substantially similar disclosure summary is included in the contract for sale, a separate disclosure summary must be attached to the contract for sale. The disclosure summary, whether separate or included in the contract, must be in a form substantially similar to the following:

PROPERTY TAX DISCLOSURE SUMMARY

BUYER SHOULD NOT RELY ON THE SELLER'S CURRENT PROPERTY TAXES AS THE AMOUNT OF PROPERTY TAXES THAT THE BUYER MAY BE OBLIGATED TO PAY IN THE YEAR SUBSEQUENT TO PURCHASE. A CHANGE OF OWNERSHIP OR PROPERTY IMPROVEMENTS TRIGGERS REASSESSMENTS OF THE PROPERTY THAT COULD RESULT IN HIGHER PROPERTY TAXES. IF YOU HAVE ANY QUESTIONS CONCERNING VALUATION, CONTACT THE COUNTY PROPERTY APPRAISER'S OFFICE FOR INFORMATION.

(2) Unless included in the contract, the disclosure summary must be provided by the seller. If the disclosure summary is not included in the contract for sale, the contract for sale must refer to and incorporate by reference the disclosure summary and include, in prominent language, a statement that the potential purchaser should not execute the contract until he or she has read the disclosure summary required by this section.

History.—s. 5, ch. 2004-349.

689.27 Termination by servicemember of agreement to purchase real property.—

(1) Notwithstanding any other provisions of law and for the purposes of this section:

(a) "Closing" means the finalizing of the sale of property, upon which title to the property is transferred from the seller to the buyer.

(b) "Contract" means an instrument purporting to contain an agreement to purchase real property.

(c) "Property" means a house, condominium, or mobile home that a servicemember intends to purchase to serve as his or her primary residence.

(d) "Servicemember" shall have the same meaning as provided in s. 250.01.

(2) Any servicemember may terminate a contract to purchase property, prior to closing on such property, by providing the seller or mortgagor of the property with a written notice of termination to be effective immediately, if any of the following criteria are met:

(a) The servicemember is required, pursuant to permanent change of station orders received after entering into a contract for the property and prior to closing, to move 35 miles or more from the location of the property;

(b) The servicemember is released from active duty or state active duty after having agreed to purchase the property and prior to closing while serving on active duty or state active duty status, and the property is 35 miles or more from the servicemember's home of record prior to entering active duty or state active duty;

(c) Prior to closing, the servicemember receives military orders requiring him or her to move into government quarters or the servicemember becomes eligible to live in and opts to move into government quarters; or

(d) Prior to closing, the servicemember receives temporary duty orders, temporary change of station orders, or active duty or state active duty orders to an area 35 miles or more from the location of the property, provided such orders are for a period exceeding 90 days.

(3) The notice to the seller or mortgagor canceling the contract must be accompanied by either a copy of the official military orders or a written verification signed by the servicemember's commanding officer.

(4) Upon termination of a contract under this section, the seller or mortgagor or his or her agent shall refund any funds provided by the servicemember under the contract within 7 days. The servicemember is not liable for any other fees due to the termination of the contract as provided for in this section.

(5) The provisions of this section may not be waived or modified by the agreement of the parties under any circumstances.

History.—s. 19, ch. 2003-72; s. 28, ch. 2022-183.

689.28 Prohibition against transfer fee covenants.—

(1) INTENT.—The Legislature finds and declares that the public policy of this state favors the marketability of real property and the transferability of interests in real property free of title defects or unreasonable restraints on alienation. The Legislature further finds and declares that transfer fee covenants violate this public policy by impairing the marketability and transferability of real property and by constituting an unreasonable restraint on alienation regardless of the duration of such covenants or the amount of such transfer fees, and do not run with the title to the property or bind subsequent owners of the property under common law or equitable principles.

(2) DEFINITIONS.—As used in this section, the term:

(a) "Environmental covenant" means a covenant or servitude that imposes limitations on the use of real property pursuant to an environmental remediation project pertaining to the property. An environmental covenant is not a transfer fee covenant.

(b) "Transfer" means the sale, gift, conveyance, assignment, inheritance, or other transfer of an ownership interest in real property located in this state.

(c) "Transfer fee" means a fee or charge required by a transfer fee covenant and payable upon the transfer of an interest in real property, or payable for the right to make or accept such transfer, regardless of whether the fee or charge is a fixed amount or is determined as a percentage of the value of the property, the purchase price, or other consideration given for the transfer. The following are not transfer fees for purposes of this section:

1. Any consideration payable by the grantee to the grantor for the interest in real property being transferred, including any subsequent additional consideration for the property payable by the grantee based upon any subsequent appreciation, development, or sale of the property. For the purposes of this subparagraph, an interest in real property may include a separate mineral estate and its appurtenant surface access rights.

2. Any commission payable to a licensed real estate broker for the transfer of real property pursuant to an agreement between the broker and the grantor or the grantee, including any subsequent additional commission for that transfer payable by the grantor or the grantee based upon any subsequent appreciation, development, or sale of the property.

3. Any interest, charges, fees, or other amounts payable by a borrower to a lender pursuant to a loan secured by a mortgage against real property, including, but not limited to, any fee payable to the lender for consenting to an assumption of the loan or a transfer of the real property subject to the mortgage, any fees or charges payable to the lender for estoppel letters or certificates, and any shared appreciation interest or profit participation or other consideration described in s. 687.03(4) and payable to the lender in connection with the loan.

4. Any rent, reimbursement, charge, fee, or other amount payable by a lessee to a lessor under a lease, including, but not limited to, any fee payable to the lessor for consenting to an assignment, subletting, encumbrance, or transfer of the lease.

5. Any consideration payable to the holder of an option to purchase an interest in real property or the holder of a right of first refusal or first offer to purchase an interest in real property for waiving, releasing, or not exercising the option or right upon the transfer of the property to another person.

6. Any tax, fee, charge, assessment, fine, or other amount payable to or imposed by a governmental authority.

7. Any fee, charge, assessment, fine, or other amount payable to a homeowners', condominium, cooperative, mobile home, or property owners' association pursuant to a declaration or covenant or law applicable to such association, including, but not limited to, fees or charges payable for estoppel letters or certificates issued by the association or its authorized agent.

8. Any fee, charge, assessment, dues, contribution, or other amount imposed by a declaration or covenant encumbering four or more parcels in a community, as defined in s. 720.301, and payable to a nonprofit or charitable organization for the purpose of supporting cultural, educational, charitable, recreational, environmental, conservation, or other similar activities benefiting the community that is subject to the declaration or covenant.

9. Any fee, charge, assessment, dues, contribution, or other amount pertaining to

the purchase or transfer of a club membership relating to real property owned by the member, including, but not limited to, any amount determined by reference to the value, purchase price, or other consideration given for the transfer of the real property.

10. Any payment required pursuant to an environmental covenant.

(d) "Transfer fee covenant" means a declaration or covenant recorded against the title to real property which requires or purports to require the payment of a transfer fee to the declarant or other person specified in the declaration or covenant or to their successors or assigns upon a subsequent transfer of an interest in the real property.

(3) PROHIBITION.—A transfer fee covenant recorded in this state on or after July 1, 2008, does not run with the title to real property and is not binding on or enforceable at law or in equity against any subsequent owner, purchaser, or mortgagee of any interest in real property as an equitable servitude or otherwise. Any liens purporting to secure the payment of a transfer fee under a transfer fee covenant that is recorded in this state on or after July 1, 2008, are void and unenforceable. This subsection does not mean that transfer fee covenants or liens recorded in this state before July 1, 2008, are presumed valid and enforceable.

History.—s. 1, ch. 2008-35.

689.29 Disclosure of subsurface rights to prospective purchaser.—

(1) A seller must provide a prospective purchaser of residential property with a disclosure summary at or before the execution of a contract if the seller or an affiliated or related entity has previously severed or retained or will sever or retain any of the subsurface rights or right of entry. The disclosure summary must be conspicuous, in boldface type, and in a form substantially similar to the following:

SUBSURFACE RIGHTS DISCLOSURE SUMMARY

SUBSURFACE RIGHTS HAVE BEEN OR WILL BE SEVERED FROM THE TITLE TO REAL PROPERTY BY CONVEYANCE (DEED) OF THE SUBSURFACE RIGHTS FROM THE SELLER OR AN AFFILIATED OR RELATED ENTITY OR BY RESERVATION OF THE SUBSURFACE RIGHTS BY THE SELLER OR AN AFFILIATED OR RELATED ENTITY. WHEN SUBSURFACE RIGHTS ARE SEVERED FROM THE PROPERTY, THE OWNER OF THOSE RIGHTS MAY HAVE THE PERPETUAL RIGHT TO DRILL, MINE, EXPLORE, OR REMOVE ANY OF THE SUBSURFACE RESOURCES ON OR FROM THE PROPERTY EITHER DIRECTLY FROM THE SURFACE OF THE PROPERTY OR FROM A NEARBY LOCATION. SUBSURFACE RIGHTS MAY HAVE A MONETARY VALUE.

(Purchaser's Initials)

(2) If the disclosure summary is not included in the contract for sale, the contract for sale must refer to and incorporate by reference the disclosure summary and must include, in prominent language, a statement that the potential purchaser should not execute the contract until he or she has read the disclosure summary required under this section.

(3) As used in this section, the term:

(a) "Seller" means a seller of real property which, at the time of sale, is zoned for residential use and is property upon which a new dwelling is being constructed or will be constructed pursuant to the contract for sale with the seller or has been constructed since the last transfer of the property.

(b) "Subsurface rights" means the rights to all minerals, mineral fuels, and

other resources, including, but not limited to, oil, gas, coal, oil shale, uranium, metals, and phosphate, whether or not they are mixed with any other substance found or located beneath the surface of the earth.

History.—s. 1, ch. 2014-34.

689.301 Disclosure of known defects in sanitary sewer laterals to prospective purchaser.—Before executing a contract for sale, a seller of real property shall disclose to a prospective purchaser any defects in the property's sanitary sewer lateral which are known to the seller. As used in this section, the term "sanitary sewer lateral" means the privately owned pipeline connecting a property to the main sewer line.

History.—s. 3, ch. 2020-158.

Grants

Assume that O owns Blackacre in fee simple. What interests are created by the following grants? Note: "→" means a grant by a deed; "⇨" means a grant by a devise.

1. O → A and his heirs.
2. O ⇨A and his heirs. O is alive.
3. O → the First Baptist Church and its successors and assigns.
4. O → A.
5. O → A and B.
6. O → A for life.
7. O → A for the life of B.
8. O → A for so long as B and C are both living.
9. O → A until both B and C are dead.
10. O → A and her heirs so long as A is alive.
11. O → my spendthrift nephew A and his heirs, but if A ever attempts to alienate, then to B and her heirs.
12. O → A and her heirs, but A shall have no power to alienate it.
13. O → A for life, but if A ever attempts to sell her life estate, then O shall have the power to reenter the property and take possession of it.
14. O → A and his heirs so long as a Democrat is President.
15. O → A and his heirs, but if a Republican is elected President, then O and her heirs shall have the right of reentry and repossession.
16. O → A for life, so long as she keeps up with her reading in property.
17. O → A and his heirs, so long as he remains unmarried.
18. O → A for life, then to B and her heirs.
19. O → A for life, then to A's children and their heirs.
20. O → A for life, then to B for life.
21. O → A and his heirs so long as the land is farmed, then to B and his heirs.
22. O → A and his heirs, but if the land ceases to be used as a farm, then B shall have the power to enter and take possession.
23. O → A for 10 years.
24. O → A for life, and then 1 day after A dies, to B.
25. O → A and his heirs on A's 21st birthday.
26. O → A for life, but if B graduates from law school, then to B and his heirs.
27. O → A for life, then to B and her heirs if B graduates from law school. [or: O → A for life, then to B and her heirs if B marries C.]
28. O → A for life, then to B's heir.
29. O → A for life, then if B marries C to B and his heirs, but if B doesn't marry C, then to D and his heirs.
30. O → A for life, remainder to B if B survives A.
31. O → X for life, then to A's children and their heirs.
32. O → A for life, then to B and her heirs, but if B forgets property law, then to C and her heirs.

Determining the Interests in a Grant

Step One: **Determine who has the present right to possess the property, and make a preliminary determination of what that interest is called.** The determination of what the interest is called has to be preliminary at this stage, because your answer may change somewhat once you've identified all the future interests. If there is any condition on the present right to possess it, make sure you understand what the condition is and what it would take for it to be violated.

Step Two: **Determine whether or not the grant creates any future interests in a third party/grantee (i.e., not O, the grantor)**. Remember that there may be more than one such future interest. If the grant creates any interest or interests in a grantee, go to Step Three. Otherwise, go to Step Six.

Step Three: **For each future interest created in a *grantee*, determine whether it's a remainder or an executory interest.** It will be one or the other.

To be a remainder, the interest must satisfy *all three* of the following rules (or tests). If it flunks any one of them, you know it's not a remainder. And since it's one or the other, if it's not a remainder it must be an executory interest.

1. A remainder can follow only a life estate.[18] So if it follows anything other than a life estate, it can't be a remainder. It must be an executory interest.
2. A remainder must be *always capable* of taking effect immediately upon the expiration of the preceding estate. It doesn't have to be certain to take effect when A (the life estate holder) dies – it just has to be *possible*, as of the time of the grant, that it would take effect immediately when A dies. If, for example, there's a built-in gap between the end of the life estate and the time when B could take possession, it can't be a remainder; it's an executory interest.
3. And a remainder can't take effect before the previous life estate expires. Or, to put it another way, it can't cut off the previous life estate. If the interest cuts off the life estate, then it can't be a remainder. It must be an executory interest.

Examples:

No. 21 *O → A and his heirs so long as the land is farmed, then to B and his heirs*. B's interest fails the first test. It doesn't follow a life estate. You don't need to apply the second and third tests to this grant to determine that it's not a remainder. All it takes is flunking any one of the three tests for a future interest created in a grantee to not be a remainder. Since it's not a remainder, it must be (and it is) an executory interest.

No. 24 *O → A for life, then 1 day after A dies, to B.* B's interest fails the second test. There's no way it could take effect immediately after A dies. It must be an executory interest.

[18] In fact, a remainder could also follow a fee tail, but don't worry about that. We aren't covering fee tails.

No. 26 *O → for life, but if B graduates from law school, then to B and his heirs*. B's interest fails the third test. The grant appears to say that B would get the property upon graduating even if A is still alive. This would cut off A's life estate.

In any of these three grants, B's interest is not a remainder. It therefore wasn't permitted at all before 1536. (The Casebook at CB 328-329 puts this in terms of a prohibition before 1536 of shifting and springing interests; this is just another way of saying that any interest created in a third party that did not qualify as a remainder under the rules above was not permitted.) Today it would be permitted, but it would be an executory interest, not a remainder.

The three rules, then, serve a dual purpose. They tell you whether the future interest created in a third party (like B) is a remainder. Post-1536 (when the Statute of Uses took effect), a future interest created in a third party that didn't qualify as a remainder was an executory interest. That remains so today. Again, an executory interest is a future interest that:

a) is created in a third party; AND
b) is not a remainder.

Why bother distinguishing a remainder from an executory interest? In particular, a contingent remainder and an executory interest look virtually identical in their function. The difference is that where the Doctrine of Destructibility of Contingent Remainders (DDCR) is in force, it applies to contingent remainders, but not to executory interests. (See the next section for more detail).[19] On an exam, if the question states that the particular jurisdiction follows the common law, you should assume the DDCR applies.

Whether the future interest is a remainder or an executory interest, make sure you can answer this question: a remainder (or executory interest) *in what*? For example, is it remainder (or executory interest) in fee simple? A remainder (or executory interest) in a life estate? A remainder (or executory interest) in fee simple subject to an executory interest? The question is – what sort of possessory interest will the future interest holder receive when the interest becomes possessory?

Finally, note what you do *not* need to worry about if the future interest in the grantee is an executory interest – namely, whether it is a shifting or a springing executory interest. There is no rule the application of which turns on whether an executory interest is shifting or springing. How you classify it (as shifting or springing) never makes a difference to what happens to the interest. So there's no point in identifying it one way or the other. It's labeling gone berserk.

[19] As the casebook notes (CB 342-344), the Restatement (Third) proposes to simplify the catalog of future interests. All future interests would be called "future interests." They would be either "vested" or "contingent." It's useful to be generally familiar with this proposal, but you need to know the classic formulation, because that's what states follow. You should, however, assume (as does the Restatement (Third)) that all future interests are fully devisable, descendible, and alienable *inter vivos*, unless a case you're reading tells you otherwise.

If the future interest is a remainder, the next step is Step Four. If the future interest is an executory interest, go to Step Five.

Step Four: **Determine whether the remainder is a vested remainder or a contingent remainder.** A remainder is contingent if it satisfies either of the following two tests:

1. There is a condition that needs to be satisfied (a condition other than the death of the preceding life estate holder) for the remainder to become vested.
2. The remainder is held by an unascertained person.

If the remainder is not contingent, it's vested.

Step Five: **Go back and review your preliminary determination of the label to be applied to the present possessory estate, and decide whether you need to modify it.**

For example, in No. 21, you might have been tempted to call A's interest a fee simple determinable. But applying Step Two, you saw that there is a future interest created in a grantee (B), so you next determined (Step Three) whether it was a remainder or an executory interest. It flunks the first of the three tests for a remainder (it doesn't follow a life estate), so it must be an executory interest. Now you look back at A's interest and realize that A has a "fee simple subject to an executory interest" (i.e., B's executory interest) (it could also be called "fee simple on executory limitation").

NOTE: It's very helpful in learning the material to follow the labels exactly. Regardless of how some courts or commentators might label it, the interest in described in 21 is best termed a "fee simple on executory limitation" (or "subject to executory limitation"), with the executory interest in B – as opposed to a "fee simple determinable in A, with an executory interest in B." But on an exam, I won't take off points if your label isn't exactly correct, so long as I can understand what you're talking about.

Step Six: **Determine whether O, the grantor, retained any interest in the property.**

If there is no way that O could get it back, then there is no future interest in the grantor.

If O might get it back, determine what that interest is called. It will be called a reversion, possibility of reverter, or a right of entry/power of termination.

Here, too, you need to determine what sort of possessory interest O would be entitled to if the retained future interest became possessory. It might be, for example, a reversion in fee simple. But it might also be a reversion in fee simple subject to an executory interest (as in No. 29).

Finally, remember that the label you give a future interest may or may not change, depending on events after the grant is made. Keep in mind two rules:

1. A transfer of a future interest from one party to another will *not* change its name. Consider, for example, O → A for life. A has a life estate; O has a reversion. If a year later, while A is alive, O transfers O's interest to B, then we would say, A has a life estate, and B has a reversion. Or consider, O → A for life, then to B. Then a year later B transfers B's remainder to O. Then we would say A has a life estate, and O has a remainder.

2. Subsequent events can cause a future interest to change from contingent to vested or even destroy it. Consider O → A for life, then to B if B marries C. Initially, A has a life estate; B has a contingent remainder; and O has a reversion. If B marries C, though, then A has a life estate, and B has a vested remainder; O now has nothing. Or suppose that a year after the original grant is made, C dies without ever having married B. Now B can never fulfill the condition. This destroys B's contingent remainder. We would then say A has a life estate and O has a reversion. (We don't say that O has B's remainder, because the death of C just destroyed B's remainder; it wasn't transferred to O. Rather, the reversion was created in O at C's death.) Note of course that there could interpretive issues in a grant like this. For example, what if B, a non-US citizen, enters into what state law deems a valid marriage with C, a US citizen, while A is alive, but B is then convicted of violating federal law based on evidence that the marriage was entered into for the purpose of securing US citizenship?

The Doctrine of Destructibility of Contingent Remainders (DDCR)

Contingent remainders were subject to the DDCR at common law. Today you would need to ask in any given state whether the doctrine was in effect. In most states it has been abolished. In a few states it has not. **In the final exam, you will not be tested on how to apply the DDCR, but it is still useful to have an understanding of what the DDCR provides:**

The Doctrine of Destructibility of *Contingent Remainders* applies only to contingent remainders, not executory interests. Consequently, where the DDCR is in effect, it is important to distinguish between contingent remainders and executory interests.

There are two ways the DDCR can destroy contingent remainders.

1. The life estate ends because the life estate holder dies, and the contingent remainder is not ready to take effect. Then the contingent remainder is destroyed.
2. The life estate ends before the person holding the life estate dies, and the contingent remainder is not ready to take effect.

No. 27 O → A for life, then to B and her heirs if B marries C.

Assuming the state has the DDCR, we would say that A has a life estate, and B has a contingent remainder in fee simple. O has a reversion in fee simple. B could lose out in either of two ways:

1. A dies and B hasn't gotten around to marrying C. O gets it back and keeps it in fee simple. B's contingent remainder is destroyed.
2. X, a developer, buys A's life estate and O's reversion, and gets a fee simple through merger. (Merger means that the present possessory estate plus the next vested estate (i.e., one certain to become possessory someday) will merge into a fee simple.) B's contingent remainder is destroyed.

The Rule in Shelley's Case and the Doctrine of Worthier Title

As the Casebook explains (CB 353-354), these two rules, like the DDCR, were created by the common law courts to destroy certain contingent remainders. **In the final exam, you will not be tested on how to apply either rule. Just read the CB pages once and put the doctrines out of your mind, unless they come up in your bar prep, in which case you can focus on them then.**

Before Nesbitt, Baskin, and Gersten, JJ.

GERSTEN, Judge

* * *

I. FACTS

In 1940, several members of the Matheson family deeded three tracts of land located on the northern portion of Key Biscayne to Dade County. This land, consisting of 680 acres, came to be known as Crandon Park. In the recorded deeds, the grantors expressly provided:

> This conveyance is made upon the express condition that the lands hereby conveyed shall be perpetually used and maintained for public park purposes only; and in case the use of said land for park purposes shall be abandoned, then and in that event the said [grantor], his heirs, grantees or assigns, shall be entitled upon their request to have the said lands reconveyed to them.

. . . In 1963, a section of the park was utilized as a dump. This use was never approved or sanctioned by the grantors, their heirs, or assigns.

In 1986, the Dade County Board of County Commissioners passed Resolution R-891-86, which authorized the execution of an agreement with Arvida International Championships, Inc., (Arvida), and the International Players Championship, Inc., (IPC), to construct a permanent tennis complex. The construction of the court facilities and infrastructure began in the summer of 1986, and terminated in 1987. Initially, the tennis complex consisted of fifteen tennis courts, service roads, utilities, and landscaping, all located on 28 acres.

The agreement provided that for two weeks each year, subject to a renewal provision, the tennis complex would become the site

The Tennis Center at Crandon Park (home of the Sony Ericsson Open)

of the Lipton International Players Championship Tennis Tournament (Lipton tournament). This renowned tournament is only open to world class players who compete for two weeks.

In February 1987, the first Lipton tournament was held before approximately 213,000 people. The county manager considered the Lipton tournament to be such a tremendous success that he recommended, and the County Commission approved in Resolution R-827-87, the construction of "Phase II," a permanent clubhouse/fitness facility. This 15,000-to-33,000-square-foot facility was to house locker rooms, training and exercise equipment, meeting rooms, food and beverage concessions, and a sporting goods store. As a result of "community input," the clubhouse was ultimately reduced to 9,800 square feet. This "community input" consisted of informal meetings with residents and one public hearing.

During the four Lipton tournaments held thus far on Key Biscayne, temporary seating has been provided. Appellants contend that a 12,000-seat permanent stadium is part of the future development plans. Although Dade County admits that "[a] stadium is a future pos-

sibility," it asserts that "no unified plan of development for a stadium exists, and no approvals or permits for any stadium have been issued."

. . .

The facilities are closed to the public for specified periods of time both before and after the two-week Lipton tournament. Dade County's agreement with the tournament sponsors, Arvida and IPC, gives them control of the tennis complex during what is called the "Tournament Period." The "Tournament Period" is defined in the agreement as the: three weeks prior to the beginning of the calendar week in which the qualifying rounds of the Tournaments . . . are to be played . . . and continuing until the date occurring one (1) week after the completion of such Tournaments concerned.

In addition, the contract gives the tournament sponsors "reasonably necessary" time before the "Tournament Period" for site preparation. Arvida and IPC are also each afforded 45 days and 30 days, respectively, after the "Tournament Period" for site dismantling.

With respect to the 1987 tournament, the agreement specifically provided for Arvida to have "Priority Use" of the "grandstand and stadium court areas from November 1, 1986 through a period ending 45 days after the conclusion of the Tournament." The agreement defines "Priority Use" as "[t]he unimpaired right of [Arvida and IPC] . . . to permit, reasonably restrict and control access to the Site . . . ."

Dade County offered testimony at trial that the public was only excluded from using the facilities for some three to four weeks. However, under the clear wording of the agreement, relative to the 1987 tournament, Arvida had the right to exclude the public from the tennis complex for as long as five months.

During the tournament, the sponsors are given most of Crandon Park's parking spaces to provide parking for the tournament spectators. The agreement provides that the "County will designate adequate parking facilities in the currently existing Crandon Park parking areas . . . for Priority Use in connection with the Tournament."

The contract estimated that the parking needs of the tournament would "not exceed 4,000 spaces per day." These 4,000 spaces were not sufficient to satisfy the needs of tournament spectators and other park visitors. At trial, Earl Buchholz, Jr., the tournament operator, testified that tournament spectators parked not only at Crandon Park, but at the Marine Stadium, as well. Correspondingly, Dr. Charles Pezoldt, Deputy Director of Dade County Parks and Recreation Department, testified that during the final Saturday and Sunday of the tournament, the parking lots were temporarily closed to the public.

In 1987 and again in 1988, Dade County attempted to obtain the consent of one of the heirs, Hardy Matheson, for the operation of the Lipton tournament. Hardy Matheson refused to give his consent, and informed the County that the tennis complex and the operation of the Lipton tournament was contrary to the deed restriction. . . .

II. THE DEED RESTRICTION

* * *

B. DADE COUNTY'S VIOLATION OF THE DEED RESTRICTION

Appellant/heirs first contend that the construction of the tennis complex violates the deed restriction. As previously stated, the deed provides that the "lands hereby conveyed shall be perpetually used and maintained for public park purposes only."

"In construing restrictive covenants the question is primarily one of intention and the fundamental rule is that the intention of the parties as shown by the agreement governs, being determined by a fair interpretation of the entire text of the covenant." Thompson v. Squibb, 183 So.2d 30, 32 (Fla. 2d DCA 1966). . . .

Appellant/heirs argue that it was the intent of the Matheson family to limit the use of Crandon Park to passive activities such as picnicking, swimming, and the like. We glean no such intention from the language of the deed. Further, the Florida Supreme Court has adopted a very broad definition for what a "park" encompasses. The court has stated:

> [A] park is considered not only as ornamental but also as a place for recreation and amusement. Changes in the concepts of parks have continued and the trend is certainly toward expanding and enlarging the facilities for amusement and recreation found therein.

Hanna, 94 So.2d at 601. The court further explained that the permissible uses for a public park include:

> [T]ennis courts, playground and dancing facilities, skating, a swimming pool and bathhouse, horseshoe pitching, walking, horseback riding, athletic sports and other outdoor exercises . . . golfing and baseball . . . parking facilities . . . provided always that a substantial portion of the park area remains in grass, trees, shrubs and flowers, with seats and tables for picnicking, for the use by and enjoyment of the public.

Hanna v. Sunrise Recreation, Inc., 94 So.2d at 601 (quoting McLauthlin v. City and County of Denver, 131 Colo. 222, 280 P.2d 1103 (1955), with approval). We conclude, based on the Florida Supreme Court's broad definition of "park" contained in Hanna , that the construction of the tennis complex did not violate the "public park purposes only" provision of the deed restriction.

Appellant/heirs next argue that turning the tennis complex over to a commercial operator violates the deed restriction. We do not agree. Florida courts have consistently ruled that commercial benefit does not defeat a park purpose. . . .

Finally, appellant/heirs contend that the operation of the Lipton tournament violates the deed restriction because it deprives the public of the use and enjoyment of Crandon Park, including the use and enjoyment of the tennis facilities. We are persuaded by this argument and rule that the holding of the Lipton tournament violates the deed restriction because it virtually bars the public use of Crandon Park during the tournament, and does bar public use of the tennis complex, for extended periods of time.

Courts have unfailingly guarded against encroachments on public parkland where such parkland is under the protection of a deed restriction or restrictive covenant. . . .

In ruling that the holding of the Lipton tournament violates the deed restriction, we note that a distinction must be made between "park purposes" and "public purposes." Assuming arguendo that the Lipton tournament is an economic success which brings innumerable benefits to Dade County and its citizens, such an undeniable public purpose is not consistent with a deed restriction mandating the narrower "public park purposes only." See Fairhope Single Tax Corporation v. City of Fairhope, 206 So.2d at 589.

In addition, the word "only" in the deed restriction at issue further buttresses our ruling that the operation of the Lipton tournament, as presently constituted, violates the restriction. As the court in Thompson v. Squibb explained, "the word `only' is synonymous with the word `solely' and is the equivalent of the phrase `and nothing else.'" Thompson, 183 So.2d at 32.

Dade County contends that the tennis complex is consistent with the "public park purposes" restriction provided for in the deed. In support, Dade County argues that the complex is open to the public when the tournament is not being held, the site of the tennis complex utilizes less than 5 percent of Crandon Park, and that a valid park purpose is served by "spectating." Dade County also points to the

benefits derived by Dade County from having the Lipton tournament in Dade County. . . .

Here, the public, in fact, is deprived from using these tennis facilities for a period of three to four weeks during the Tournament Period. Further, under the contract as to the 1987 tournament, Arvida had the right to exclude the public for as long as five months.

. . . Here, the operation of the Lipton tournament, for all practical purposes, does amount to the virtual ouster of the public from the park for periods of time during the two-week tournament.

The contract gives the sponsors "Priority Use" of the parking areas of Crandon Park during the tournament. The contract estimated that the tournament needs "would not exceed 4,000 spaces per day." The amount of parking spaces was not adequate to meet the needs of tournament spectators and other park visitors as the testimony was uncontroverted that people were turned away from parking lots at the park. There was also uncontroverted testimony that some people found it necessary to park at the Marine Stadium.

We recognize that many legitimate park events, such as softball or golf tournaments, might fill up lots and make it difficult for latecomers to find a parking space at a certain area within the park. This, however, is not simply a case of a filled parking lot within a certain area of the park. The testimony demonstrates that the tournament apparently takes up all the available public parking spaces at Crandon Park for periods of time during the tournament. This is a public park parking nightmare.

We also recognize that the agreement between the tournament sponsors and the County required the County to provide shuttle services, if necessary, to transport tournament spectators. The parties' agreement, however, provides onlyfor the County's shuttle transportation of spectators from the parking facilities in "Crandon Park parking areas."

. . .

Dade county argues that the use of the property as a tennis complex is better than its previous use as a dump. While we agree that a tennis complex in a public part, is better than a dump in a public park, we note that the County's previous us of the site as a dump, was also in violation of the deed restriction. . . . Dade County, in fact, conceded before the trial court that the dump was inconsistent with a public purpose. We do not congratulate Dade County for shifting from one impermissible use to another.

Finally, Dade County argues, and we agree, that it is well settled that "equity abhors a forfeiture," that "such restrictions are not favored in law if they have the effect of destroying an estate," and that they "will be construed strictly and will be most strongly construed against the grantor." Dade County v. City of North Miami Beach, 69 So. 2d 780, 782-783 (Fla. 1953).

Appellant/heirs, however, clearly represented to this court and the trial court that they were not seeking a reversion. What appellant/heirs want is a declaratory judgment that the present use of the park is in violation of the deed restriction and an injunction to prevent any further erosion of the "public park purposes only" deed restriction.

Florida's declaratory judgment statute gives courts of this state jurisdiction to declare the rights of parties when there is a dispute over the interpretation of a deed. Sec. 86.021, Fla. Stat. (1989). Further, injunctive relief has long been recognized as an appropriate remedy for violation of a deed restriction or restrictive covenant. . . .

We therefore declare Dade County to be in violation of the deed restriction. We reverse the trial court order as to the deed restriction, and remand for entry of an order enjoining Dade County from permitting the Lipton tournament to proceed as it is presently

held. Our ruling does not prevent Dade County from using the tennis complex for tennis tournaments. It merely seeks to insure that in holding such tournaments, public access to the rest of Crandon Park is not infringed; and use of the tennis complex is not denied to the public for unreasonable periods of time. . . .

Reversed and remanded with instructions.

NESBITT, Judge (dissenting):

. . . I disagree with the majority's holding that the tournament violates the deed restriction because it a) virtually bars the public's use of the entire Crandon Park facilities during the tournament period and b) does bar the public's use of the tennis complex itself for extended periods of time. I base my disagreement on the evidence set forth in the record. . . .

The record shows that the public flocks to the tournament events, that the tournament operator makes every effort to maintain the courts open to the public during those times when the tournament is being set up and taken down; in sum, that the complex is not inaccessible to the public for eight to nine weeks out of the year. In addition, it is uncontroverted that most of the twenty-eight acre site devoted to the Lipton Tennis Tournament, which comprises some five per cent of the entire park, was previously an illegal dump which has been made accessible and converted to a public park use. Consequently, with the elimination of the dump more usable land has been devoted to the park. (The majority's statement that the county is not to be congratulated for changing use of the site from an impermissible dump to an impermissible tennis complex is inconsistent with its own holding that the tennis complex is permissible but that the public's ouster from the park and tennis complex during the tournament violates the deed restriction.) The fact that this newly available recreational facility is closed to public use for three to four weeks in order to prepare for a tennis tournament which some 200,000 park-goers can enjoy does not amount to a violation of the deed restriction. The closing of the tennis center to public play for a brief period in order to prepare it for an event that is enjoyed by tens of thousands is most assuredly a fair trade-off. Even if the evidence in this record is considered in a light most favorable to the appellants, rather than the appellees, it will in no way support a determination that the public has been ousted or will be ousted from the park or the tennis facility. Obviously then, the majority has impermissibly substituted its judgment as to the weight of the evidence presented to the trial court. . . .

Douglas Hanks, Court loss for Miami Open tennis tourney, Miami Herald, 12/29/15

After a big loss on appeal, the Miami Open tennis tournament may be closing the door on staying in Key Biscayne's Crandon Park.

Amplifying a familiar warning, the for-profit tourney's lawyer says an exit to another city is a virtual certainty on the heels of last week's defeat before the Third District Court of Appeal. He said the only variable is how long it will take the Open to leave after losing its challenge to growth restrictions at the county-owned Crandon, home to the tourney that each spring draws some of the biggest stars in tennis and about 300,000 attendees.

FILE--A view of the men's final match between Andy Murray, of Great Britain, and Novak Djokovic of Serbia, at Miami Open tennis tournament at Crandon Park in Key Biscayne on Sunday, April 5, 2015. After a big loss on appeal, the Miami Open tennis tournament may be closing the door on staying in Key Biscayne's Crandon Park.

"At some point, it's going to be gone. The only question is when," said Eugene Stearns, the Miami lawyer who represented the tournament in its losing effort to overturn the county rules and allow for the Miami Open to begin a $50 million expansion plan at Crandon.

Tournament owner International Players Championship Inc. has an eight-year commitment in its contract with Miami-Dade, but Stearns maintains that agreement is no longer valid because the county has failed to provide an updated home for the yearly event.

"I can't predict whether the tournament is going to want to stick it out for the next eight years," he said. "They'll certainly have to consider their options. Under the circumstances, this has become a hostile environment to conduct business."

Late last week, the Third DCA ruled against the Open with a single-sheet ruling affirming a lower court's ruling that upheld the Crandon restrictions. That came on the heels of an oral argument where the appellate judges took the rare step of asking no questions of the lawyers — a sign that the judges weren't that interested in exploring the dispute.

The opinion-free decision makes further appeal impossible, meaning the Open would have to convince the Third DCA to write a decision before it could even pursue relief in front of the Florida Supreme Court.

"I'm not going to hold my breath," Stearns said.

At the heart of the dispute is Bruce Matheson, a descendant of the original family that owned Crandon. The land continues to be governed by restrictions tied to the 1940 donation of the property to the county. The Mathesons, at the time large land holders on Key Biscayne, required Miami-Dade to build a bridge to the island after accepting the 975 acres for Crandon, which was required to be operated only for "public park purposes."

Other Mathesons sued to block creating a large stadium to serve the tennis tournament in the

1980s, and the litigation was settled in part by creating a four-person committee to approve any changes to the park's master plan. A non-profit picked by the Matheson family, the National Parks Conservation Association, holds half of the seats and named Bruce Matheson to one of them.

From his post, Matheson has become a top foe of the tennis tournament, which sued him and Miami-Dade last year to have the committee declared illegal. In a written brief to the Third DCA, the tournament stated: "This appeal asks this Court to return control of Crandon Park to the people and their elected representatives." Oren Rosenthal, an assistant county attorney handling the case, declined to comment.

Miami Open executives did not respond to interview requests this week, but the blunt comments from their lawyer follow a broader argument from the annual event: clear the way for it to create a new tennis complex or risk losing the pro tourney to another city.

Tournament officials have declined to tamp down speculation that a new tennis facility in Orlando would be a good alternative for the Open, and last month tourney chief Adam Barrett noted cities as far away as Dubai and Beijing would welcome the kind of pro tennis event that's been held in Key Biscayne since the 1980s.

The Third DCA ruling could prompt the Open to act on its warnings about a departure. Or the finality of the legal fight could pressure tournament officials to negotiate a more modest expansion plan with Matheson and the NPCA.

"They already have the one stadium," said Richard Ovelmen, Matheson's lawyer. "They could ask the Amendment Committee to make improvements to it. But what they can't do is add a bunch of stadiums or permanent structures." In its brief to the Third DCA, Miami-Dade wrote that the tournament "abandoned" the process of trying to amend the master plan "in favor of this wasteful and unmeritorious litigation."

The tournament, an arm of the IMG sports conglomerate, began building political pressure for the expansion in 2012, when it championed a countywide ballot question endorsing the $50 million plan to redo the main 14,000-seat tennis stadium at Crandon and create two other permanent stadiums where smaller courts now stand. The ballot item passed with 73 percent of the vote.

Miami Open pledged to pay for the construction, but the agreement with Miami-Dade also includes a 50-year extension on the tournament's Crandon lease, as well as a new year-round management deal that has the tourney acting as the private operator of the public tennis courts.

The county deals calls for Miami-Dade to pay Miami Open $1.8 million a year in management fees, but the county expects to save about $850,000 a year by not having to dedicate staff to facility year-round., according to a 2013 summary. Miami Open would pay at least $1.5 million a year to host the tournament, and Miami-Dade would pay $14 million over 14 years in capital improvements for the facility.

Mayra Peña Lindsay, Key Biscayne's mayor, said losing the tournament would definitely create a "void" in the affluent island village, where the pro tennis matches are a popular draw each year for locals. But she noted the original Matheson suit from the 1980s enjoyed support from Key Biscayne residents, and that the restrictions that came from that litigation made the current tournament's traffic and other complications "bearable."

"Bruce Matheson is very respected in terms of kind of being the watchdog and the person that keeps the park a park," she said.

In an interview, Matheson said he wasn't overly concerned about Key Biscayne losing the Open.

"The economic destiny of Miami-Dade County and Crandon Park does not depend on a two-week tennis tournament," he said.

Jerry Ianielli, Bruce Matheson Single-Handedly Kills the Miami Open, Miami New Times, March 15, 2016

Andy Murray is melting in the Florida heat. It's the final round — set three, game one — of the Miami Open, the biggest tennis tournament in Florida, the second-biggest in America, and, for at least a little while longer, the fifth-biggest in the world. The match is even at one set each. As the game draws to a close, he tosses the ball up and drives a serve toward his opponent, wheezing in the process.

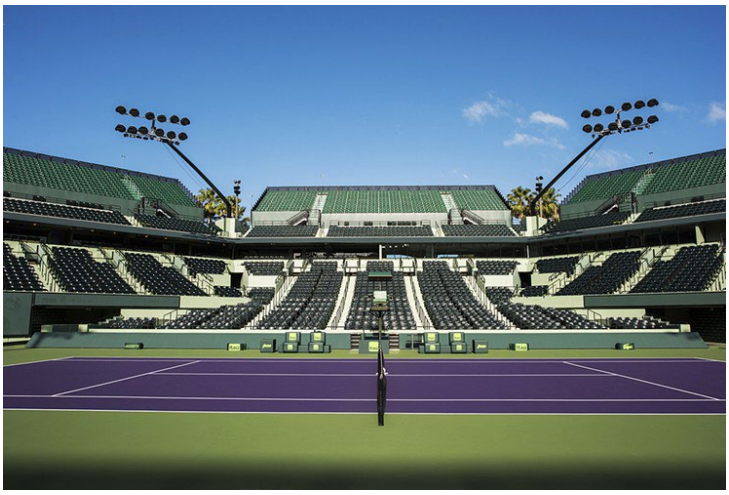
Across the net, Serbian Novak Djokovic, the top-ranked male player in the world, swats the ball back with ease. He fans shots to the opposite corners, forcing the Brit to wind-sprint back and forth along the baseline. It's cruel. Eventually, Murray runs out of gas and flops a halfhearted shot straight into the net. He crumples over his racket. Advantage Djokovic.

Murray looks faint, grimacing between points and wobbling from side to side on his feet, trying in vain to summon his last drops of energy.

Smelling blood, Djokovic hammers a series of powerful volleys at Murray. After a few strokes, the curly-haired 27-year-old Murray sends another halfhearted backhand straight into the net, dropping the first game of the third set.

Murray staggers immediately to the sideline, cracks open a plastic water bottle filled with a greenish-yellow energy drink, and gulps it down. He tries to summon his coach for more liquid, but there isn't time. Murray staggers back onto the court and drops the next game, consistently flubbing shots. As he goes down 2-0, he gnashes his teeth and mouths, "I'm gone."

In a news conference later, Murray apologizes for wilting. "I'm sorry I couldn't make it more of a fight in the third set," he says. "I was trying, but my legs were tired, and I couldn't quite make it happen." Later, Djokovic calls the park's conditions "brutal."



The Crandon Park Tennis Center has hosted Miami's largest tennis tournament since 1994.

The 13,000-seat Crandon Park Tennis Center on Key Biscayne can be a hothouse, melting even high-level players like Murray as if they were on Mars. As top-flight stadiums like Wimbledon have added retractable roofs, Crandon remains uncovered and behind the times. The lighting rigs are temporary, as are about 5,000 seats. By county rules, everything is installed no earlier than 45 days before the tournament begins, which creates chaos. Many of the restrooms are portable. The property was formerly a landfill, and the entire site is sinking.

Next week, the tennis center will host Djokovic, Murray, Serena Williams, Rafael Nadal, and the rest of tennis' greats for the Miami Open. But soon, tennis' best may no longer compete here. Roger Federer, notably, is skipping the tournament for the third time in four years. Though IMG, a New York-based sports management firm that owns the tournament,

has offered to spend roughly $50 million to beef up the grounds — and Miami-Dade County voters overwhelmingly approved the proposal — an unlikely obstacle has arisen: Bruce Matheson, scion of one of Miami's founding families.

And backed by Florida's Third District Court of Appeal, which quashed a lawsuit the tournament filed this past December, it now seems likely the tournament will soon leave town for good.

"It's a shame," says Butch Buchholz, the Open's founder. "One person has done this. One person."

Bruce Matheson hits the accelerator and plunges a beat-up, yellow-white Ford Expedition over the Rickenbacker Causeway and onto the northern tip of Crandon Park. Stains pockmark the truck's gray cloth seats, and the back is crammed with boxes and old newspaper clippings, though his 72-foot Argosy yacht is docked not far away. Used napkins choke the cup holders.

Matheson, age 70, is a huge presence. He's nearly six-foot-five and drives with his chin poking out over the steering wheel, stretching his bird-like nose over the dash. His brown hair is parted to the side and is pinned in place by his huge, oblong ears. He wears oval-shaped glasses.

"Do you see how the road vanishes?" he booms in a vintage South Florida drawl. Thick expanses of trees and mangroves arch along both sides of Crandon Boulevard, the main highway slicing through the park. The plants turn the lanes into tunnels. You're supposed to feel like you're getting lost deep in the forest. The entire park is a mecca of unblemished nature and ample parking.

The island of Key Biscayne is roughly five miles long and split into thirds. Crandon Park's 800 acres take up the top section. In the middle sits a village of roughly 12,000 people – a place of immense wealth where tennis and golf play an outsized role. Bill Baggs Cape Florida State Park makes up the bottom third.

Bruce's great-grandfather was W.J. Matheson, a scientist, inventor, world traveler, and, around the turn of the 20th Century, one of the country's richest men. The son of a Scottish sugar farmer, he made a fortune in upstate New York selling synthetic dyes to factories during the early 20th Century. Having built himself into an aristocrat —he later befriended Theodore Roosevelt — he sent Bruce's father, Hugh, to the Adirondack-Florida School, a prestigious academy that sent boys away to a camp in the Sunshine State for half the year. After some pleading, Hugh eventually convinced W.J. to sail down and visit. The young man's father quickly fell in love with the land.

Bruce Matheson claims to speak for the 130-person Matheson family, which once owned most of Key Biscayne.

"The elder Matheson had this wanderlust, this love for adventure, like, 'Let me send my son into this primeval world,' " historian Paul George says. "Florida was very raw at the time, in its infancy."

In 1902, W.J. Matheson bought up land for a massive winter estate in what is now Coconut Grove. Six years later, he started purchasing tracts on Key Biscayne too. Around that time, Hugh graduated from Yale and began working

in his father's factories. But the son soon came down with lead poisoning, a common illness for factory workers at the time. His joints hurt, his kidneys were failing, and he was struck with bouts of delirium. His doctors told him to spend as much time as possible in the sun.

So Hugh moved permanently to South Florida and, with his father's money, attempted to turn Key Biscayne into an empire. He brought in 60 workers from the Bahamas who planted thousands of coconut trees across the island. He dredged canals across the key, set up massive water wheels to irrigate the land, and laid out a series of huge cisterns to catch rainwater for his employees to drink.

At the island's westernmost point, the Mathesons built a massive estate called "Mashta" — an Egyptian name for "resting house by the sea." The home was modeled after a palace W.J. Matheson had seen while sailing down the Nile. The courtyards spread out in every direction, not unlike James Deering's Villa Vizcaya, which was built at roughly the same time in Coconut Grove. "Mashta was a party house," George says. "They had the Vanderbilts, Carnegies, the Mellons there."

W.J. instilled a love for nature and animals in his children. His son Hugh adopted two Galapagos tortoises. The family even brought back a whole flock of flamingos, then extinct in the United States, from Andros Island in the Bahamas.

(Years later, Finlay Matheson, W.J.'s grandson and Bruce's uncle, adopted emus and kept them on his Coconut Grove estate. In 1998, one emu escaped from its enclosure and began sprinting through the city streets at 35 miles per hour — five miles over the speed limit at the time. "My brother Michael got it cornered in by a swimming pool," Finlay's son, also named Finlay, says, "but the emu kicked a piece of PVC pipe out, and my brother ended up soaked, head to toe, and covered in emu shit.")

In the 1930s, Dade County Commissioner Charles Crandon offered a trade: The family would give land to the county, and in return a bridge would be built to the island. In 1939, W.J. Matheson's three heirs — Hugh, Malcolm, and Anna — agreed, under one condition: The land must be used "for public park purposes only." Private companies — like, say, the one that now operates the Miami Open — would be banned.

Bruce Matheson recalls this history as he trudges out toward the beach at Crandon. A few families sit by the water. A wild iguana perches on a tree stump but scurries away when Matheson approaches. A pair of thick-breasted turkey vultures swoops by overhead.

"Want to know the difference between a buzzard and a turkey vulture?" he asks. "Buzzards have black heads. Turkey vultures have red ones."

Bruce Matheson grew up in South Miami. As a teen, he was sent off to a boarding school in New Jersey. In his downtime, he sailed with his father in South Florida. He attended college but didn't graduate, then spent most of his time traveling the globe as a salesman for a metal fabrication company in Texas. He has never married, has no children, and is intensely secretive. According to court documents, he splits his time between his girlfriend's Coconut Grove apartment and the 72-foot boat docked at the Biscayne Bay Yacht Club. Most of his life is spent micromanaging park minutiae, like fence-post heights at Crandon Park. He is a well-meaning curmudgeon, incapable of letting even the smallest detail slide.

This explains why the Miami Open infuriates him so. Pulling into the Crandon Park Tennis Center, he comes upon a sea of activity: Giant cranes are everywhere. Men blast the sidewalks with power washers. Golf carts whiz by, carrying men holding clipboards. It's preparation time for the tournament, which begins March 21, and white tents for food and souvenir stands are popping up all over.

For a tennis fan, this is hallowed ground. But Matheson's temperature rises just seeing the beehive of activity. He parks his truck and trudges out, his mouth melting into a frown. "We don't hate tennis," he says, speaking for the family. "I used to play tennis in high school, actually."

What it's about, Matheson says, is ensuring Crandon Park doesn't fall into the grubby hands of private developers. But his opponents say the county has, instead, allowed the park to fall into Matheson's own grubby hands.

"The Mathesons weren't conservationists," says Gene Stearns, the tournament's lawyer. "Look at what it took to plow Crandon Boulevard right through the park. Our friend Matheson just wants the tournament gone."

Novak Djokovic has won four of the last five Miami tournaments.

Cliff Drysdale is 74 years old and in stunningly good shape. His hair is dark and thick. His eyes seem wild. He runs a tennis clinic at the Ritz-Carlton on Key Biscayne — today, he's in playing mode, wearing a loose-fitting shirt and glasses with a strap tied behind his ears. Despite the fact that he looks like the world's strongest librarian, he's a tennis legend — formerly the world's fourth-ranked player. He also ran men's pro tennis for a short stint in the '70s. He's now ESPN's most prominent tennis announcer and has called every Miami tournament for the network. As he speaks, a dozen small children chase tennis balls around a fenced-in court.

"There was a time when there were rumors of Miami overtaking the Australian Open as a major," Drysdale says. "It's not going to happen now. And if the tournament leaves, you lose exposure for the city, worldwide."

The tournament began in 1985 under the auspices of Drysdale's close friends, Butch and Cliff Buchholz. They were the sons of a former pro from St. Louis — by the time the boys were in their teens, their father had migrated to coaching. Jimmy Connors, the best male player in the '70s not named Björn Borg, trained in their dad's program. Chuck McKinley, who won Wimbledon without losing a set in 1963, grew up alongside Butch, the elder brother.

As a pro, Butch Buchholz was rail-thin, wore Lacoste shirts, and combed a thick head of hair to the side. Now in his 70s, he's grown shaggier and has a grandfatherly air about him. After retiring from tennis, Buchholz later ran the men's pro league in 1981 and 1982.

"The [Miami] tournament was really Butch's idea," brother Cliff says. "He wanted to have a player's championship, sort of like the player's championship in golf. It was to be a men's and women's event, with a two-week format."

Butch, who was living in Connecticut at the time, says he intentionally chose South Florida to create a bridge among the North American, European, and South American tennis markets. "We wanted close contact with Latin America, since there wasn't a major event down there," he says. "We almost wanted to create a South American Open." At the time, the Lipton Tea Co. had already been sponsoring a tournament outside Jacksonville. Buchholz, who had a friend in Lipton's beverage-sales department, convinced the company to pony up $1.5 million to sponsor the tournament.

In 1985, the first Lipton's International Players Championship was held in Delray Beach. Tim Mayotte, a tall, rangy New Yorker, battled back from two sets down to win the inaugural final over his childhood friend Scott Davis. Mayotte took home $112,000. (The total purse has since grown to more than $5 million.) On the women's side, Martina Navratilova beat Chris Evert in straight sets. The next year, the tournament moved to the Boca West facility in Boca Raton.

Hungry for a permanent home, the Buchholzes struck a deal to start playing, permanently, in a new stadium, to be built in Weston in 1987. But as the contest neared, it became clear construction wouldn't be completed on time. "It was still pretty barren," Butch says. "The roads were totally unfinished."

As the brothers scrambled to find a place to play, Butch says he ran into Merrett Stierheim, who had been Dade County manager from 1976 to 1986 but was then heading the Women's Tennis Association. "I said, 'For heaven's sakes, why don't you bring the tournament to Miami?' " Stierheim, who recently underwent heart surgery, said over the phone.

Butch Buchholz said Dade County Deputy Parks Director Chuck Pezoldt then began scoping out locations. "We saw Tropical Park, Haulover Park, Amelia Earhart Park. The last one we went to was Key Biscayne," Buchholz recalls. At the time, the site was occupied by a landfill. "He said, 'We've been trying to figure out what to do with this dump for a long time.' There was a dead dog in there, old refrigerators, sofas. The smell was just terrible. But going over the bridge was really beautiful — you could see the skyline. It felt like a postcard. And the fact that they wanted to do something to get rid of the dump felt like it made sense."

In 1986, the tournament built 15 tennis courts on the property. Key Biscayne hosted its first Lipton Tournament the following year, accommodating 213,000 people in temporary bleachers. Miroslav Mecir, a cerebral, slow-moving player from Slovakia, took the men's final in straight sets. Among the women, Steffi Graf won her first of five Miami championships, beating Evert.

But the players still needed a proper clubhouse, and the tournament required a stadium.

"This," Buchholz says, "is where things get a little bit cloudy. Obviously, we didn't think there would be a problem." Buchholz maintains he was never warned about any of the Matheson family's deeds before setting up plans to build the tennis center at Crandon Park. By any estimation, the county rushed the deal through without seriously pondering future issues. Bruce Matheson's one-man war was still in the future.

Around Thanksgiving of 1992, Bruce Matheson sat in a cushy office in Boston, staring across a table at Butch Buchholz, then-Miami-Dade County Manager Joaquin Aviño, a host of lawyers, and Roger Fisher, the man who'd settled the Camp David accords. In the late '80s, the Matheson family embarked on a winding path of lawsuits aimed at blocking the Buchholzes from building a stadium in Crandon Park. Perhaps sensing doom, the county suggested the three parties meet in a neutral location with a trained mediator. At the time, Fisher was likely the best in the world.

One county representative "opened with a story about these two women," Matheson told New Times in 1996. "There was one orange on the table, and both [of those present] wanted it. So what were you going to do? Cut the orange in half? Well, when you found out in conversation that one of them wanted orange juice and the other wanted to make marmalade, you let one person have all the juice and you let the other person have all the skin, and they were both happy."

What the Matheson family wanted had been obvious for years. In 1988, a coalition of 60 Key Biscayners, including Matheson family members, sued Dade County, claiming the Lipton Tournament's use of Crandon violated the

original Matheson deeds. The suit halted construction at the tennis center.

"You don't turn a privately dedicated public park into a commercial development zone," Matheson growled, recalling his feelings at the time.

In 1990, an appellate court decided that the tennis center needed to serve a "public park purpose" to stay. (The center remains open to the public for all but the tournament's 12 days.) In 1991, the Mathesons sued again.

Threatened with never-ending litigation, Dade County suggested the mediation in Boston. Bruce was chosen to represent the family, which had ballooned to more than 130 heirs spread all over the country.

County lawyer Robert Ginsburg recruited Fisher, a fellow Harvard graduate, to mediate the dispute. At a cost of $20,000 — which the county paid, Matheson says — the group shuffled in and out of meetings for two straight days. "Matheson didn't say much," Cliff Buchholz says.

Eventually, the county agreed to this: Provided the Mathesons stopped suing, the tennis center would be built. But only 7,500 of the stadium's seats would be permanent, and bleachers would be set up each year for the tournament. A new Crandon Park Master Plan would be drafted by the Olmstead Firm, which had designed Central Park in New York City. The stadium eventually opened in 1994. (The settlement agreement required the county to pay Matheson's legal fees, which at one point totaled close to half a million dollars.)

But, the mediators said, if the Matheson family objected to the Master Plan, a five-person team, including Matheson himself, would settle any issues that arose.

In hindsight, Bruce Matheson's critics — and there have been many over the years — say he installed himself as Crandon Park's "dictator." He objected to huge portions of the plan, tried to kick out softball fields, and attempted to raze a children's playground. But Matheson points out that those things never happened. "I'm just here to ensure the park is protected for all future generations," he says.

In 1996, the village of Key Biscayne sued the county, claiming, among other things, that Matheson's control of the park was unconstitutional. The village lost.

Most important, the settlement agreement prohibited the tournament from building any additional structures on stadium grounds. Realizing that last clause could prove disastrous, Butch Buchholz refused to sign off on any of the resolutions that sprang from the mediation sessions. But the county eventually agreed to Matheson's demands. "That was a mistake," says Stierheim, who watched it happen from the sidelines. "We never should have agreed to that." The plan was eventually ratified in 2000.

Crandon Park

In 1999, the Buchholz brothers decided to sell the tournament to IMG. (IMG is now owned by Rahm Emanuel's brother Ari Emanuel, who served as the basis for Jeremy Piven's character on Entourage.) "We sold because of tennis politics, mostly," Butch Buchholz says. Pro tennis had sold the sport's marketing and TV rights to an outside company, thus taking away a huge cash source. "What were we going to do?" Buchholz asks. "Sell hamburgers, hot dogs, and T-shirts?"

By that time, the tournament had exploded in popularity. Pete Sampras and Andre Agassi spent a decade slugging it out on the tennis center's hardcourt. In 1996, Agassi lost to upstart Marcelo Ríos — the win catapulted Ríos to the number-one ranking, making him the first Chilean to earn it. The day Ríos won, Santiago's streets erupted in celebration.

Among women players, Serena Williams has won the tournament eight times, more than anyone else.

The tournament ran through a host of sponsors, from Lipton to Sony. In March 2004, at what was then called the NASDAQ-100 Open, 22-year-old Roger Federer was matched against 16-year-old Rafael Nadal, then an unknown talent. Federer, ranked first overall, was the heavy favorite; Nadal sat at number 34. But during the match, Nadal kicked into a gear few knew he had, taking the first set and then the second. The famously calm Federer fell into a rage, crushing the ball harder and harder. Eventually, Nadal won in straight sets.

The next year, Federer beat Nadal in the NASDAQ-100 final, battling back from a 0-2 deficit and setting up a rivalry that lasted more than a decade.

The tournament became a glamorous, worldwide event, to the point that Vogue Editor Anna Wintour attended in 2011. But at the same time, the stadium itself started looking more like a relic. While the tournament was barred from renovating the stadium grounds, investors were pumping money into the tournament's main competitor.

That tournament, known informally as the Indian Wells Open, is held each year in California's Coachella Valley. In 2009, gonzo tech billionaire Larry Ellison, the world's fifth-richest man, bought the entire Indian Wells tournament and started stuffing fistfuls of money into the grounds. "Indian Wells has invested millions of dollars into their facilities," says Cliff Drysdale. "And it pays dividends. The place is jammed with people. It's sort of downgraded the Miami tournament in the minds of the players."

When construction started on Crandon Boulevard in 1999, lawyer Gene Stearns led a protest against it. "One day, bulldozers started showing up and started ripping up the median strip in front of the tennis center. Everybody went, 'What the hell is going on here?' "

He soon found out: The county had agreed to build a tunnel that would connect the parking lot to the Crandon Tennis Center. The road would need to be elevated and the trees surrounding the tunnel torn out. Stearns and his friends bought wooden stakes, tied yellow ribbons on them, and marched down Harbor Drive with their arms linked. "We literally planted a thousand stakes. It was civil disobedience to the extreme. Who in the hell thought this was a good idea for two weeks a year?"

These days, Stearns, an egg-headed man with large, round glasses, is the chief lawyer representing the tournament. He is also Bruce Matheson's nemesis. "I don't think Bruce likes me very much," he says.

He characterizes Matheson as a rube who never graduated from college and has no formal degree in anything, let alone park planning. Matheson, he says, is an undeserving heir, a man given far too much power for far too long. With Crandon Park, Stearns says, "Matheson is trying to preserve a 1950s park museum."

On August 23, 2012, Stearns stood in front of Miami-Dade's Board of County Commissioners, gesticulating at a series of posterboards that sat to his left. "What began as an idea for a professional tennis tournament in our community has turned into the single most important economic engine in Dade County," he claimed. "According to the most recent study, it generated over $380 million in investment and spending in Miami-Dade County in the last year alone."

What the tournament needed, Stearns claimed, was a tune-up. With his Brahmin charisma, Stearns pitched the county on a $50 million Tennis Center upgrade. The main court's temporary seats would become permanent. Three of the practice courts, he said, would be converted into permanent stadiums.

The tournament would also build a massive promenade with a 35-foot clock tower sprouting from the center. And, Stearns claimed, his client would pay for everything. Despite some trepidation, county commissioners set a referendum on the plan.

Matheson took up arms. "They were under a court order not to build any new structures on the property," he says. As the vote neared, he took out a series of full-page ads in the Miami Herald denouncing the plan.The referendum on the plan was held November 6, 2012, and 73 percent of voters — more than 500,000 people — backed the Tennis Center upgrade.In a last-ditch effort to salvage the tournament, Stearns sued Matheson and Dade County, claiming Matheson had no say in the upgrade. He lost – and then failed on appeal.

Stearns is now trying to appeal again. If that goes nowhere, he says the Open has no choice but to move. Buenos Aires and Shanghai have been mentioned as possibilities. The lawyer notes that Orlando just built a $60 million, 100-court facility and proposed bringing the Open there. There's a hang-up, though. IMG still has eight years left on its contract with Miami-Dade County.

"There are other communities that will pay hundreds of millions of dollars," Cliff Drysdale says. "Larry Ellison paid hundreds of millions of dollars for Indian Wells... It's a matter of what Orlando will do or what Beijing or Tokyo or Buenos Aires will do."

But the tournament isn't rolling over. In January, when IMG began selling tickets for a Duran Duran concert to be held at the tennis center on April 1, the Village of Key Biscayne demanded it stop.

On January 26, tournament director Adam Barrett, wearing a gray suit, went before the village council to address the issue. Barrett has dark hair, small eyes, and a smile that tends to melt into a grimace. His voice is somewhat nasal in tone. He gripped both sides of the podium and said: "We have no intent to create any ill will with the village. If there's a way we can... create a win-win situation for both of us, we would love to have that conversation."

Village Councilman Michael Kelly then cut Barrett off. "Mr. Barrett, with all due respect," he began, "your explanation as to why you're doing this is utter B.S." Kelly then added: "Obviously, this was a moneymaking ploy, and you chose to ignore the restriction that goes with that land."

Barrett recoiled, his eyebrows shooting to the top of his forehead, his head shrinking down into his torso like a turtle. "Everyone is free to their opinion," he said.

The concert was moved to Bayfront Park.

[Note: The Miami Open now takes place at Hard Rock Stadium.]

Equitable Title and Legal Title

Tanya dies leaving an estate consisting of $500,000 in stocks and bonds, the farm she lived on, and several office buildings that she developed and that produce significant rental income. She is survived by one son, Barry, who is 35 years old and recently married, and by her nephew Nestor, who is 30. Barry has no children.

In her will Tanya says that she is leaving her farm to Nestor so long as the land is used for farming; but if it is no longer used for farming, then the property is to go to the church that Tanya attended.

The residuary clause in Tanya's will puts the rest of her property in a trust, with her lawyer as trustee. Under the terms of the trust, the income from the trust is to be paid to Barry until he dies. Then the corpus of the trust is to be paid to the first born of Barry's children. If he has no first-born child, then the corpus is to go to the church.

1. *What is the state of the title?*

a. *The farm*: As the trust terms are written, Nestor has a fee simple subject to an executory limitation, and the church that Tanya attended has the executory interest.

However, with application of the Rule Against Perpetuities (see below), Nestor will end up with a fee simple determinable in the farm, and the church will have nothing. Since Nestor has a fee simple determinable, there is also a possibility of reverter. Tanya's will makes no specific provision for the possibility of reverter, so it is covered by the residuary clause. That means that the trustee holds the possibility of reverter.

b. *The trust*: The assets of the trust consist of the following property interests: (a) the possibility of reverter in the farm; (b) fee simple title to the office buildings; and (c) the personal property equivalent of fee simple in the stocks and bonds. These legal interests are held by the trustee for the benefit of the beneficiaries.

What equitable interests does the trust purport to create? The beneficiaries are Tanya's son Barry, Barry's first-born child if he ever has one, and the church. You might find it helpful to express the interests in the schematic form that we have been using:

T --> B for life, then to B's first-born child, otherwise to the church.

Here, however, the interest being conveyed is not legal title to real property, but equitable equivalent interests in a trust. Thus, Barry has the equitable equivalent of a life estate in the trust. Barry's first-born (not yet in existence), has the equitable equivalent of a contingent remainder in the trust, with an alternative contingent remainder in the church.

To say that Barry has the equitable equivalent of a life estate is to say that he is entitled to the income produced by the assets in the trust--whatever those assets may be--so long as he lives.

To say that Barry's first-born has the equitable equivalent of a contingent remainder is simply to say that at Barry's death, that child (if he's ever had a child) will receive the corpus of the trust, which will be terminated. (For the sake of simplicity, people often refer to interests like this as "remainders," without qualifying them as the "equitable equivalent" thereof. The important point is to be able to see the nature of the interest.)

To say that there is an alternative contingent remainder in the church is to say that at Barry's death, the assets of the trust will be distributed to the church if Barry has never had a child. (Such a distribution could be accomplished either by dividing the property up or by selling it all and dividing the proceeds. As you can imagine, valuing the possibility of reverter would pose a practical problem.)

So long as the trust is in existence, the trustee is free, for example, to sell the office buildings and invest the proceeds in something else if she believes that that would produce a better return. She can do so because she has the legal title to the buildings in fee simple. (Of course, she is accountable to the *beneficiaries* for her conduct.) In addition, suppose Nestor or his heirs stopped farming the land. Then the trustee would automatically get fee simple ownership of the farm. (If Nestor or his heirs failed to acknowledge that, the trustee would bring an action to quiet title or eject Nestor or his heirs within the statute of limitations.) The trustee could then either keep the farm and rent it out or sell it and invest the proceeds in something else. Either way, the farm would add to the income stream produced by the assets in the trust. When the time came to distribute the corpus, the farm (or the assets that replaced it) would be distributed along with everything else.

Suppose that Barry wanted to have a lump sum instead of a stream of income. What could Barry sell? He could *not* sell the stream of expected rental income from one of the office buildings; only the trustee could do that. (For the same reason, Barry could not sell the office building itself.) What Barry *could* do is assign his right to receive the income from the trust during his life, in exchange for a lump sum.

2. *Application of the Rule Against Perpetuities.* The Rule caused the church's purported executory interest in the farm to be stricken, leaving the trust with a possibility of reverter. Make sure you understand why (a) the church's purported executory interest in the farm was invalid under the RAP, (b) why there was then a possibility of reverter, and (c) why the trust got the possibility of reverter.

The Rule would also apply to those equitable interests in the trust itself that are contingent. Thus, because they are contingent remainders, one would have to ask whether the interests in Barry's first-born child or in the church violate the Rule.

B's first-born child's contingent remainder is valid. There is no way that that interest could vest beyond Barry's life (or 9 months thereafter). Similarly, we will know for certain at Barry's death whether the church will ever get the interest.

Perpetuities Problems

Note: "→" means a grant; "⇨" means a devise. All named persons (except for testators) are alive when the interest is created, unless otherwise stated.

1. O → A and his heirs so long as the land is used for residential purposes.
2. O → A for life, then to the first-born child of B for life, then to C and his heirs. B has no children.
3. O → A and his heirs until a cure for insomnia is found, then to B and his heirs.
4. O → A and his heirs until a cure for insomnia is found during the lifetime of someone living at the time of this grant, then to B and his heirs.
5. O → A and his heirs until a cure for insomnia is found, then to B for life.
6. O → A and his heirs until A finds a cure for insomnia, then to B and his heirs.
7. O → The Insomnia Institute, provided that if a cure for insomnia is found, then to the Society to Cure Sleeping Sickness.
8. O → A for life, then to B and his heirs if any of C's children conquers diabetes. (a) Suppose C is alive and has 2 children. (b) Suppose C is dead, and is survived by 2 children.
9. O → A for life, then to the first of A's children to reach age 25. A, who is 60 and is a widower, has two children, A1 (aged 18) and A2 (age 22).
10. O → A and her heirs one day after B is buried.
11. O ⇨ A and his heirs upon A's graduation from law school.
12. O → A and his heirs 25 years from now.

The Rule Against Perpetuities

I. Steps for applying the Rule Against Perpetuities (RAP)

A. *Determine what present estates and future interests are created by the grant.*

B. *Determine whether any of the future interests are subject to the RAP.*

Subject to the Rule	***Not Subject to the Rule***
• Contingent remainders • Executory interests • Vested remainders subject to open	• Future interests created in a grantor • Vested remainders (except vested subject to open) • Charity to charity exemption (CB 365 n.28)

C. *Apply the RAP as of the date the interest is created.* A future interest is created when the deed is delivered (*e.g.*, at closing) or, in the case of a will, when the testator dies. Under the common law "what might happen" approach, ignore anything that in fact happens after the interest is created, and concentrate on what might happen (*see* III below). Consider, for example, "O -- > A so long as the land is used for farming, then to B and his heirs." B's executory interest violates the RAP. Suppose that in fact, A builds a housing division on the land 6 months after the grant, and B brings an action to eject A. Under the common law version of the Rule, A can defend on the ground that B's interest violates the Rule because, looking at it as of the day of the grant, it appeared that it might vest centuries from now. The fact that it actually vested 6 months after the grant is irrelevant.

D. *Strike any interest that violates the Rule from the grant.* For example, you would rewrite the grant above as follows: "O -- > A so long as the land is used for farming~~, then to B and his heirs.~~" A has a fee simple determinable, and O has a possibility of reverter. What if the grant had been written as "O -- > A and his heirs, but if the land is ever not used for farming, then B shall the power to enter and take possession"?

II. The Rule:[20]

A. *Statement of the Rule:*

1. An interest is valid under the Rule if you can find a person who can serve as a "measuring life" for the interest.

2. An interest is invalid under the Rule if there is any possibility, no matter how unlikely, that it might "vest" beyond "the perpetuities period."

[20] *See* FREDERICK C. SCHWARTZ, A STUDENT'S GUIDE TO THE RULE AGAINST PERPETUITIES 22 (1988).

NOTE: (i) and (ii) are simply two sides of the same coin. That is, if there is no measuring life, then it means that there is a possibility that the interest might vest beyond the perpetuities period.

B. *Definitions:*

1. To be a "measuring life," a person must satisfy the following conditions:

   a. She must have been alive at the time the interest was created;

   b. You must be *certain* that the future interest will "vest" or definitively fail to vest during her lifetime, or her lifetime plus 21 years (that is, no later than 21 years after her death).

Note that someone can be a measuring life even if she is not mentioned in the grant, and even if she is given no property interest at all by the grant. Note also that all you need is one person to serve as a measuring life. There may sometimes be more than one person who could be a measuring life, but one is all you need.

2. "Vest," for purposes of the RAP, means either of two things:

   a. The future interest becomes a vested remainder.

   b. The future interest becomes possessory -- ***i.e.,*** entitles the holder of the future interest to possession of the property.

   "Fail to vest" means that you determine, once and for all, that the interest will never vest. Consider "O -- > A for life, then to O's grandchildren." If O dies without ever having had any children, then you know at O's death that the contingent remainder in O's grandchildren will never vest -- no grandchild of O will ever be born. At that point, you'd say that A has a life estate and O has a reversion, which would pass by O's will along with any other property O had. Note that if O died without grandchildren, but with children still living, then you could not be certain at the time of the O's death that the contingent remainder in O's grandchildren would never vest.

3. The "perpetuities period" is often defined as a life in being at the time of the creation of the interest plus 21 years. That is not a very helpful definition. It may help, intuitively, to think of it as "the current generation and the next." In general, if you see a future interest created in someone's grandchildren, you should be suspicious -- that's trying to go two generations beyond the present one. Nevertheless, you can't rely on that entirely; a future interest in someone's children might violate the Rule, while another future interest in someone's grandchildren could satisfy it.

In general, it's best not to worry about how to define the perpetuities period, and instead to mechanically apply the following guidelines.

III. Guidelines for Application of the Rule

A. *Once you've identified the future interests subject to the Rule, ask what the contingency is for each separate future interest (a grant may create several).*

Since only contingent remainders, executory interests, and vested remainders subject to open are subject to the RAP, there will always be some contingency -- some condition that has to be satisfied for the interest to vest. For example, in "O --> A for life, then to B if B marries C," the contingency is that B must marry C. In "O ==> A for life, then to O's first grandchild," (a will -- O dies before ever having a grandchild; assume that O has two children C1 and C2) the contingency is that O have a grandchild.

B. *Once you've identified the contingency for each future interest, ask what event or events would resolve it* -- i.e.*, what events would let us know whether the interest will ever vest.* In the first grant above, what will resolve the contingency is a definitive answer to whether B is going to marry C. Thus, what could resolve the contingency would be (a) B marries C; (b) B dies without having married C; or (c) C dies without having married B. In the second grant above, what will resolve the contingency is the birth of a grandchild to O, or something that will let us know for certain that O will never have a grandchild at all -- namely, the death of C1 and C2 without ever having had a child.

In asking what will resolve the contingency, keep the following in mind:[21]

1. *If there's a condition that someone do something, it will be resolved one way or the other by his death.*

2. *If there's a condition that someone be born, that condition is resolved by the death of all their possible parents.*

3. *A contingency that someone must reach age X will be resolved within X years of the death of all their possible parents.*[22]

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[21] *See* SCHWARTZ at 33-34.

[22] What is meant by "possible parents"? In the case of someone's children, the answer is obvious: their parents. That is, the possible parents of the children of X are X and X's spouse. The reason for using the awkward phrase "possible parents" is that someone's *grandchildren* may have any of several parents. Suppose O is alive and has two children, C1 and C2. Who are the possible parents of O's grandchildren? Clearly C1 and C2, but are they the only possible parents? No, because O might have another child C3, and C3's children would be O's grandchildren as well as the children of C1 and C2. That means that if there's a condition that a grandchild be born, that condition won't be resolved until "all possible parents" are dead. And so long as O is alive, you can't say that all possible parents of O's grandchildren are dead, because O might have another child.

C. *List all possible measuring lives.* For all practical purposes, you should list all persons specifically referred to in the grant, and all persons who are causally related to the contingency (whether or not they're named in the grant). For example, in the second grant above, O's children are causally related: it's they who will produce O's grandchildren (if they ever have any children). Be careful when you start talking about groups of people as measuring lives. For example, in the second grant above, since O is dead, O isn't going to have any more children. That means that C1 and C2 are the only children O is going to have, and that any grandchildren O might have will have to be the children of C1 or C2, who were alive at the time of the grant. Suppose, in contrast, that O were alive -- that the grant were a deed, not a will. Then if you tried to use "O's children" as the measuring lives, you should note that "O's children" might include children who were not alive at the time of the grant -- *e.g.,* C3, born the day after the grant. That should tip you off to a problem with the Rule.

D. *For each possible measuring life, ask yourself, "Can I be* certain *that the interest will either vest or definitively fail during his lifetime or within 21 years after his death?"* If the answer for someone is yes, then the interest is valid -- you have found the "measuring life." All you need is one. But remember that just because the first person you happen to check can't serve as a measuring life, you have to go on to test the others. The fact that any given person can't serve as a measuring life doesn't rule out the possibility that someone else will. So you need to keep on checking.

E. If you go through all the people on the list you've developed in C, and find no measuring life, then the interest probably violates the Rule. The way to make certain is to construct a possible hypothetical in which the interest vests beyond the perpetuities period. *See* the Comments on the Perpetuities problems for examples of constructing such hypotheticals.

The New York Times, June 1, 1990, at B5, col. 1 (AP)

For 40 years Henry Ringling North, the nephew of John Ringling, has battled to have the flamboyant circus promoter and his wife, Mabel, buried at the Ringling Museum in Sarasota, Fla., along with Mr. North's mother, Ida North. Mrs. North was Mr. Ringling's sister.

Pat Buck, a grandniece of the Ringlings, had opposed the plan because Mrs. North had nothing to do with the circus. Mr. and Mrs. Ringling died in 1936 and 1929, respectively, and Mrs. North in 1950. Because of the dispute, her body has been in storage at a Sarasota funeral home since then.

In 1987 Mr. North had the Ringlings' bodies transferred from a cemetery in Fairview, N.J., to crypts near Sarasota. Ms. Buck and other relatives had taken the dispute into court.

On Wednesday the Second District Court of Appeal in Lakeland, Fla., upheld a judge's order last year allowing burials at the museum. The museum's trustees voted last year to permit the burials if family differences were resolved. The museum director, Laurence Ruggiero, said he believed the ruling would settle the question, and the burials would take place.

Martin Merzer, *Three-Ring Circus*, MIAMI HERALD, June 6, 1991, at 6B

The Greatest Show Under The Earth is over: Circus king John Ringling was finally laid to rest this week, 55 years after his death. Maybe even forever.

In a private ceremony, Ringling, his wife Mable and sister Ida Ringling North were buried Tuesday on the grounds of the John and Mable Ringling Museum of Art in Sarasota.

And about time, too: Mable died in 1929, John in 1936 and Ida in 1950.

Buried with them was a family feud that raged for years, climaxing in the secret disinterments by one of the 'Wrangling Ringlings' of John and Mable, and the 'temporary' storage of Ida's body in a Sarasota funeral home -- for the last 41 years.

Please follow closely here:

On one side was Henry Ringling North, son of Ida and nephew of John Ringling. North wanted his mother buried at the museum, but the rest of the family objected.

North had been disinherited by John Ringling long ago, but he had the last laugh in 1987 when he had himself legally appointed Ringling's next of kin. Then, in his idea of a package deal, he had John and Mable quietly disinterred and shipped to Sarasota so they and Ida could all rest together at the museum.

Still with us?

On the other side were two of Ringling's grandnieces and a grandnephew. They were willing, in a grudging sort of way, to host John and Mable at the museum, but they maintained that Ida had nothing to do with the circus, and should rest in peace elsewhere.

The controversy was the talk of Sarasota, which John Ringling virtually created when he decided long ago to make it the winter home of his Greatest Show on Earth.

Several judges eventually agreed with Henry North, and the other side finally surrendered, saying it was time for this three-ring circus to end.

Frenchman Cremates Frozen Parents, BBC News, March 16, 2006

A Frenchman who fought a long-running legal battle to keep his parents' bodies in a deep-freeze has cremated them after the freezer broke down.

Raymond Martinot showed his wife's body to tourists

Remy Martinot's parents were frozen soon after their deaths in the hope of bringing them back to life.

A court in January ordered them to be buried or cremated, and Mr Martinot had said he would appeal the decision.

However, they were cremated on 3 March after the crypt where they were kept at -65C heated up to -20C.

"I decided that it was no longer reasonable to carry on," Mr Martinot told the AFP news agency.

"I am no more sad today that at the time my parents died. I have finished mourning," he added.

"But I am bitter that I could not carry out my father's wishes. Maybe the future will show that my father was right and that he was a pioneer."

Court battle

Remy Martinot planned to appeal to keep his parents frozen

Mr Martinot's father, Raymond, a cryogenics enthusiast, froze his wife after her death in 1984, hoping that one day science might enable her to be revived.

He showed off her crypt for a fee in the cellar of his chateau, in the Loire Valley town of Nueil-sur-Layon, to help pay for upkeep of the equipment.

When Raymond died in 2002, his body was frozen by his son.

In March that year, a court ruled that keeping the bodies refrigerated at the family chateau was against French law.

In January this year, France's highest administrative court, the Council of State, ordered Mr Martinot to either bury or cremate his parents.

He had planned to take his case before the European Court of Human Rights.

Michael Asimow, *Estate Planning and Body Heat*, Picturing Justice (Jan. 1998)

http://www.usfca.edu/pj/articles/BodyHeat.htm

The neo-noir *Body Heat* (MGM 1981) has a captivatingly cynical plot, pleasingly reminiscent of the immortal *Double Indemnity*. The witty dialogue, photography, Lawrence Kasdan's direction, music, and acting are all superb. Florida sizzles, and apparently nothing is air conditioned. Kathleen Turner is a deliciously erotic Matty Walker. But our focus here is on William Hurt's role as lawyer Ned Racine.

Body Heat presents a fully realized version of a particular kind of lawyer—the kind the profession can easily get along without. A graduate of Florida State's law school, Ned isn't likely to be named FSU alum of the year. He's the sort of small-time lawyer who tends to get into a lot of trouble.

Ned isn't too smart (as Matty says "I like that in a man"). He's pretty incompetent. (He was successfully sued for malpractice a couple of years ago.) He doesn't seem to care about his clients. He really doesn't like being a lawyer much, he remarks at dinner. Judges and other lawyers don't respect him—and with good reason. He drinks too much. He jogs faithfully, but lights up a cigarette when he's through. He plays around with loose women. Worst of all, Ned's a little weak in the ethical department. He takes up with Matty, knowing that she is married. And before long, Matty manipulates Ned into killing her husband Edmund to get a hold of his money.

The character of Ned Racine is discussed in greater detail in an article by John Burkoff, *If God Wanted Lawyers to Fly, She Would have Given Them Wings: Life, Lust & Legal Ethics in* Body Heat*,* 22 Okla. City U. L. Rev. 187 (1997) (an excellent law and film symposium by the way).

Only law and film nerds would care much about the estate planning aspects of *Body Heat*—but therein hangs an interesting tale. Not to give away too much, a key plot element concerns Edmund Walker's wills. Edmund's first will left half of his estate to Matty, half in trust for his young niece Heather. But Matty is a bottom-line type of person; she wants to do away with Edmund and get all of his money, not just half. So she steals some of Racine's stationery and drafts a new will, forging the necessary signatures.

Like Edmund's first will, the phony second will divides the loot 50-50 between Matty and Heather, but the bequest to Heather in the second will is deliberately drafted so as to violate the rule against perpetuities. As a result the bequest to Heather in the second will is invalid. Since Matty is the sole intestate heir, she takes the entire estate.

But what was the perpetuities problem in the second will? We're not told exactly, but presumably the trust for Heather included a contingent remainder, where the contingency could not vest during the period of lives-in-being-plus-21-years. Under the traditional version of the rule against perpetuities, the presence of such a contingency (however unlikely to materialize) invalidates the gift (unless the will contained a "savings clause" which obviously it didn't).

Trouble is, before the film was shot, Florida had abolished this form of the rule against perpetuities. Instead it took a wait-and-see approach, under which the gift remains valid unless and until the interest actually fails to vest within the perpetuities period. Thus under the Florida rule, the second will was entirely valid and Heather gets half. How could the film makers have made such an error?

My colleague, perpetuities guru Jesse Dukeminier, tracked down the technical adviser to the movie. It seems that the film was originally set

in New Jersey which at the time followed the traditional rule against perpetuities. Because of a Teamster's strike in the New York-New Jersey area, the movie was moved to Florida and the story rewritten to occur there. But nobody took into account that Florida's rule is different from New Jersey's.

Moreover, as Jesse points out, even if Edmund's second will was partially invalid because of the perpetuities problem, the doctrine of dependent relative revocation should have applied. Under this doctrine, a will revocation is conditional. If a second will proves to be invalid, it's assumed the testator would want the first one to remain in effect if doing so would more closely carry out the testator's intent than would intestacy. Since it is obvious that Edmund intended to benefit Heather (she got half under both wills), the doctrine should have applied and the bequest to Heather under the first will should have remained in effect. As a result, Heather should have gotten half of Edmund's estate. The technical adviser missed this issue entirely.

§ 822. General Rule

One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either

a) intentional and unreasonable, or
b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

§ 826. Unreasonableness of Intentional Invasion

An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if

a) the gravity of the harm outweighs the utility of the actor's conduct, or
b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.

§ 827. Gravity of Harm--Factors Involved

In determining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:

a) the extent of the harm involved;
b) the character of the harm involved;
c) the social value that the law attaches to the type of use or enjoyment invaded;
d) the suitability of the particular use or enjoyment invaded to the character of the locality; and
e) the burden on the person harmed of avoiding the harm.

§ 828. Utility Of Conduct--Factors Involved

In determining the utility of conduct that causes an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:

a) the social value that the law attaches to the primary purpose of the conduct;
b) the suitability of the conduct to the character of the locality; and
c) the impracticability of preventing or avoiding the invasion.

§ 829. Gravity vs. Utility--Conduct Malicious Or Indecent

An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if the harm is significant and the actor's conduct is

a) for the sole purpose of causing harm to the other; or
b) contrary to common standards of decency.

§ 831. Gravity vs. Utility--Conduct Unsuited To Locality

An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if the harm is significant, and

a) the particular use or enjoyment interfered with is well suited to the character of the locality; and
b) the actor's conduct is unsuited to the character of that locality.

Alyssa Johnson & Claudia Chacin, Outgunned: A firing range's neighbors say it is a noisy nuisance. Florida law says tough, Miami Herald, Aug. 7, 2022

Way, way west of Homestead, past the crisp, white towers of the modern police station and colorful lights of the historic Seminole Theater, beyond the shade houses and the massive sprinklers and the ditches dotted with the occasional threadbare couch or worn-out fridge, the pavement gives way to dirt, which feeds into a dusty, secluded farming community. Fields filled with fruits and flowers extend for miles. It is a place that Kevin Barber calls a "tropical paradise" — for the most part.

The entrance to Henry's Sport Shooting Range on Friday, July 15, 2022, west of Homestead, Florida. MATIAS J. OCNER mocner@miamiherald.com

Except…this piece of paradise can be noisy. The pop-pop-pop of firearms rings out as do occasional explosions that shake the floor of Barber's home, claims the 45-year-old military veteran. Not to mention on rare occasions the blistering, blast-furnace fwooooosh of a flamethrower as it scorches the foliage. The source of that commotion is Barber's neighbor, Henry La Due, who owns and operates an outdoor gun range, one that is secluded, rustic — and popular, at least with those who sing its praises on social media.

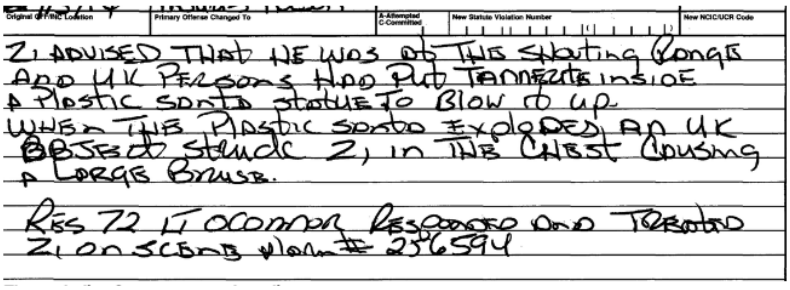
Here on the edge of civilization, where minding one's own business is expected, an unlikely neighborhood dispute has broken out. It pits a long-standing, legally permitted firing range, Henry's Sport Shooting, enveloped by trees at the end of a winding, rutted dirt driveway, against the farmers and tree growers who came here to till the land, tend the trees and live in peace. Barber, who has led the opposition, has learned to his dismay that in Florida the laws look favorably on firing ranges and guns in general, with local agencies more or less preempted by state law from doing much of anything to address complaints.

BEWARE OF EXPLODING SANTAS

Henry's is popular with shooters, including those who, if social media videos are what they appear to be, brandish military-style weapons and sometimes don fatigues and roll around while practicing a version of urban combat. One video on social media shows a patron blasting away with a handgun through the


In a photo posted on social media, a man with a flamethrower scorches the foliage at Henry's Sport Shooting Range.

windshield of a car (hashtag: “roadrage”). Customers rhapsodize about targets rigged with explosive Tannerite. (According to one police report, a shard from an exploding “Santa” two weeks before Christmas in 2014 injured a patron of the range when it struck him in the midsection.) There is a wall-like berm across from where the shooters are positioned that should block stray bullets.


2, ADVISED THAT HE WAS AT THE SHOOTING RANGE AND HK PERSONS HAD PUT TANNERITE INSIDE A PLASTIC SANTA STATUE TO BLOW IT UP. WHEN THE PLASTIC SANTA EXPLODED, AN HK OBJECT STRUCK 2, IN THE CHEST CAUSING A LARGE BRUISE.

RES 72 LT OCONNOR RESPONDED AND TREATED 2, ON SCENE #256594

The exploding Santa generated a police report.

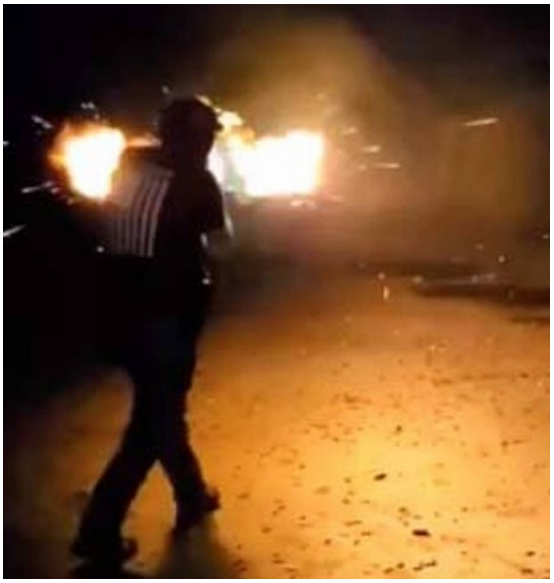
Barber alleges that the business, whose presence preceded him in the neighborhood by a decade, has fostered a culture of “disrespect” toward the surrounding community. He says that when visitors find the firing range gate locked and the business closed, they will indulge their trigger fingers by firing at whatever is handy, be it trees or the nearby canal bank that divides farmland from sawgrass and scrub. Located on the canal bank are signs that say “DISCHARGE OF FIREARMS IS PROHIBITED.” They are pockmarked with bullet holes.

Barber worries about the 8-year-old daughter he and his wife are raising. La Due declined several invitations to discuss the range with the Herald and did not respond to a hand-delivered letter listing specific questions. Aurora Giles, employed at an agricultural nursery less than a block from firing range for two months, said that stray bullets have reached the nursery in the past. They have never hit anyone, but they’ve come close, she said.

“I just don’t know how to turn the other cheek or pretend I don’t hear it anymore,” said Barber. “I did it for a while — I did and it just got me nowhere.” The fight has spilled over into the code enforcement arena, and bad feelings abound. Barber claimed that shortly after he called the police on the gun range for detonating excessive explosions, inspectors showed up at his property, resulting in him having to spend $15,000 on a new roof. He said someone also alleged that his pet dogs amounted to an illegal breeding business.

Barber said shortly after he filed a complaint against the range he witnessed men in a car fire 60-plus rounds into his grove and later discovered that someone poisoned some of his trees. He doesn’t know who did it or why. ‘UNUSUAL USE’ The range has an “unusual use approval” allowing the range to operate. La Due went through a public hearing process in 2009 where he wrote in a letter of intent to Miami-Dade Planning and Zoning that he wanted to “build and maintain a sport shooting and training range” for his “private/recreational use.” Approval was granted in 2010, despite a recommendation from county staff that the application be denied because “the proposed range facility will have a negative aural impact on the surrounding rural farm communities, is incompatible with the same, and could potentially be


Aurora Giles, an agricultural nursery worker, says she is concerned about stray bullets fired by people drawn by Henry’s Sport Shooting Range. MATIAS J. OCNER mocner@miamiherald.com



From social media, a night scene at Henry's Sports Shooting Range.

developed to serve residents outside of this community."

Twelve years later, that prophecy seems on the money. But it is also true that users of the firing range seem to love it. In all but a handful of the over 100 reviews on Google, customers shared their satisfaction with Henry's. The patrons describe, or post pictures of, themselves going with their friends and family, including small children. Organizations that conduct firearms training go there. Some customers stated that what makes the range appealing is its laid-back and less restrictive environment.

One customer on Google Reviews, referencing the rough roads that lead to Henry's, praised the place and wrote "just when it feels your car suspension is about to break you're there, and quickly forget about all that nonsense and proceed to have the most fun $20 can possibly buy you." Another customer wrote "my first time at a range was great thanks to Henry! Made me feel welcome and the whole environment was so wholesome."

However, there are a handful of Google and Yelp reviews that list concerns about safety at the range. (One patron shot himself in the thigh in October 2021 and had to be airlifted to the hospital, but besides that, and a bullet fragment hitting someone's arm and the exploding Santa, the Herald found no other public records describing range injuries.) "Elliot," a longtime customer of the range who didn't want his last name published, said that one of his favorite aspects of the private range is the "homey" environment and that the range allows customers to shoot in a more "lifelike" way than other outdoor ranges. "Being able to use your firearm in a way that you would need to use it [in real life], it teaches individuals, in my opinion, a better learning experience in terms of recoil and in terms of response from your firearm," Elliot said.

Elliot estimated that he's visited the range 10 times over the years and said that he's had only positive experiences and never felt unsafe. "I think most people are on the same page and they want to have a safe experience," he said. "They want to go home at the end of the day like anyone else." Similar to Elliot, Kendra Geronimo, a regular customer, said she loves going to the range because of the community and environment. Geronimo said she's been a customer for the past seven years and tries to go at least three to four times a year.

Geronimo is a firearms instructor and executive protection agent who works as an independent contractor. When she goes to the range she usually goes with Offshore Kinetics MV, a training and security consulting group. The organization rents out the range for the day. She said being a woman in a male-dominated field can be difficult, but that La Due has always made her feel welcome.

"I do feel at home when I'm at his range. He's never belittled me, He's never made me feel like I was a little girl on the range or I couldn't hang with the guys," said Geronimo. "It's always been the utmost respect; I don't think I've ever had to gain it or earn it." She emphasized that reputation matters in the industry of security and firearm instruction and she holds

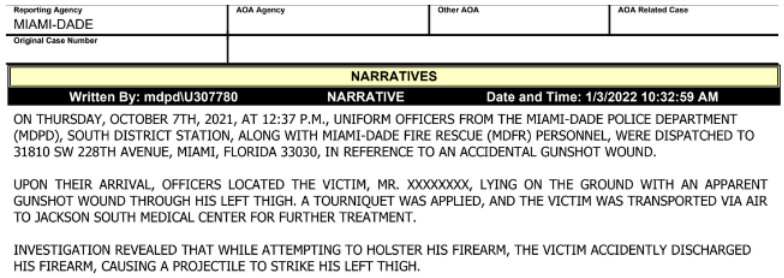
Henry's in high regard. "If I went to horrible ranges and I went with bad instructors, people are gonna be like 'well, that's what you're a product of' so I made sure to keep good people in my circle. They make me better."

UNSETTLING MOVE

Barber moved down to this area of unincorporated Miami-Dade County in 2020 after Hurricane Michael, a category 5 monster that was the most powerful recorded hurricane to hit Florida's Panhandle, where he had a similar business. The 2018 storm destroyed his home in Panama City. Not only did he and his family need to seek refuge, but so did his trees.

He packed all of his trees that were spared into U-Haul trucks and had limited time to form a plan. Barber was able to get in touch with the Redland Fruit and Spice Park, a Miami-Dade landmark, where the assistant director, Louise King, agreed to help take care of his trees for a year. As he was looking for a place to live close to the park, a real estate agent showed him his current property, which is zoned for residential and agricultural use. The agent informed him about the gun range, but he was shown the property only on the days the range was closed.

Barber met La Due after catching two men and one woman stealing from his grove. He called the police and they told the officers that they were not stealing and claimed they were in the area because they were shooting at the range. The police asked La Due if their statements were true but he denied they were customers.



Reporting Agency	AOA Agency	Other AOA	AOA Related Case
MIAMI-DADE			
Original Case Number			

NARRATIVES

Written By: mdpd\U307780 | NARRATIVE | Date and Time: 1/3/2022 10:32:59 AM

ON THURSDAY, OCTOBER 7TH, 2021, AT 12:37 P.M., UNIFORM OFFICERS FROM THE MIAMI-DADE POLICE DEPARTMENT (MDPD), SOUTH DISTRICT STATION, ALONG WITH MIAMI-DADE FIRE RESCUE (MDFR) PERSONNEL, WERE DISPATCHED TO 31810 SW 228TH AVENUE, MIAMI, FLORIDA 33030, IN REFERENCE TO AN ACCIDENTAL GUNSHOT WOUND.

UPON THEIR ARRIVAL, OFFICERS LOCATED THE VICTIM, MR. XXXXXXXX, LYING ON THE GROUND WITH AN APPARENT GUNSHOT WOUND THROUGH HIS LEFT THIGH. A TOURNIQUET WAS APPLIED, AND THE VICTIM WAS TRANSPORTED VIA AIR TO JACKSON SOUTH MEDICAL CENTER FOR FURTHER TREATMENT.

INVESTIGATION REVEALED THAT WHILE ATTEMPTING TO HOLSTER HIS FIREARM, THE VICTIM ACCIDENTLY DISCHARGED HIS FIREARM, CAUSING A PROJECTILE TO STRIKE HIS LEFT THIGH.

A mishap at Henry's Sport Shooting Range this past October. A Herald records check found few such incidents.

Barber said he thanked his neighbor for helping him out. Barber said the relationship began to sour as he had to endure loud explosions coming from the range. He said as time went on the explosions became more frequent and bigger. He also said he had to continuously call the police on people who were found shooting their guns recklessly near his property or by the canal close to his house. Things deteriorated further when La Due made a habit of using a bulldozer to level off the bumpy, pockmarked dirt road leading to his range. Barber said the impromptu road work would leave mounds of muck and debris on his property. His concerns and frustrations came to a tipping point in February, when Barber claimed that there were at least 13 big explosions in one day.

Elliot explained that a customer can pay an extra $10 for the "experience" of an exploding target. He said that staff will set up Tannerite, a binary explosive brand that is sold for commercial use. Tannerite uses two agents that when mixed together become an explosive. The more Tannerite, the more powerful the explosion. The Miami Field Division of the Bureau of Alcohol, Tobacco and Firearms stated that when a person mixes together chemicals in a Tannerite package it is "considered manufacturing explosives and a person is required to obtain a federal explosives manufacturing license if they intend to engage in the business of manufacturing explosives for sale, distribution, or for business use." The Herald asked how it would find out if someone holds such a license, but ATF said that is "confidential."

"I was in the Army. I'm not shy about guns. If things are being approached in a respectful way, then I can respect that," said Barber. "The disrespectful nature of the individual and his business, it has residual effects, not only on me, but everybody in my community. It's all bad, except for the patrons that get to go blow up

[expletive]. Besides those guys, and Henry's pockets, what else? How's the community benefiting from [the range] being here?" The nurseries, groves and fields that make up the community employ a number of growers and field workers. The Herald spoke with nursery owners and workers located nearby. Several expressed concerns about stray bullets and explosions, although some were hesitant to speak out by name. Pedro Rubio, who works at his son-in-law's nursery next to the range, said the loud, uncontrolled noises worry him.

"They go there to have shooting parties," he said. Often, when Henry's gates are closed, Rubio said patrons will honk their horns excessively, and if no one opens, they will start shooting their own targets around the area. "We're scared that we'll get gunned down unjustly." Rene Ramos, a guava grower, said he doesn't like to work – or send his employees out into the grove — on the weekends because it is the busiest time at the range. Ramos said the explosions can sound like "grenades'' detonating.

WHO'S IN CHARGE?

From a legislative standpoint, the deck is stacked against the range's neighbors. Florida statute 823.16 says firing ranges are immune from lawsuits and criminal prosecution over the noise they make as long as they are in compliance with National Rifle Association safety standards and whatever law was in effect at the time the range opened. A separate statute, 790.333, says the state legislature is in charge of the regulation of gun ranges. It preemptively prevents local governments from making their own more restrictive rules regarding gun ranges — or from suing a range that becomes a nuisance. The statutory language points out that "unnecessary" litigation and regulation of gun ranges "impairs the ability of residents of this state to ensure safe handling of firearms." The laws are a reflection of the state's enthusiastic embrace of gun rights. Exceptions to the hands-off policy are environmental agencies that oversee the use and disposal of lead and ATF, which can crackdown on illegal firearms and the use of explosives. According to county records, Miami-Dade's Department of Environmental Resources Management took a look but so no issues. 790.333 does state: "Nothing in this law is intended to impair or diminish the private property rights of owners of property adjoining a sport shooting or training range."

Eric Friday, general counsel of Florida Carry, a non-profit that promotes gun rights, said that particular clause can be interpreted to mean that someone living next to a gun range reserves the right to reject trespassing — be it in the form of

A photo posted on social media: Target shooting at Henry's Sports Shooting Range.

The scene along the canal, where a sea of spent shells crunches underfoot. MATIAS J. OCNER mocner@miamiherald.com

a person or a projectile. In other words, he said: "The minute a bullet enters from my range onto your property, that bullet, and therefore I for directing it, have trespassed onto your property." Barber has complained to police about people firing randomly, including into his property, but by the time the cruiser gets to his remote neighborhood, the shooter or shooters are long gone. In eight police reports examined by the Herald in relation to Barber's property regarding "shots fired," the majority say there was no evidence at the scene. Barber said he thought getting his concerns addressed with the county would be "simple," but as he learned more about state protections and witnessed lack of support from the county, he slowly realized the situation was bigger than just La Due's range. He wondered if the enforcement might be better if he lived in an incorporated part of the county where more people live. Of course, a more populated place likely won't have an outdoor firing range in its midst. "I don't want to get shot, just like you. Just because somebody works in a certain area or owns property in a certain area then our rights are diminished or our safety takes a backseat?" he said. "Who says that's okay? And that's the thing, nobody will say that it's okay but everybody will have these gray areas that keep accountability from happening." END OF THE ROAD Outside the confines of the firing range and due west of Barber's land, one side of a north-south canal is home to a vast, unpopulated expanse. Wildlife and lush trees outline the sky. On Barber's — and the firing range's — side of the canal, the bank is something else: a carpet of plastic and metal bullet casings that covers the ground like Sanibel Island sea shells, the remnants of people shooting and leaving behind their debris.

"You got to think of it like this: This is the end of the road," Barber said of the people who blast away in and around the canal. "So if you're looking to do some [expletive] that you're not supposed to be doing, this is the edge of civilization. And so they come as far as they can and to as rural of a location they can and this is the spot to do this." Three years ago, he saw the neighborhood as a beautiful oasis at a time of desperation for his family. Now, his safe haven from a treacherous storm has turned against him. "I'm optimistic with what we're doing right now, documenting the way that certain institutions are insulating this business and keeping anyone from being held accountable," said Barber as he and his family continue to keep a record of his frustrations. "If we can correct that and make sure that everybody does what they're supposed to do, everything should be better, right? Is that what's going to be what happens? I don't know. But I want to be optimistic."

Alyssa Johnson, Feud between gun range, fruit grower resolved, Miami Herald, 4/21/23

A hostile, years-long feud involving a gun range owner, a fruit farmer, a bulldozer, targets rigged with the binary explosive Tannerite and flamethrowers has ended peaceably for now, with a pair of restraining orders.

Kevin Barber, 45, and Perla Vargas, 40, live and work on their small fruit farm in an agriculture community way, way west of Home-

Kevin Barber stands on a pile of empty shotgun shells near a canal in unincorporated Miami-Dade on Friday, July 15, 2022. Barber, who grows tropical fruit nearby, said people are attracted to this area because a sport shooting range is nearby. And if the range isn't open, people still want to shoot.

stead. After moving to their current property three years ago, the military veteran and his fiance hoped for a peaceful settlement to grow their fruit and raise their daughter.

That's not what they got. The gun range next to their property, Henry's Sports Shooting Range, and its owner, Henry La Due, have made them fear for their safety, they said. Both Vargas and Barber alleged that La Due, 74, threatened them verbally on numerous occasions after the couple complained to police about explosions and other disruptions emanating from the range.

What's more, they felt that police weren't taking their complaints very seriously.

Undeterred, Barber and Vargas filed requests in court for sanctions against La Due, seeking "protection against stalking violence." This time they came armed — with video showing the neighbor and his customers doing exactly what the couple said they were doing.

This past Monday, April 17, the couple were granted permanent restraining orders by County Judge Javier Enriquez. La Due failed to show up for the scheduled court hearing. A woman who answered the phone at the gun range hung up on a reporter upon the caller identifying herself.

"It felt like this was a long time coming," said Barber in response to Judge Enriquez's action. "I'm very happy with the results but it was a lot of stress. There was a burden to bear on this road that we were on and it was unkind. I think now there is a chance for a new beginning."

In court on Monday, Barber recounted to Judge Enriquez the series of events that led to that hearing.

Barber explained that the feud began after he called the police on the gun range for the first time back in February 2022, reporting excessive, loud explosions went throughout the day. He said after that call to police, La Due's hostility toward him and Vargas escalated. Barber alleged La Due pointed a gun at him and threatened to kill him and also threatened to shoot their dog. What La Due operated next door seemed not to be a typical firing range. Videos posted online showed patrons scorching the foliage with flame throwers, firing guns from inside the shell of an auto in what was jokingly termed road rage practice and blasting targets rigged with the explosive Tannerite.

On top of that, Barber claimed that individuals, frustrated upon finding the firing range closed, would fire volleys into his grove, which doubled as the location of his home. However,

without video evidence, the police did not make any arrests. Barber felt officers were not going to move forward on anything until he presented evidence.

That's when Barber and Vargas made the decision to buy and install cameras in the trees facing the firing range.

Those cameras captured plenty.

In court, Barber presented video that he said showed La Due using a bulldozer to scrape up gravel they had used to improve the grade on the road outside the couple's property and move it to the road by his own property. He showed a video of La Due strolling over to their land, directly in front of an unseen surveillance camera, and deliberately kicking over a fence post.

Barber said that in both March and in April, individuals Barber believed to be gun range patrons fired into their property. That too was captured on video, which he shared with the judge. He said even though they had reported

In a photo posted on social media, a man with a flamethrower scorches the foliage at Henry's Sport Shooting Range.

these incidents to the police, they didn't feel enough was being done to keep them safe--which ultimately led to their requests for restraining orders.

In the most recent shooting incident on April 11, Vargas was working on the farm when she said she heard gunshots going off frighteningly nearby. After running inside for safety, she called police to report what had happened. She said she was grateful her daughter wasn't home. The family typically works together, taking care of their fruit trees.

"I don't even feel safe with her being outside playing around because of those shootings," Vargas said of her daughter. "It just happens out of nowhere."

Barber cited similar fears and called the incoming gunfire a "reckless" act that endangered both him and others in the rural community.

"Right behind our farm is a field full of people picking okra. Those bullets have a range that can fly right through our farm and strike them as well…There's people everywhere and they're shooting like nothing's gonna' happen. It's just a matter of time, if they continue to do this, that somebody is gonna' get hit and my greatest fear is that it's my daughter or Perla."

"They're my whole world," he said of his family.

Others in the area have expressed similar concerns. Pedro Rubio, who works at a nearby nursery, told the Herald last year that he's witnessed patrons shooting outside the range when the business is closed.

"We're scared that we'll get gunned down unjustly," Rubio said.

Judge Enriquez stated that Barber and Vargas were "credible" and that the evidence shown in court was enough to prove their claims. . Enriquez granted both Barber and Vargas permanent injunctions against La Due and required that the gun range operator un-

dergo substance abuse and mental health evaluations. He must also enter into a batterers' intervention program and is required to stay 500 feet away from the neighbors' property.

Enriquez stated that if La Due violates the court's order he could be criminally charged.

As for the future of the gun range, both Barber and Vargas said they worry that friends or patrons of the business will continue to blast away into their property and others' with impunity. In Florida, sometimes derided as the "Gunshine State" for its lax rules on firearms, ranges have special rights. A state statute prevents local governments from making their own more restrictive rules regarding gun ranges.

Barber said La Due's "bad karma" is his own fault and that he will be watching to ensure La Due follows the judge's ruling.

"My intent isn't to ruin their fun," Barber said. "It's only to protect my family...I hope that they understand that."

The videos referred to in the article are available here.

A photo posted on social media: Target shooting at Henry's Sports Shooting Range.

Florida Statutes on Shooting Ranges

Title XLVI. Crimes. Chapter 790. Weapons and Firearms.

790.333 Sport shooting and training range protection; liability; claims, expenses, and fees; penalties; preemption; construction.—

(1) LEGISLATIVE FINDINGS.—

(a) The Legislature finds that in excess of 400 sport shooting and training ranges exist on public and private lands throughout this state.

(b) These sport shooting and training ranges are widely used and enjoyed by the residents of this state and are a necessary component of the guarantees of the Second Amendment to the United States Constitution and of s. 8, Art. I of the State Constitution.

(c) Many of these ranges are used by state and local law enforcement agencies for training, practice, and regular mandatory qualification by law enforcement officers; by Fish and Wildlife Conservation Commission hunter safety instructors who teach adults and youngsters in the safe use and handling of firearms in preparation for obtaining hunting licenses; by school boards, colleges, and universities for reserve officer training corps training and activities; by school shooting teams; by Olympic competitors; and by certified instructors who teach the safe use and handling of firearms in preparation for applying for licenses to carry concealed firearms for lawful self-protection.

(d) The public policy of the State of Florida is to encourage the safe handling and operation of firearms and mandates appropriate training in the safe use and handling of firearms for persons licensed to carry concealed firearms and for persons licensed to hunt in the state. Sport shooting and training ranges throughout this state provide the location at which this important public purpose is served and at which the firearms training mandates are fulfilled.

(e) Projectiles are integral to sport shooting and training range activity and to the ownership and use of firearms.

(f) Over years of operation, projectiles have accumulated in the environment at many ranges. Whether this projectile accumulation has caused or will cause degradation of the environment or harm to human health depends on factors that are site-specific. Therefore, sport shooting and training ranges must be allowed flexibility to apply appropriate environmental management practices at ranges. The use of environmental management practices can be implemented to avoid or reduce any potential for adverse environmental impact.

(g) The Department of Environmental Protection, in collaboration with shooting range owners and operators, sport shooting organizations, law enforcement representatives, and university researchers, has developed shooting range best management practices in order to minimize any potential for any adverse environmental impact resulting from the operation of shooting ranges.

(h) Appropriate environmental management practices, when implemented where applicable, can minimize or eliminate environmental impacts associated with projectiles. Environmental management practices to maintain or to improve the condition of ranges is evolving and will continue to evolve.

(i) Unnecessary litigation and unnecessary regulation by governmental agencies of sport shooting and training ranges impairs the ability of residents of this state to ensure safe handling of firearms and to enjoy the recreational opportunities ranges provide. The cost of defending these actions is prohibitive and threatens to bankrupt and destroy the sport shooting and training range industry.

(j) The Department of Environmental Protection does not have nor has it ever had authority to force permitting requirements of part IV of

chapter 403 on owners and operators of sport shooting and training ranges.

(k) The elimination of sport shooting ranges will unnecessarily impair the ability of residents of this state to exercise and practice their constitutional guarantees under the Second Amendment to the United States Constitution and under s. 8, Art. I of the State Constitution.

(2) LEGISLATIVE INTENT.—The Legislature intends to protect public and private sport shooting or training range owners, operators, users, employees, agents, contractors, customers, lenders, and insurers from lawsuits and other legal actions by the state, special purpose districts, or political subdivisions and to promote maximum flexibility for implementation of environmental management practices and of the principles of risk-based corrective action pursuant to s. 376.30701. It is also the intent of the Legislature that legal action against sport shooting and training ranges will only be a last-resort option and be available only to the department and only after all reasonable efforts to resolve disputes at shooting ranges, including compliance assistance, negotiations, and alternative dispute resolution, have been attempted.

(3) DEFINITIONS.—As used in this act:

(a) "Department" means the Department of Environmental Protection.

(b) "Operator" means any person who operates or has operated a sport shooting or training range.

(c) "Owner" means any person who owns or has owned a sport shooting or training range or any interest therein.

(d) "Projectile" means any object expelled, propelled, discharged, shot, or otherwise released from a firearm, BB gun, airgun, or similar device, including, but not limited to, gunpowder, ammunition, lead, shot, skeet, and trap targets and associated chemicals, derivatives, and constituents thereof.

(e) "Environmental management practices" includes but is not limited to Best Management Practices for Environmental Stewardship of Florida Shooting Ranges as developed by the Department of Environmental Protection. Such practices include, but are not limited to, control and containment of projectiles, prevention of the migration of projectiles and their constituents to ground and surface water, periodic removal and recycling of projectiles, and documentation of actions taken.

(f) "Environment" means the air, water, surface water, sediment, soil, and groundwater and other natural and manmade resources of this state.

(g) "User" means any person, partner, joint venture, business or social entity, or corporation, or any group of the foregoing, organized or united for a business, sport, or social purpose.

(h) "Sport shooting and training range" or "range" means any area that has been designed, or operated for the use of, firearms, rifles, shotguns, pistols, silhouettes, skeet, trap, black powder, BB guns, airguns, or similar devices, or any other type of sport or training shooting.

(4) DUTIES.—

(a) The department shall make a good faith effort to provide copies of the Best Management Practices for Environmental Stewardship of Florida Shooting Ranges to all owners or operators of sport shooting or training ranges. The department shall also provide technical assistance with implementing environmental management practices, which may include workshops, demonstrations, or other guidance, if any owner or operator of sport shooting or training ranges requests such assistance.

(b) Sport shooting or training range owners, operators, tenants, or occupants shall implement situation appropriate environmental management practices.

(c) If contamination is suspected or identified by any owner, operator, tenant, or occupant of sport shooting or training ranges, any owner, operator, tenant, or occupant of sport shooting or training ranges may request that the department assist with or perform contamination assessment, including, but not limited to, assistance preparing and presenting a plan to confirm the presence and extent of contamination.

(d) If contamination is suspected or identified by a third-party complaint or adjacent property sampling events, the department shall give 60 days' notice to the sport shooting or training range owner, operator, tenant, or occupant of the department's intent to enter the site for the purpose of investigating potential sources of contamination. The department may assist with or perform contamination assessment, including, but not limited to, assistance preparing and presenting a plan to confirm the presence and extent of contamination.

(e) If the department confirms contamination under paragraph (c) or paragraph (d), principles of risk-based corrective action pursuant to s. 376.30701 shall be applied to sport shooting or training ranges. Application of the minimum risk-based corrective action principles shall be the primary responsibility of the sport shooting range or training range owner or operator for implementation, however, the department may assist in these efforts. Risk-based corrective action plans used for these cleanups shall be based upon the presumption that the sport shooting or training range is an industrial use and not a residential use and will continue to be operated as a sport shooting or training range.

(5) SPORT SHOOTING AND TRAINING RANGE PROTECTION.—

(a) Notwithstanding any other provision of law, any public or private owner, operator, employee, agent, contractor, customer, lender, insurer, or user of any sport shooting or training range located in this state shall have immunity from lawsuits and other legal actions from the state and any of its agencies, special purpose districts, or political subdivisions for any claims of any kind associated with the use, release, placement, deposition, or accumulation of any projectile in the environment, on or under that sport shooting or training range, or any other property over which the range has an easement, leasehold, or other legal right of use, if the sport shooting or training range owner or operator has made a good faith effort to comply with subsection (4).

(b) Nothing in this act is intended to impair or diminish the private property rights of owners of property adjoining a sport shooting or training range.

(c) The sport shooting and training range protections provided by this act are supplemental to any other protections provided by general law.

(6) WITHDRAWALS OF CLAIMS AND RECOVERY OF EXPENSES AND ATTORNEY'S FEES.—

(a) Within 90 days after the effective date of this act becoming law, all claims by the state and any of its agencies, special purpose districts, or political subdivisions against sport shooting or training ranges pending in any court of this state or before any administrative agency on January 1, 2004, shall be withdrawn. The termination of such cases shall have no effect on the defendant's cause of action for damages, reasonable attorney's fees, and costs.

(b) In any action filed in violation of this act after the effective date of this act, the defendant shall recover all expenses resulting from such action from the governmental body, person, or entity bringing such unlawful action.

(7) PENALTIES.—Any official, agent, or employee of a county, municipality, town, special purpose district, or other political subdivision or agent of the state, while he or she was acting in his or her official capacity and within the scope of his or her employment or office, who intentionally and maliciously violates the provisions of this section or is party to bringing an action in violation of this section commits a misdemeanor of the first degree, punishable as provided in ss. 775.082 and 775.083.

(8) PREEMPTION.—Except as expressly provided by general law, the Legislature hereby declares that it is occupying the whole field of regulation of firearms and ammunition use at sport shooting and training ranges, including the environmental effects of projectile deposition at sport shooting and training ranges.

(9) The provisions of this act shall supersede any conflicting provisions of chapter 376 or chapter 403.

(10) CONSTRUCTION.—This act shall be liberally construed to effectuate its remedial and deterrent purposes.

History.—s. 1, ch. 2004-56; s. 165, ch. 2020-2.

Title XLVI. Crimes. Chapter 823. Public Nuisances.

823.16 Sport shooting ranges; definitions; exemption from liability; exemption from specified rules; exemption from nuisance actions; continued operation.—

(1) Definitions.—As used in this act, the following terms shall have the following meanings:

(a) "Unit of local government" means a unit of local government created or established by law, including, but not limited to, a city, consolidated government, county, metropolitan government, municipality, town, or village.

(b) "Person" means an individual, corporation, proprietorship, partnership, association, club, two or more persons having a joint or common interest, or any other legal entity.

(c) "Sport shooting range" or "range" means an area designed and operated for the use of rifles, shotguns, pistols, silhouettes, skeet, trap, black powder, or any other similar type of sport shooting.

(2) Notwithstanding any other provision of law, a person who operates or uses a sport shooting range in this state shall not be subject to civil liability or criminal prosecution in any matter relating to noise or noise pollution which results from the operation or use of a sport shooting range, if the range is in compliance with any noise control laws or ordinances adopted by a unit of local government applicable to the range and its operation at the time of construction or initial operation of the range.

(3) A person who operates or uses a sport shooting range is not subject to an action for nuisance, and a court of this state shall not enjoin the use or operation of a sport shooting range on the basis of noise or noise pollution, if the range is in compliance with any noise control laws or ordinances that applied to the range and its operation at the time of construction or initial operation of the range.

(4) Rules adopted by any state department or agency for limiting levels of noise in terms of decibel levels which may occur in the outdoor atmosphere shall not apply to a sport shooting range exempted from liability under this act.

(5) A person who acquires title to or owns real property adversely affected by the use of property with a permanently located and improved sport shooting range shall not maintain a nuisance action against the person who owns the range to restrain, enjoin, or impede the use of the range where there has not been a substantial change in the nature of the use of the range. This section does not prohibit actions for negligence or recklessness in the operation of a sport shooting range or by a person using the range.

(6) A sport shooting range that is not in violation of existing law at the time of the enactment of an ordinance applicable to the sport shooting range shall be permitted to continue in operation even if the operation of the sport shooting range does not conform to the new ordinance or an amendment to an existing ordinance, provided the range was not in violation of any law when the range was constructed and provided that the range continues to conform to current National Rifle Association gun safety and shooting range standards.

(7) Except as otherwise provided in this act, this act shall not prohibit a local government from regulating the location and construction of a sport shooting range after the effective date of this act.

History.—s. 1, ch. 99-134.

Easements, Covenants, and Equitable Servitudes

As the casebook explains, the differences among easements, real covenants, and equitable servitudes are essentially historical. Because the different doctrines developed over time, and in different courts, the terminology and requirements for each can vary.

The underlying problem, which you should keep in mind, is this: two or more adjacent or nearby landowners may wish to create their own "private" land use regime, or a developer or other landowner who is subdividing land may with to do the same.[23] Two or more people can create enforceable contractual obligations among themselves, but how will they make the scheme binding on successors – how will they enable successors to the benefited or dominant parcel be able to enforce the promises on successors to the burdened or servient estate? If they don't have that ability, sales of the lots by the original promisor and promisee will undermine the land use regime they've created. For example, A, who owns beachfront property, might agree to grant an easement to B (who owns a lot across the street) to walk across A's lot to get to the beach. A is going to want money because having that easement on her lot diminishes the value of her property. B may be willing to pay for the easement because it makes his house more valuable; it may not be on the beach, but it has convenient access to the beach. But B may not want to pay for the easement unless he knows that (a) he can assure future buyers of his lot that they'll also have that access, and (b) he can be sure that a sale by A of her lot to a new owner (say, X) will not end the easement – in other words, that X will be bound, too.

The question you always need to ask in analyzing any set of facts is this: is there some theory (easement, covenant, equitable servitude) which would support the running of the benefit or the burden (or both, if necessary), **and** get your client the relief (injunction or damages or both) that he or she wants? In theory, you need to analyze each set of facts under all three theories; just because something doesn't qualify as a real covenant, for example, doesn't mean that it might not be enforceable as an equitable servitude.

In addition to the reading you have in the casebook, you may find the following tables and charts useful.

1. As to whether it's likely to be viewed as an easement, real covenant, or equitable servitude, consider the following chart for some rules of thumb:

[23] These are private in the sense that they are not legislative initiatives, as in the case of zoning, but of course they are still publicly enforced through a government agency (i.e., the courts).

		Action or restraint	
		Do Something	**Refrain from Doing Something**
Where the Action or Restraint Takes Place/ Applies	**On one's own land or in relation to one's own land**	*A promise to do something on one's own land*: Typically a covenant or equitable servitude: e.g., (i) *A* promises to maintain a drainage ditch on *A's* land to keep water from draining onto *B's* land, or (ii) *A*, living in a private subdivision, promises to make monthly homeowners' association payments	*A promise to refrain from doing something on one's own land* Typically a negative easement (some states limit the types) or restrictive covenant (real covenant or equitable servitude): e.g., *A* promises not to build anything on *A's* lot that would block the view to the lake for *B*, who owns an adjacent parcel.
	On Another's Land	*A right to do something on another's land*: Typically an easement: e.g., *A* grants to *B* (who lives across the street from *A*) the right to cross *A's* ocean front property to get to the beach.	~~*An obligation to refrain from doing something on another's Land:* [no easement or covenant running with the land; this is just the owner's right to exclude]~~

Keep in mind that the above chart simply shows what you'd typically expect. (The lower right box is crossed out because the situation does not represent an easement, real covenant, or equitable servitude.)

2. The following chart and list of notes may also be useful in summarizing the issues you need to address for each. (They don't cover prescriptive easements or easements by necessity.)

Type	**Requirements for the Burden or Benefit or Both to Run**		
	Writing, Intent, Notice	**Test of Appropri-ateness**	**Party Relationships**
Easements	Y	Appurtenant versus in gross (for bene-fit/dominant estate)	Successor to dominant/servient estates?
Real Covenants	Y	Touch and Concern	Privity (may include horizontal or vertical or both)?
Equitable Servitudes	Y	Touch and Concern	Who is it appropriate to have enforce the promise? (E.g, nearby benefited landowner; a homeowners' association?) And against whom can it be enforced (typically the occupant of the land originally owned by the promisor)

Easements (issues/requirements)

- Writing
- Intent (to be an easement as opposed to, say, a fee simple or defeasible fee)
- Notice
- Appurtenant versus in gross/successors to dominant and/or servient estates?

Real Covenants (issues/requirements):

For the burden of a covenant to run:

- Writing
- Intent
- Touch and concern
- Notice
- Horizontal and vertical privity

For the benefit to run:

- Writing
- Intent
- Touch and concern
- Horizontal and vertical privity: may dispense with horizontal privity - maybe even with vertical privity

Equitable servitudes (issues/requirements):

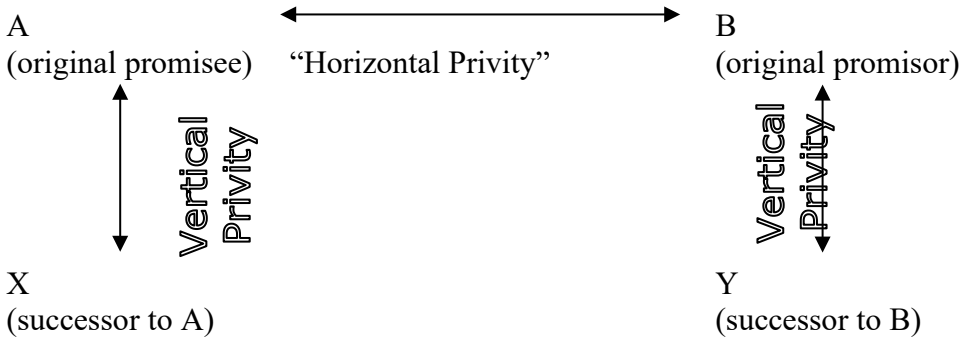
For the burden of an equitable servitude to run:

- Writing
- Intent
- Touch and concern
- Notice
- Horizontal and vertical privity: not required; applies to against whomever is occupying the land.

For the benefit to run:
Benefit —

- Writing
- Intent
- Touch and concern
- Horizontal and vertical privity: not required; one who may enforce must be appropriate

3. As you can see, vertical and horizontal privity are relevant only to real covenants, though in all cases you do have to ask whether successor parties may enforce or be burdened by a promise someone else made. When you're thinking about what "privity" is, keep in mind that the terms horizontal and vertical refer to the following chart:



To ask whether there's "horizontal privity" is simply to ask about the relationship between the two original parties, A and B. It has nothing to do with the relationship between A and X or B and Y. In England, only landlords and tenants were in horizontal privity. In most U.S. states, there is "horizontal privity" between A and B if, and only if, the promise by A to B or vice versa was made in connection with a conveyance of the land from A to B or B to A. In other words, there is horizontal privity only if the promise occurred when one of the parties subdivided a plot of land and sold part of it to someone else. There is no horizontal privity if A and B are just two nearby neighbors, each of whom bought there property separately, and they just decide one day to enter into a land use agreement.

To ask whether there is "vertical privity" is simply to ask whether the successor (X or Y above) succeeded to the other's entire interest. It has nothing to do with the relationship between A and B. If X just gets a life estate or a term of years from A, then there is no vertical privity between A and X. (That might prevent the burden of the covenant from running with the land; it would almost certainly not prevent the benefit from running).

4. Don't overlook interpretive issues.

5. Keep in the mind the question of relief. If you're looking for an injunction, that would be available through an easement, a real covenant, or an equitable servitude. If you're looking for damages, on the other hand, that may be available only for an easement or real covenant – not for an equitable servitude (though this may vary from state to state).

Sandy Gadow, *Know About Easements When You Buy a House*, Wash. Post, 3/18/15

You may think of an easement as just a right of way — that is given over your property — to a utility company for overhead power lines, phone cables or underground water pipes.

Many properties have easements, and they were often laid out back when the subdivision was created. You might share a common driveway with your neighbor, or perhaps have an access road at the back of your property that can be used by others.

There are many types of easements — rights given to someone else that allow them to use part of your property — and most of these are recorded in the public records in the county where the property is located. Anyone who searches those records will be able to identify the easements.

Recorded easements will be listed in your title report and covered by your policy of title insurance. If a title company overlooks an easement that is recorded, it will be liable to compensate you and/or or take the necessary steps to resolve the error. Potential problems arise when an easement is not recorded or goes unnoticed (sometimes for years), and it impacts a later — oftentimes serious — potential use of the property.

There are three types of easements:

• **Easement in gross**: These are recorded and described in your deed. They typically cannot be sold or assigned, and are given to a specific person or business entity — such as the telephone, water and/or electric companies for a specific use.

• **Easement appurtenant**: This is an interest in property set aside for things such as a shared driveway or access roads. These easements are often recorded — but many are not — and would not appear on the official title report. They would be listed as an exclusion in your policy of title coverage. Once created, they will normally stay with the property from owner to owner and be transferred with the title, although it will depend how the initial easement agreement was drafted.

• **Prescriptive easement**: This arises when someone uses part of your property without your permission over a period of time.

When you look at a property, consider how you would be affected if, for example, an access road across the property, which now leads to a field where horses graze, were to later carry scores of cars if the land were sold to a developer and homes built on the land. Or, perhaps you intend to install a swimming pool in the back yard only to find out later that an undetected easement exists in the same spot you intended for the pool.

What would happen if the friendly neighbor who shares a common driveway sells his property, and the new owner refuses to help with repairs or upkeep?

To prevent future problems, ask to look at the current owners' survey, which may have been done when they purchased the property because it will reveal if any unrecorded easements exist. If no survey is available — and you suspect that there could be a right of way or shared use over part of the land that could be a potential problem — you can order a new survey. You might have to cover the cost yourself, but it could be well worth the investment if a problem is detected.

If you discover an easement, check the wording carefully. When a document grants an easement to a particular person, the restriction may end when either he or she dies or sells the property. If it is granted to someone for a term of years or to someone and his "heirs and assigns," then the easement probably remains in effect no matter who owns the property.

State laws vary as to the requirement for both setting up and extinguishing an easement. In Virginia, for example, an owner may establish a "conservation easement" to protect his or her land and prevent commercial development or residential subdivisions. In Maryland, a "historical easement" deed may exist that prevents the owner from altering the house or changing the design of the building. This form of easement is usually in perpetuity, and it is inheritable and assignable to stay with the property.

Some types of easements — such as an access road or common driveway — can be extinguished by mutual consent of the parties. You may be able to either approach your neighbor and offer to buy his share of the easement property, or claim that the easement was "abandoned" and not used by your neighbor for a specified number of years. If your neighbor agrees to release his interest in the easement, the agreement can normally be terminated by filing a quit-claim deed. Since state law determines how a claim of abandonment must be handled, check with a local attorney to make sure you follow the proper procedures.

If you suspect that a neighbor's fence is on your side of the property, a survey will show if the fence was erected on the wrong side of the boundary line. The encroaching neighbor (referred to as a "hostile user") may argue that since the fence has been standing for a number of years that a prescriptive easement now exists. If the "hostile user" meets all the requirements prescribed by law, he or she could then be entitled to the land. You can offer to grant permission to your neighbor to use the land for a designated amount of time and prevent a permanent easement from being created. Permission should be documented by a letter to the "hostile user."

When you know about an easement, and realize that you share a designated space with your neighbor, a utility company, or other entity, it is easy to plan ahead.

§ 7.12 Modification and Termination of Certain Affirmative Covenants

(1) A covenant to pay money or provide services terminates after a reasonable time if the instrument that created the covenant does not specify the total sum due or a definite termination point. This subsection does not apply to an obligation to pay for services or facilities concurrently provided to the burdened estate.

(2) A covenant to pay money or provide services in exchange for services or facilities provided to the burdened estate may be modified or terminated if the obligation becomes excessive in relation to the cost of providing the services or facilities or to the value received by the burdened estate; provided, however, that modification based on a decrease in value to the burdened estate should take account of any investment made by the covenantee in reasonable reliance on continued validity of the covenant obligation. This subsection does not apply if the servient owner is obliged to pay only for services or facilities actually used and the servient owner may practicably obtain the services or facilities from other sources.

(3) The rules stated in (1) and (2) above do not apply to obligations to a common-interest community or to obligations imposed pursuant to a conservation servitude.