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IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No. SC13-775

STATE OF FLORIDA DEPARTMENT
OF TRANSPORTATION,

Petitioner,

vs.

CLIPPER BAY INVESTMENTS, LLC,

Respondent.

First District Court of Florida Case No. 1D11-5496
First Judicial Circuit Court Lower Case No. 08-1218-CA01-ORP

RESPONDENT'S ANSWER BRIEF

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STATEMENT OF CASE

This Court granted the State of Florida, Department of Transportation's ("FDOT") petition to review the First District Court of Appeal's ("First District") decision in *Clipper Bay Investments, LLC v. State of Florida Department of Transportation & Santa Rosa County*, 117 So. 3d 7 (Fla. 1st DCA 2013). (App. 1 *Clipper Bay* decision). That decision holds that the exception to marketability in "section 712.03(5) applies to land held in fee for the purpose of a right-of-way." *Id.* at 16. The jurisdictional basis for review is express and direct conflict with the Fourth District Court of Appeal's ("Fourth District") decision in *Florida Department of Transportation v. Dardashti Properties*, 605 So. 2d 120 (Fla. 4th DCA 1992), *rev. denied*, 617 So. 2d 318 (Fla. 1993). (App. 2 *Dardashti* decision). *See* art. V, § 3(b)(3), Fla. Const.

Claiming the right to marketable record title under Florida's Marketable Record Title Act (MRTA), Clipper Bay Investments, LLC ("Clipper Bay") filed an action in Santa Rosa County to quiet its fee title to seven acres of waterfront property lying north of FDOT's Interstate 10 ("I-10") fence line. ("Parcel"). This filing was based on Clipper Bay's thirty-seven-year record chain of title rooted in a deed recorded in 1970. FDOT counterclaimed, seeking to quiet its competing fee

title to the Parcel and to eject Clipper Bay. FDOT based its counterclaim on a 1965 deed from a common grantor.

The trial court split the fee title to the Parcel. R. at X-1885-1889, 2192-97. [1] Both parties appealed. Clipper Bay asserted that the trial court erred by not fully extinguishing FDOT's competing, pre-root fee estate. FDOT answered by asserting that "the exception contained in section 712.03(5), Florida Statutes (2008), which preserves easements and rights-of-way, precluded Clipper Bay from extinguishing any portion of FDOT's interest in the land." *Clipper Bay*, 117 So. 3d at 8. By cross-appeal, FDOT separately asserted it was entitled to quiet its title in the entire Parcel. In pertinent part, FDOT asserted that (1) under section 712.03(1), "MRTA did not extinguish FDOT's fee estate because a post-root muniment of title in Clipper Bay's chain of title specifically confirmed FDOT's estate," and (2) "the exception for easements and rights-of-way under section 712.03(5) precluded any portion of FDOT's estate from being extinguished under MRTA." *Id.* at 8. FDOT raises the same issues here.

[1] The Record on Appeal will be in the form of "R. at [Record Volume]-[Record Page]." Trial transcript references, although part of the record, have been separately paginated and accordingly will be separately referenced in the form of "Tr. at [Trial Volume]-[Transcript Page]." Physical exhibits included in the Record but not paginated as part of the Record will be in the form of "Ex. [Number]." Appendices to this Brief will be cited as "App. [Number]."

The First District found FDOT's cross-appeal meritless. As did the trial court, the First District rejected without discussion FDOT's assertion that section 712.03(1) applies. It also rejected FDOT's argument that "the exception for easements and rights-of-way under section 712.03(5) precluded any portion of FDOT's estate from being extinguished under MRTA." *Id*. at 8.

As to Clipper Bay's appeal, the First District held that the exception to marketability in "section 712.03(5) applies to land held in fee for the purpose of right-of-way." *Id.* at 16. However, it also concluded that "FDOT failed to present competent, substantial evidence that the land at issue, which lies north of the Interstate 10 fence line, was held for purpose of right-of-way." *Id.* at 16.

The First District remanded for entry of an order quieting title in Clipper Bay to the Parcel "with the exception of the land utilized by Santa Rosa County to construct a road." *Id.*

STATEMENT OF FACTS

Two warranty deeds from the same grantor give Clipper Bay and FDOT competing fee estate titles to seven acres of undeveloped, waterfront property in Santa Rosa County. This Parcel is north of FDOT's limited access since that contains the Interstate 10 transportation facility.

A. Clipper Bay's reliance on the record title.

Clipper Bay purchased the Parcel in 2006-2007. A canal leading to Escambia Bay forms the Parcel's northern boundary. R. at X-1892-96; X-1889-1901. FDOT's I-10 right-of-way fence forms the Parcel's southern boundary. R. at I-14-15; II-266; Tr. at III-321-22. The only road access to the parcel is 14th Avenue, an east-west county road that Santa Rosa County built and maintains.

To assure that it had clear and marketable title, Clipper Bay had the Parcel's record title searched, obtained a title policy, and, to reveal any unrecorded interests, Clipper Bay had a licensed surveyor survey the Parcel. R. at III-422-23. The record title search revealed that for thirty-seven years, six private parties had purchased and sold the Parcel. Ex. 18. These deeds date back to the warranty deed to Escambia Shores, Inc. recorded March 17, 1970, at OR Book 204, Page 704 (App. 4). That deed is Clipper Bay's root-of-title under Florida's Marketable Record Title Act ("MRTA"). R. at XI-2199. (App. 3, Chapter 712, Fla. Stat.).

Keith Hodges, a predecessor-in-title to Clipper Bay, owned the Parcel from 2004-2005. R. at III-331, 443; Tr. 314-315. Mr. Hodges had more than thirty years' experience in buying, selling, appraising, developing, and researching easements and ownership of real estate in Escambia and Santa Rosa County. He had even managed FDOT's right-of-way office in Santa Rosa County. R. at III-430; Tr. at III-311-13.

Mr. Hodges testified about the steps he took to assure that he had marketable record title to the Parcel. He obtained title insurance, which required the property's record title to be searched, and a boundary survey. R. at III-431; Tr. at III-317-18.

Despite his extensive experience with land title transactions and familiarity with FDOT rights-of-way, Hodges was unaware that FDOT had any claim to the Parcel except for a small area in the southwest corner south of 14th Avenue. Tr. at III-322. Hodges considered putting an outdoor sign on his fee estate. He called FDOT in 2004 to see if they would relocate the encroaching fence "to the boundary of Block C, per [his] survey." FDOT told Hodges that "their fence was their right-of-way." Tr. at III-322.

FDOT's sole witness at trial was Eddie Rudd, the document supervisor of right-of-way mapping in FDOT's Chipley office. His testimony in the light most favorable to affirmance was that the I-10 fence was the boundary of FDOT's right-of-way. Tr. at II-255. Rudd testified that FDOT's fence "limits access onto the (I-10) right-of-way" and such limited access fences generally "follow the right-of-way lines but not necessarily so." Tr. at II-275, 285-86. This fencing being the right-of-way's width is consistent with the fact that FDOT maintained only the area south of its I-10 right-of-way fence. Tr. at III-323.

FDOT never challenged Mr. Hodges' assertion in 2004 that he owned the Parcel north of the I-10 right-of-way fence. FDOT did not record a notice of claim pursuant to section 712.05, Florida Statutes, until May 7, 2007, three months after Clipper Bay's deeds were of record, three years after its discussion with Mr. Hodges, and thirty-seven years after Clipper Bay's root-of-title was recorded. R. at I-13-16. Moreover, FDOT never questioned Hodge's testimony that FDOT informed him that its fence marked the boundary of its right-of-way.

B. Clipper Bay's root of title is the warranty deed from DeJoris and Amadio to Escambia Shores, Inc. recorded on March 17, 1970.

Clipper Bay's root of title is the warranty deed to Escambia Shores, Inc. from "Julio DeJoris & Sue DeJoris, husband and wife, and Americo Amadio & Mamie Amadio, husband and wife" recorded March 17, 1970. R. at VIII-1527 (App. 4). This root of title gives Clipper Bay marketable record title to the land described therein "free and clear of all claims except the matters set forth as exceptions to marketability in statute 712.03." § 712.02, Fla. Stat. (2008). As section 712.04, Florida Statutes, provides, "[s]ubject to the matters stated in statute 712.03, such marketable record title shall be free and clear of all estates, interests, claims or charges whatsoever, the existence of which depends upon any act, title transaction, event or omission that occurred prior to" March 17, 1970. This

voiding of prior interests applies whether the estate, interest, or claim is "private or governmental." § 712.04, Fla. Stat. (2008).

Since March 1970, the Parcel has been described as being "situated in Block 'C,' Escambia Shores Unit 1." "Block 'C,' Escambia Shores Unit 1" is a reference to the Parcel as platted by Escambia Shores, Inc. Santa Rosa County formally accepted and recorded the plat of Escambia Shores Unit 1 in January 1970 at Plat Book B, Page 147. R. at I-24; Ex. 4. (App. 5 Escambia Shores Unit 1 Plat).

In summary, Block "C," Escambia Shores Unit 1, is a platted portion of the property north of the I-10 right-of-way (as established by the limited access fence). The land platted was conveyed to Escambia Shores, Inc. by the deed recorded in 1970 at OR Book 204, Page 74. A portion of this Block "C" is the Parcel that, by the time Clipper Bay took title thirty-seven years later, had been owned by six different private parties who had the free use of their record title fee interest without interference from FDOT.

C. FDOT's competing fee title is the 1965 deed from the same DeJoris and Amadio to a larger tract that included the Parcel.

In the mid-1960s, FDOT acquired fee title to a series of parcels to build I-10 (a/k/a State Road 8), a roadway that extends the length of North Florida. Among these conveyances were deeds in 1965 from DeJoris and Amadio, the same grantors who, in 1969, deeded the property north of the I-10 fence to Escambia

Shores, Inc. R. at I-109-116. The northern boundary of the fee simple estate extends well above the Parcel in dispute and the I-10 transportation facility as built, fenced and maintained. R. at I-109-1 16; II-368.

As part of its ordinary procedures for procuring and building transportation facilities, FDOT prepared a multi-page right-of-way map in 1963. R. at II-Tr.259. This map was a projection of the property FDOT believed it would need to construct the I-10 transportation facility, including the bridge across Escambia Bay. Tr. at II-289-291.

Section 335.02(2), Florida Statutes, mandates that "(r)ight of way maps used for the acquisition of real property rights and adopted by (FDOT) shall, upon completion of monumentation, be filed in accordance with chapter 177 in the office of the clerk of the circuit court in the appropriate county." FDOT failed to monument the land and never filed its official right-of-way map in Santa Rosa County. (App. 6, Chapter 335, Fla. Stat.). Instead, FDOT simply kept that map in its Chipley, Washington County, Florida office. Tr. at II-280, 286-287. This unrecorded map is not referenced in Clipper Bay's chain of title.

Since its completion of the I-10 transportation facility in the 1960s, FDOT has actively maintained that facility (the paved road, median, roadsides, and green area, etc.) between the limited access fences that bound either side of the paved road. *See* R. at IV-1751-1752; Tr. at III-323. The only evidence of FDOT's

involvement with the Parcel north of its access fence since I-10 was completed is its lease to Santa Rosa County for the construction of 14th Avenue.

Other than the minor fence encroachment into the Parcel, FDOT presented no evidence of a present use or future need for Clipper Bay's Parcel as part of the I-10 transportation facility. In other words, there is no evidence that FDOT's established right-of-way includes the Parcel.

D. Expert testimony on how MRTA impacts these competing fee estates.

In addition to Keith Hodges, Clipper Bay presented the testimony of three experts with decades of land title transaction experience. Wayne Parker, a Registered Land Surveyor with forty years of surveying experience, testified that I-10's north right-of-way line is described and shown on the Escambia Shores, Unit 1 plat, as the Parcel's southern boundary. As he explained, the Escambia Shores Unit 1 plat shows the I-10 right-of-way as being south of the southern boundary of Block "C." In other words, the north right-of-way line of I-10 is the southern boundary of Block "C." Tr. at I-86.

Frank Jackson, a Florida Certified Land Searcher and Licensed Title Insurance Agent who has searched and examined thousands of Florida land titles for over forty-two years, opined as an expert in Florida land title searches and examination. Tr. at I-158. He testified that the warranty deed into Escambia

Shores recorded on March 17, 1970, was Clipper Bay's root of title. Mr. Jackson explained that because the root of title was greater than thirty years old, there was no need under MRTA to search the public records back any further. Tr. at I-172-173 (App. 6).

Mr. Jackson also testified that nothing in Clipper Bay's record chain of title would have prevented him from insuring title to Clipper Bay's Parcel. He found nothing in Santa Rosa County's public records indicating that the I-10 right-of-way was anywhere other than where the existing right-of-way fence has been since the 1960s, and as depicted on the Escambia Shores Unit 1 plat recorded in January, 1970.

The final expert witness was Joseph R. Boyd, a Board Certified Real Estate Lawyer and Title Insurance Agent with thirty-eight years' experience as a Florida real estate lawyer. Mr. Boyd explained that after MRTA became effective in 1964, title records are searched backward for a qualifying thirty-year root-of-title. Under MRTA, anything recorded prior to that root is void (subject to certain exceptions). Tr. at II-230-231. Mr. Boyd further explained the significance of MRTA as being:

> [S]o the public can look at the record title and determine that that is a piece of property that has title that, according to the records, can be okay. It is marketable . . . Marketable Record Title is being able to look at the records, and in the recording office and tell if there's Marketable Title.

Tr. at II-235-236.

E. The relevant lower court rulings.

The First District affirmed the trial court's finding that: (1) the common grantors' deed to Escambia Shores recorded on March 17, 1970, at OR Book 204, Page 704, is Clipper Bay's root of title; (2) the section 712.03(1) exception does not apply; and (3) the section 712.03(5) exception applies to land held in fee for the purpose of right-of-way. Both lower courts rejected FDOT's argument repeated here that section 712.03(5) applies so that its use of any portion of its fee estate for the I-10 transportation facility exempts its entire fee estate from MRTA.

SUMMARY OF ARGUMENT

The Marketable Record Title Act renders marketable any estate in land recorded for thirty years or more. The root of title for marketability is the last title transaction recorded for at least thirty years. Any and all interests arising prior to the root of title are extinguished unless the interest falls within one of the classes of interests excepted in § 712.03, Florida Statutes.

Section 712.03(5) protects "recorded or unrecorded easements or rights, interest or servitude in the nature of easements, rights-of-way and terminal facilities." This text speaks of an interest one has to use land owned by another. It also includes the dedication of such a way across one's own fee estate.

Florida law mandates that public rights-of-way be formally established by recording a right-of-way map in the county's public records. See Chapters 335,

336, 177, Fla. Stat. This requirement puts the public on proper notice of the public interest in the right-of-way; and, by doing so, maintains MRTA's protection against hidden interests.

If a public right-of-way map is not recorded in the county public records as required, another statute protects an established roadway. Section 95.361, Florida Statutes vests and preserves "(a)ll right, title, easement, and appurtenances in and to" a continuously maintained or repaired right-of-way.

These two statutory methods of assuring that public rights-of-way are preserved are supplemented by a third method. An unrecorded public right-of-way is preserved under section 712.03(5) by presentation of clear and positive proof satisfying the three-part test announced in *City of Jacksonville v. Horn*, 496 So. 2d 204 (Fla. 1st DCA 1986).

FDOT failed to formally establish its right-of-way as required by chapter 335. It did not monument or record its right-of-way map in the Santa Rosa County Clerk of Court's public records. And, any right or interest FDOT has vested under section 95.361, Florida Statutes, is limited to the roadway actually maintained between the I-10 limited access fences. FDOT also failed to present the proof required under section 712.03(5) as mandated under *Horn*. These three strikes or failures due to FDOT's failure to comply with Florida law require one conclusion.

FDOT has no right-of-way interest in or on the Parcel in dispute. Section 712.03(5) does not apply.

With no right-of-way on the Parcel, FDOT's interest is a competing fee estate. That interest is declared null and void under Section 712.04.

As to the decisional conflict, *Dardashti* does not hold that section 712.03(5) applies to rights-of-way as easements, but not to rights-of-way held in fee. That decision holds only that the right-of-way language in the 1917 deed FDOT was relying on as creating the right-of-way did not create a right-of-way. That deed simply conveyed fee title. The *Dardashti* decision is correct.

On the other hand, the First District erred by holding that section 712.03(5) applies to land held in fee for the purpose of right-of-way. This statement is too broad. It risks undermining the intent and core purposes of MRTA. Section 712.03(5) applies to land on which there is an established right-of-way, not just land that may be held for purposes of right-of-way. In part, this error arose from that court finding the statute ambiguous and then applying its own public policy of giving special protection to rights or easements acquired for the use and benefit of the public. Such judicial expansion of the limited exceptions in section 712.03 is unnecessary and improper.

If the Court considers Issue II, it should affirm both lower courts' decisions rejecting FDOT's argument that the section 712.03(1) exception applies. *Clipper*

Bay, 117 So. 3d at 8-9. FDOT failed to establish that the 1981 Trustee Deed is a muniment of title on which Clipper Bay's estate is based. FDOT also failed to prove that this deed's reference to the 1965 deed is "a record transaction which imposed, transferred or continued" FDOT's competing fee estates. *See* § 712.03(1), Fla. Stat.

With no applicable exception within section 712.03, Florida Statutes, FDOT's competing fee estate interest in the Parcel to which Clipper Bay otherwise has the right to marketable title is null and void. § 712.04, Fla. Stat. Clipper Bay asks this Court to remand the case to the trial court for entry of a judgment quieting title to Clipper Bay free and clear of any and all interest or claim by FDOT.

ISSUE ONE (RESTATED): DOES THE SECTION 712.03(5) EXCEPTION TO MARKETABILITY APPLY TO LAND HELD IN FEE FOR PURPOSES OF A RIGHT-OF-WAY? IF SO, DID THE FIRST DISTRICT COURT OF APPEAL ERR IN HOLDING THAT THIS EXCEPTION DOES NOT APPLY BECAUSE FDOT FAILED TO PRESENT COMPETENT, SUBSTANTIAL EVIDENCE THAT ITS FEE INTEREST IN THE LAND NORTH OF THE INTERSTATE 10 FENCE LINE WAS HELD FOR PURPOSE OF RIGHT OF WAY?

STANDARD OF REVIEW

Questions of statutory interpretation are reviewed *de novo*. *Raymond James Financial Services, Inc. v. Phillips*, 2013 WL 2096252, 38 Fla. L. Weekly S325 (Fla. May 16, 2013).

ARGUMENT

Vested with record fee title to the Parcel for thirty years or more, Clipper Bay has the right to a marketable record title subject only to the limited exceptions to marketability listed in section 712.03. § 712.02, Fla. Stat. The exception at issue here preserves interests in the nature of easements, rights-of-way, and terminal facilities that are in use. Specifically, section 712.03(5) preserves:

> (5) Recorded or unrecorded easements or rights, interest or servitude in the nature of easements, rights-of-way and terminal facilities, including those of a public utility or of a governmental agency so long as the same are used and the use of any part thereof shall except from the operation hereof the right to the entire use thereof.

Clipper Bay does not read *Dardashti* as does FDOT.

Dardashti does not hold that section 712.03(5) does not apply to rights-of-way in fee.[2] Instead, the conflict question is whether or not this exception applies to preserve (1) a competing fee estate the state holds "for purposes of a right-of-way" (the decision below) or (2) an actual right-of-way, the location, length and width of which the state has properly established across another's fee or by dedication across it own. (See *Dardashti* and *Horn*.)

[2] The First District states that "*Dardashti* directly stands for the proposition that the exception in section 712.03(5) cannot apply to land held in fee by the government." *Id*. at 14. It does not expressly state that *Dardashti* holds that the exception does not apply to a government right-of-way held in fee. And, instead of finding decisional conflict, it uses *Dardashti* to find section 712.03(5) "ambiguous as to whether it can be applied to protect public rights of land held in fee." Id. at 14.

To answer this question, Clipper Bay will apply this Court's well-established principles of statutory interpretation to argue that section 712.03(5) preserves a sufficiently established right-of-way on the Parcel (whether an easement or fee estate), not a competing fee estate simply held for purposes of a right-of-way. This is the only resolution that avoids the risk of "hidden interests" that MRTA was enacted to eliminate. *Clipper Bay*, 117 So. 3d at 11 (citing *H & F Land, Inc. v. Panama City-Bay County Airport & Indus. Dist.*, 1167, 1172 (Fla. 1999), *receded from on other grounds by Blanton v. City of Pinellas Park,* 887 So. 2d 1224 (Fla. 2004)).

A. Interpreting the Marketable Record Title Act

The primary rule of statutory construction is to give effect to legislative intent. And, because legislative intent is determined first and foremost from the statute's text, the language used in the statute is examined. *Raymond James Financial Services, Inc. v. Phillips, supra*, *3. If the statute's text conveys a clear and definite meaning, its unequivocal meaning is applied without resort to rules of statutory interpretation and construction. If the language is ambiguous, the rules of statutory construction are applied to help interpret legislative intent. This search may include examination of legislative history and the purpose behind the statute's enactment. *West Florida Reg'l Med. Ctr., Inc. v. See*, 79 So. 3d 9 (Fla. 2012) (internal citations omitted).

In addition to these general interpretive principles, three additional principles guide a proper interpretation of MRTA. First, the legislature has stated its intent and purpose; and it has mandated that MRTA's text be liberally construed to achieve its intent and purpose. As section 712.10 requires, MRTA "shall be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record title as described in statute 712.02 subject only to such limitations as appear in statute 712.03." § 712.10, Fla. Stat. (2008). Stated otherwise, the legislative intent is that MRTA be liberally construed so that persons can rely on record title subject only to the limitations in section 712.03.

Second, this Court has already articulated MRTAs legislative history and has reiterated its purpose. *See H & F Land, Inc., v. Panama City-Bay Co. Airport Indus. Dist.,* 736 So. 2d 1167 (Fla. 1999), *receded from in part on other grounds, Blanton v. City of Pinellas Park*, 887 So. 2d 1224 (Fla. 2004). As this Court stated in *H & F Land*, the core purposes of MRTA are: (1) to stabilize property law by clearing old defects from land titles; (2) to limit the period of record search; and, (3) to clearly define marketability by extinguishing old interests of record not specifically claimed or reserved. *H & F Land, Inc.* 736 So. 2d at 1172-73. Stated otherwise, "(a) core concern of MRTA was that there be no "hidden"' interests in property that could be asserted without limitation against a record property owner.

MRTA achieves this core concern by shifting the burden to those claiming "any claim or interest" in property to come forward in a timely fashion and assert that interest publically." *Id*. at 1172.

Third, this Court has made it clear that the judiciary will not expand or add to the legislatively enumerated exceptions in section 712.03. Doing so "would undermine the core purpose of MRTA." *H & F Land, Inc.* at 1172-73 (Fla. 1999). Indeed, judicial expansion of the enumerated exceptions would violate legislative intent. As this Court wrote in *ITT Rayonier, Inc. v. Wadsworth*, 346 So. 2d 1004, 1009 (Fla. 1977), the section 712.03 exceptions "and the specific provision in section 712.05 for the protection of valid claims indicate a legislative intent to exclude no other claims from extinction by the operation of Sections 712.02 and 712.04." *Id*. at 1012.

The First District's interpretation of section 712.03(5) rests on that court's extra-legislative policy giving special protection to public "rights or easements." Initial Br. 12, 24. This special protection disregards the prohibition against judicial expansion of the stated exceptions and must be addressed.

B. Section 712.03(5)'s recorded and unrecorded easements exception to marketability preserves a sufficiently established public and private right-of-way on the Parcel that is used.

The above interpretive principles establish that the legislative intent for section 712.03(5) is to protect and preserve from extinguishment established public

and private rights-of-way that actually cross over the Parcel. Nothing in the statute, its history, or purpose suggests a legislative intent to give special protection to a public fee estate simply because it is being "held for the purpose of right-of-way." *Clipper Bay* at 16. In reaching its decision, the First District concedes this fact when it acknowledges that its interpretive problem was not trying to reconcile the statute with legislative intent. Instead, its problem was reconciling the statute and legislative intent with its own public policy "that rights or easements once acquired for the use or benefit of the public are not easily lost or surrendered." *Clipper Bay* at 14 (quoting *City of Jacksonville v. Horn*, 496 So. 2d 204, 208 (Fla. 1st DCA 1986)).

Before addressing the propriety of the First District adding its own public policy to MRTA, Clipper Bay will apply this Court's interpretive principles and precedent. The statutory text will be examined first.

1. Defining "rights-of-way" as used in section 712.03(5), Fla. Stat.

Chapter 712 does not define "rights-of-way." So, this Court must decide its legislatively intended meaning.

a. The ordinary meaning of "rights-of-way."

"When considering the meaning of terms used in a statute, [this Court] looks first to the terms' ordinary definitions . . . definitions [that] may be derived from dictionaries." *Phillips,* at *3 (citation omitted). *Black's Law Dictionary* defines

"right of way" as: "1. The right to pass through property owned by another; 2. The right to build and operate a . . . highway on land belonging to another or the land so used." *Black's Law Dictionary*, 1341 (8th ed. 2009). As such, the ordinary meaning of right-of-way includes easements or lands so used.

b. Statutory definitions for right-of-way.

In addition to this ordinary meaning of right-of-way are two statutory definitions in other chapters of Florida Statutes. Chapter 334, Florida's Transportation Code defines right-of-way as "land in which the state, the department, a county, or a municipality owns the fee or has an easement devoted to or required for use as a transportation facility." § 334.03(22), Fla. Stat. Chapter 177, Land Boundaries, defines right-of-way as "land dedicated, deeded, used or to be used for a street, alley, walkway, boulevard, drainage facility, access for ingress and egress, or other purpose by the public, certain designated individuals, or governing bodies." § 177.031(16), Fla. Stat.

There is no legislative history that suggests the legislature intended "rights-of-way" as used in section 712.03(5) to have more than its ordinary meaning as an easement right or the land that actually is used as a right-of-way.[3]

[3] Clipper Bay acknowledges that it argued below that the ordinary meaning of "rights-of-way" was limited to an easement right. In finalizing this brief, Clipper Bay became convinced otherwise. The second Black's Law Dictionary definition includes the phrase "or land so used." This phrase suggests rights-of-way in fee are included in the ordinary definition. If so, the dichotomy between rights-of-way as an easement versus a fee interest is a false dichotomy. As

As such, relying on the definition of right-of-way in chapter 334 is unnecessary in defining the meaning of rights-of-way in chapter 712. Nonetheless, chapter 334 and its related chapter 335 are helpful in resolving the decisional conflict and answering FDOT's other issues.

As noted earlier, section 335.02 requires that "[r]ight of way maps used for the acquisition of real property rights and adopted by the (FDOT) shall, upon completion of monumentation, be filed in accordance with chapter 177 in the office of the clerk of the circuit court in the appropriate county." The obvious purpose of this mandate is to put anyone surveying and searching title to property on notice that FDOT claims an interest in the land. It also clarifies the location, length and width of FDOT's rights-of-way. FDOT failed to monument or file a right-of-way map in Santa Rosa County.

Chapter 177 includes Florida law on platting subdivisions such as the Escambia Shores, Unit 1 plat in this case. As chapters 334 and 335, chapter 177's definition of "rights-of-way" is in the context of requiring one to record in the county clerk's public records a map that delineates the location, length and width of all rights-of-way, lots, etc. In other words, the land to be used as a right-of-way must be delineated as such.

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such, section 712.03(5) is unambiguous. The question then is simply whether or not FDOT has a right-of-way interest to be preserved.

Given the unambiguous ordinary meaning of rights-of-way as an easement access across another's parcel or land so used, the exception in Section 712.03(5) cannot be read to preserve a competing fee estate simply because that competing fee may be "held for purposes of right-of-way." To be more than a "hidden" interest and preserved under Section 712.03(5), the right-of-way must be properly established. This is true whether that right-of-way is an easement across another's fee (a servitude) or properly imposed on the state's own fee (a use dedication). Chapter 335 dictates how the state is to establish its rights-of-way interests. FDOT never established a right-of-way across the Parcel as chapter 335 dictates. Failing to establish a right-of-way beyond the one it has constructed and maintained south of the Parcel, FDOT simply holds a competing fee estate title to the Parcel. That competing fee estate is extinguished under MRTA.

2. The Inter-District Conflict between *Dardashti* and *Clipper Bay*.

a. Under *Dardashti*, established rights-of-way are not extinguished, only competing fee estates that may be held for the purposes of right-of-way, but across which no right-of-way was ever created are extinguished.

In *Dardashti*, the two trial judges concluded "that subsection (5) did not apply to a right-of-way in fee." *Id.* at 122. In doing so, they applied the ordinary meaning of rights-of-way and read subsection (5) in its context. They reasoned that, had the legislature intended subsection (5) to preserve possessory estates, it

would have included the term “estates” as it did in subsections 712.03(1), (2) and (4). There is no indication these trial judges considered the statutory definitions in chapters 334 and 177.

The *Dardashti* decision notes but never adopts the trial judges' reasoning as its own. The decision is that the 1917 deed conveyed fee title, but that conveyance of fee title did not itself establish or create a right-of-way on that fee. As the court wrote:

> As did Judge Carlisle, **we hold that the 1917 deed did not <u>create</u> an easement or right-of-way**. Although the 1917 deed labeled the fifty foot parcel as a "right of way and easement," those words merely described the purpose for the conveyance. *See Robb v. Atlantic Coast R.R. Co.,* 117 So.2d 534, 537 (Fla. 2d DCA 1960) ("fee [title] will pass by deed containing a clause or recital which is merely declaratory of the use contemplated of the land."). Although the 1917 deed provided that the land would revert if not used as a public highway, that provision merely created a covenant of the deed. *Id*. at 535-36. **Whatever one chooses to call it, an ownership interest, a right-of-way in fee, or a determinable fee interest, we hold that the County received fee title to the fifty foot parcel**." *Id.* at 122. (emphasis added).

With this penultimate decision, the *Dardashti* court next looked to MRTA's purpose and the text of section 712.03(5). It ultimately concluded that, "[b]ecause the County did not have an easement or right-of-way over the fifty foot parcel, section 712.03(5) would not apply." *Id.* at 123. In other words, the *Dardashti* decision does **<u>not</u>** hold that section 712.03(5) applies to preserve rights-of-way as easements (a "lesser interest") but does not preserve rights-of-way in fee (a

"greater interest"). *Dardashti* simply holds that the 1917 deed itself did not create a right-of-way.

The right-of-way in *Dardashti* was not created or established until decades later when the right-of-way was mapped and that map was recorded. That recorded map showed the location, length and width of the right-of-way that the County dedicated or imposed on its own fee. That established right-of-way covered only a portion of the fee (39 ft.) and was north of the parcel in dispute. With no dedicated or established right-of-way on the remaining fee, *Dardashti* simply and correctly holds that section 712.03(5) did not preserve FDOT's competing fee estate in the eleven-feet portion that was outside the established right-of-way.

b. The First District's injudicious expansion of section 712.03(5) to protect fee estates held for the purpose of right-of-way.

The First District disagreed with *Dardashti*. As noted earlier, it acknowledged that MRTA mandates a liberal construction "to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on record title," and it was aware of this Court's precedent admonishing against judicial expansion of the section 712.03 exceptions. *Id*. at 3. (citing § 712.10, Fla. Stat.; *H & F Land, Inc.*, *supra*). It even quotes from *H & F Land, Inc.* that "[a] core concern of MRTA was that there be no hidden interests in property

that could be asserted without limitation against a record property owner." *Clipper Bay*, 117 So. 3d at 11. Nonetheless, the First District found it necessary to reconcile these dictates with its own public policy "that rights or easements once acquired for the use and benefit of the public are not easily lost or surrendered." *Id.* at 14 (citing *City of Jacksonville v. Horn*, 496 So. 2d 204, 208 (Fla. 1st DCA 1986)). It also was troubled by FDOT's erroneous argument that under the *Dardashti* rationale, a right-of-way in fee is given less protection than a non-possessory right-of-way. On this basis, the First District ultimately held that "the exception to marketability in section 712.03(5) applies to land held in fee for the purpose of right-of-way." *Clipper Bay,* 117 So. 3d at 9.

3. Resolving the Intra-District Decisional Conflict.

From Clipper Bay's perspective, the decisional conflict does not turn on whether section 712.03(5) preserves both rights-of-way as easements and rights-of-way in fee. Therefore, whether or not the term "right-of-way" as used in section 712.03(5) includes a right-of-way in fee is not the issue. The proper question is whether FDOT has an established right-of-way on the disputed fee that is subject to preservation under section 712.03(5), Florida Statutes. As a matter of law, FDOT never created or established a right-of-way on the Parcel. The only right-of-way it established was the land it used as the right-of-way. That land is south of

the Parcel. As such, FDOT simply has a competing fee estate that is not preserved under section 712.03(5).

The decisional conflict instead turns on whether or not section 712.03(5) preserves (1) a competing fee estate the state holds "for purposes of a right-of-way" (the decision below) or (2) an actual right-of-way, the location, length and width of which the state has properly established across another's fee or by dedication across its own fee (*Dardashti* and *Horn*).

The text of section 712.03(5) conveys a clear and definite meaning on this question. It preserves rights or interests that are in the nature of "rights-of-way." It does so without regard to whether the right or interest is public or private. In other words, section 712.03(5) does not provide special protection for governmental interests held for purposes of a right-of-way (whether an easement or a fee estate). With no ambiguity in this regard, the statute's plain meaning must be applied without resort to rules of statutory interpretation and construction. *West Florida Regional Medical Center, Inc. v. See*, 79 So. 3d 9 (Fla. 2012).

Nonetheless, if one looks beyond the statutory text and considers rules of construction, the applicable interpretive principles mandate that this exception be limited to a properly established right-of-way, whether public or private. These principles do not allow for a judicial expansion that provides special protection for a government easement or fee estate simply "held for the purposes of a right-of-

way." Doing so violates clear legislative intent and the core purposes of MRTA. As the facts in this case establish, the First District's decision would permit the assertion of "hidden" interests if all the state must show is that it is "[holding] the fee for purposes of right-of-way." The focus must be on more than "the reason or purpose that the state holds the land in question." *Clipper Bay* at 14. Without clarification from this Court, if the reason and purpose for which the state holds the fee is sufficient to establish the section 712.03(5) exception, persons cannot rely on the record title as intended by MRTA. Instead, as here and in *Dardashti*, owners otherwise entitled to marketable title will be subjected to years of expensive litigation over hidden governmental interests. Land title transactions will not be simplified and facilitated, but instead complicated and impaired. In other words, the core intent and purpose of MRTA would be violated.

The *Clipper Bay* decision rests on the First District finding the text ambiguous and adding to the legislative intent "the judicially mandated broad construction of the exception" so “that rights or easements once acquired for the use and benefit of the public are not easily lost or surrendered.” Initial Br. at 12; *Clipper Bay*, 117 So. 3d at 14. This Court has made it clear that such judicially mandated expansions or additions to the legislatively enumerated exceptions are improper. *H & F Land, Inc, supra.*; *ITT Rayonier, Inc.*, *supra*.

Several other factors support disapproving the *Clipper Bay* holding here and affirming the *Dardashti* approach. If the legislature viewed *Dardashti* as misreading its intent, the legislature has had over twenty years to amend the statute. This passage of time actually establishes legislative acceptance. While this litigation was pending, the legislature amended section 712.03 in 2010 to add a ninth exception for other governmental interests. It did so without modifying section 712.03(5). This ninth exception preserves "[a]ny right, title or interest held by the Board of Trustees of the Internal Improvement Trust Fund, any water management district created under chapter 373, or the United States." Ch. 2010-104, § 1, Laws of Fla. Tellingly, this amendment resolves any concern about Water Management District interests like those at issue in *Water Control District of South Brevard v. Davidson*, 638 So. 2d 521 (Fla. 5th DCA 1994), yet does not similarly protect FDOT interests like those in *Dardashti* or here. In addition, this new ninth exception is narrower than the 2009 proposal that would have excepted "any right, title or interest held by any governmental entity." §§ 12-13, CS/CS/HB 1349.

Clearly, by this recent review of the section 712.03 exceptions and the addition of a ninth exception (and inclusion of other governmental interests such as those of Water Management Districts and rejection of the broader exemptions for all governmental interest), the legislature did not express any concerns with

Dardashti. And, it certainly did not evidence any intent to give the broader protection to public rights-of-way the First District imposes by its judicially imposed "public policy."

This Court has repeatedly recognized that such facts amount to legislative acceptance or approval of the *Dardashti* court's reading of its legislative intent. *See, State v. Cable*, 51 So. 3d 434, 443 (Fla. 2010) (long-term legislative inaction after a court construes a statute amounts to legislative acceptance or approval of that judicial construction). *See also Goldenburg v. Sawczak*, 791 So. 2d 1078 (Fla. 2001); *State v. Hall*, 641 So. 2d 403 (Fla. 1994); *Johnson v. State*, 91 So. 2d. 185 (Fla. 1957).

4. The baseless concern that public rights-of-way held in fee will be easily lost.

Any concern that public rights-of-way held in fee would be easily lost by limiting section 712.03(5) to established rights-of-way that cross the Parcel is baseless for at least two reasons. First, there is no evidence that public rights-of-way have ever been subject to undue loss since 1992 when *Dardashti* was decided. Second, other Florida laws expressly establish how public rights-of-way are to be preserved. Chapters 335 and 336 require that state and county road systems be mapped and that those maps be recorded in the county clerk's plat books. This process dovetails with MRTA's core purpose of allowing parties engaged in land

title transactions to rely on such public records. By putting in the public records the location, length and width of state and local rights-of-way, everyone is on notice of any public right-of-way that may impact a parcel. And, this mandated mapping and public recording applies whether the public right-of-way is held in fee or as an easement. In addition, section 95.361 preserves roads that FDOT, a county or a municipality maintains or repairs regardless of recording as to that portion that is actually maintained. This statute is the basis for the stipulation to preserve Santa Rosa County's 14th Avenue that provides access to the parcel.

Long before MRTA was ever adopted and I-10 completed, Florida law required FDOT to monument and record its rights-of-way maps in the county's public records. § 335.02(2)(1)-(2), Fla. Stat. (2012); § 177.131, Fla. Stat. (2012). FDOT simply failed to either monument its property or record its official right-of-way map in Santa Rosa County Clerk's plat books. FDOT now wants to shift the burden of its neglect onto the shoulders of a private party.

FDOT ignores and the First District neglected to consider these statutory means of establishing and preserving public rights-of-ways in a manner consistent with MRTA's text, intent and purpose.

The significance of FDOT's failure to monument its property and record its official right-of-way map is highlighted by consideration of the three cases most discussed in the briefing. In *Dardashti*, Palm Beach County took fee title to a fifty

foot strip in 1917. In 1956, consistent with chapter 336, the County adopted a road plat and recorded a right-of-way map that "showed a right-of-way over the north thirty-nine feet of the County's fifty foot parcel." *Id.* at 122-123. That same year, the County deeded title to that thirty-nine-foot right-of-way to the State Road Department, n/k/a FDOT. FDOT did not take title to the remaining eleven feet until 1989, thirty-three years later. By then, Dardashti Properties had a root-of-title to the eleven-foot strip recorded in 1953; and MRTA gave it marketable title to the eleven feet free and clear of FDOT's competing fee estate.

Had Palm Beach County shown the full fifty feet on its adopted plat and recorded right-of-way map, the result would have been different. This would have established the land it intended to use as right-of-way to be the entire fifty feet, not just the thirty-nine foot right-of-way as mapped and recorded. Similarly, in this case, the result may have been different if FDOT had created or dedicated a wider right-of-way than it built and maintained by monumenting and recording a right-of-way map in Santa Rosa County's public records.

The *Davidson* opinion is hopelessly confusing. It even refers to section 712.03(5) as "a governmental easement or rights-of-way exception." Clearly, this section does not give preferential treatment to governmental interests. It equally preserves private and public easements and rights-of-way. Nonetheless, it is clear that the Water Control District's right-of-way was much different than FDOT's

claim in this case. *Id.* at 526. The 117 feet at issue in *Davidson* was unquestionably part of the land dedicated for use as a right-of-way, and that dedicated right-of-way was on the disputed parcel. That parcel was also "required for . . . the District roads and canals." *Id.* at 523. Finally, there was a judicially approved engineer's map that defined the location, length and width of the right-of-way. In contrast, FDOT's competing fee interest satisfies none of these criteria. As the First District properly understood, there is no evidence the Parcel is part of the I-10 right-of-way; the dedicated right-of-way by means of construction and maintenance is south of the Parcel and marked by a well-maintained fence; and there is no evidence that any part of the Parcel is a necessary part of the I-10 right-of-way. *Clipper Bay* at 15.

Finally, in *Horn*, a sixty foot wide county road named "Crystal Road" was lawfully established as an easement. The south thirty feet of Crystal Road went across the northern boundary of the Horn's property. However, "the existence of the roadway was never manifested by the recording of any map or document among the public records. . . ." *Id.* at 204. Without record evidence of the city's claim "sufficient to avert the operation of the MRTA," the city argued that its extinguishment from the Horn's parcel could be avoided by proof that the northern thirty feet of the sixty-foot roadway had been used. The City failed in its proof.

Significant to resolution of this appeal, in interpreting section 712.03(5), the *Horn* decision speaks to how section 712.03(5) was intended to preserve an identifiable, "established" easement or right-of-way. As Judge Smith wrote in *Horn*, it is reasonable to:

> "[A]scribe to the lawmakers the intent to preserve a public easement or right-of-way to its full *width*, notwithstanding the use of only a part of its width **as designated by the conveyance, dedication or other means by which it was established**. *See, Dade County v. Harris*, 90 So. 2d 316 (Fla. 1956) (use of portion of a highway right-of-way as a "grass parkway" not incompatible with dedication and use of the whole for highway purposes); *Smith v. City of Melbourne*, 211 So. 2d 66 (Fla. 4th DCA 1968) (there was a completed dedication of a thirty-foot right-of-way although the city had not paved the *full width* of the roadway)."

Id. at 208 (emphasis in original and added). In the *Harris* case that the *Horn* decision relies upon, the land to be used as a right-of-way was established as part of a recorded plat. In *Smith*, the thirty foot right-of-way was established by a recorded deed, a recorded plat, and by a common law dedication. It also had been used for many years.

In all of these prior cases there was a well-established, identifiable, recorded or judicially approved right-of-way map that defined the location, length and width of the land to be used as a public right-of-way. Moreover, each of those established rights-of-way actually crossed the disputed parcel. Neither is true here. There is no recorded map or plat that shows the location, length and width of

FDOT's right-of-way. And, the "proof" on the ground does not evidence any use beyond its fence that for over thirty years has formed the southern boundary of Clipper Bay's Parcel.

To summarize, any concern about public rights-of-way needing some special protection is baseless. For over sixty years, all FDOT has needed to do to protect its interest beyond the established right-of-way was fulfill its duty under section 335.02(2) to monument its property and to record its official right-of-way map in the public records of Santa Rosa County. Otherwise, FDOT simply needed to timely file a notice of claim, the burden that MRTA places upon it and all other owners of stale interests. FDOT failed to do so and it wants Clipper Bay to suffer the consequence.

So that there is no misunderstanding, Clipper Bay is not arguing that section 712.03(5) only protects recorded rights-of-way in use. This section does not require that the right-of-way be recorded. If a governmental right-of-way is not recorded as required by law (or preserved by being deemed dedicated under section 95.361), all is not lost for the government. All FDOT or other governmental entity must do in such a case is satisfy the burden of proof set out in *Horn*. It must present clear and positive proof of: (1) public use, (2) the location, length and width of its unrecorded right-of-way; and (3) that its use was adverse. FDOT failed to present such proof.

In summation, there must be an established right-of-way for section 712.03(5) to apply. This establishment is accomplished in one of three ways: (1) the proper recording of a right-of-way map as required by law (chapters 334-336, 177); (2) dedication under section 95.361; or (3) clear and positive proof of the three elements from *Horn*. Proof under *Horn* is the absolute minimum that the government must establish to preserve an unrecorded right-of way that it wants to assert over a competing fee interest that is otherwise entitled to marketable title under MRTA. Such requirements properly protect public rights-of-way and at the same time assure that Florida land title transactions are simplified and facilitated as MRTA mandates.

5. This Court should reject FDOT's sword versus shield approach.

a. The First District Court of Appeal correctly found section 712.03(5) inapplicable because FDOT failed to establish its right-of-way included the Parcel.

The First District correctly held that the section 712.03(5) exception does not apply to preserve FDOT's competing fee estate. Even under its expansive reading of section 712.03(5), the court limited the right-of-way in fee to the land FDOT established as "devoted to or required for use as a transportation facility." § 334.03(22), Fla. Stat. It then correctly held that FDOT failed to present competent, substantial evidence that the (Parcel) was ever "devoted to or required for use as a transportation facility." *Clipper Bay*, 117 So. 3d at 15.

FDOT's suggestion that its lease to Santa Rosa County for a county built and maintained road "and concomitant retention of the underlying fee" established that FDOT had devoted a portion of the Parcel as its own right-of-way is meritless. Initial Br. 33-34. Santa Rosa County might have standing to assert preservation of its leasehold right-of-way under section 712.035. FDOT does not have such standing. Section 712.03(5) does not apply to preserve FDOT's competing fee estate.

FDOT relies on *Horn* and *Davidson*. These cases, where the location, length and width of the right-of-way was never in question, actually defeat FDOT's argument. FDOT simply failed to present clear and positive proof of a publicly used right-of-way extending beyond its long-established fences.

b. Addressing the "use" exception and argument.

Clipper Bay reasonably relied on the land title records and a professional survey to purchase platted property that had been titled in private hands for over thirty-seven years. It has since been embroiled for over six years in litigation over a hidden interest that its government has asserted. MRTA was enacted to prevent this very type of litigation. So, based on the discussion above, Clipper Bay asks this Court to do more than reject FDOT's argument that its use of a portion of its fee estate as a right-of-way preserves its entire fee estate. This Court should take the opportunity to make it clear how such unrecorded rights-of-way are to be

established under section 712.03(5). As the *Horn* court understood, the "use" provision is ambiguous and problematic.

Section 712.03(5) preserves recorded and unrecorded easements and rights-of-way that are used. And, "the use of any part thereof shall except from the operation hereof the right to the entire use thereof." § 712.03(5), Fla. Stat. This case well illustrates the significant problems with this provision when the right-of-way is not established by the recording of a right-of-way map, plat or other instrument that adequately defines the location, length and width of the land to be used as a right-of-way.

Horn is the only Florida appellate court decision that has struggled with applying this "use exception." Judge Smith's decision provided much needed procedural and substantive guidance that this Court may find appropriate to adopt. It carried over elements regarding prescriptive rights and applied them to measure the sufficiency of the evidence regarding the existence and use of Crystal Road, the disputed right-of-way in *Horn*. *Id*. at 209. To reiterate, for an unrecorded public right-of-way, these principles require that a public entity such as FDOT prove "by clear and positive proof" the following:

1. Use of the easement by the public;
2. The roadway's identity, location, length and width; and
3. That the use was adverse, in the sense that (for road purposes) it must be inconsistent with the servient owner's use and enjoyment of his own lands, and not a permissive use.

Id. at 209.

Clipper Bay urges this Court to adopt this approach for unrecorded easements or rights-of-way. Doing so avoids a fundamental problem with FDOT's argument, an argument rejected below and in *Dardashti*. Section 712.03(5) preserves recorded or unrecorded easements and rights-of-way that would otherwise be declared null and void. In other words, it preserves easements and rights-of-way on the Parcel to which Clipper Bay otherwise has the right to marketable title. Like the eleven feet in dispute in *Dardashti*, FDOT's fee interest in the Parcel was never dedicated or otherwise established as part of the I-10 right-of-way that FDOT constructed on its fee estate. Instead, as FDOT told Mr. Hodges when he inquired, that fence marks the boundary of FDOT's right-of-way. Tr. at III-322. In essence, just as in *Dardashti*, FDOT's 1965 deed did not create a right-of-way. FDOT's interest in this Parcel is simply a competing fee estate that MRTA declares null and void.

This Court must not lose sight of the fact that FDOT is not seeking to preserve a right-of-way so that it may continue to cross over Clipper Bay's parcel. Nor is it seeking to preserve an actually unused portion of the I-10 transportation facility. Instead, FDOT is claiming the preservation of its entire fee estate interest (which includes other portions of the subdivision platted as Escambia Shores, Unit

1). As such, FDOT wants this "easement/right-of-way" exception to allow its fee estate to entirely swallow Clipper Bay's right to a marketable title under MRTA. FDOT's approach yields an absurd result. Section 712.03(5) was created to shield legitimate easements and rights-of-way from being extinguished by the grant of marketability. However hard FDOT may try, that shield cannot be beat into a sword to eliminate Clipper Bay's fee estate. The legislature has not granted FDOT such a sweeping exception under MRTA. For this Court to do so would require it to abandon the polestar that must guide its statutory interpretation: legislative intent.

ISSUE TWO (RESTATED): IS THE 1981 TRUSTEE DEED A MUNIMENT OF TITLE ON WHICH CLIPPER BAY'S TITLE IS BASED; AND, IF SO, DOES IT SUFFICIENTLY DISCLOSE FDOT'S COMPETING FEE ESTATE SUCH THAT THE EXCEPTION IN SECTION 712.03(1), FLORIDA STATUTES, APPLIES?

STANDARD OF REVIEW

Issues of statutory interpretation are reviewed *de novo*. *State v. Sturdivant*, 37 Fla. L. Weekly A127, 128 (Fla. Feb. 23, 2012). The exception in section 712.03(1) is narrowly construed. *ITT Rayonier, Inc.* at 1010-11; *H & F Land, Inc*., at 1172-73. The competent, substantial evidence test applies to the trial court's findings of fact. *Clegg v. Chipola Aviation, Inc.*, 458 So. 2d 1186 (Fla. 1st DCA 1984). The "clearly erroneous" standard applies to the trial court's interpretation of undisputed evidence. *Holland v. Gross*, 89 So. 2d 255, 258 (Fla. 1956). If the

trial court has not made findings of fact, this Court must accept the facts to be those shown by the evidence most favorable to the prevailing party. *New Nautical Coatings, Inc. v. Scoggin*, 731 So. 2d 145 (Fla. 4th DCA 1999).

ARGUMENT

If the Court considers this issue, it should affirm both lower courts decisions rejecting FDOT's argument that the section 712.03(1) exception applies to preserve its competing fee estate. *Clipper Bay*, 117 So. 3d at 8-9. FDOT failed to establish that the 1981 Trustee Deed is a muniment of title on which Clipper Bay's estate is based. App. 7. FDOT also failed to prove that this deed's reference to the 1965 deed is "a record transaction which imposed, transferred or continued" FDOT's competing fee estates. *See* § 712.03(1), Fla. Stat.

FDOT argues that the 1981 Trustee's Deed, by reciting that the trustee was acting "by virtue of the powers vested" in it by a September 14, 1965, deed at OR Book 119, Page 16 and by referencing "the premises it conveyed," "recognized the existence of the Department's fee estate and should foreclose any suggestion that the fee estate was extinguished by operation of section § 712.02, Fla. Stat." Initial Br. 46-47.

Substantively, FDOT ignores or evades the plain language of section 712.03(1). Factually, FDOT mischaracterizes the 1981 deed. That deed does not "recognize the existence of the Department's fee estate." Instead, it simply

specifies the trustee's authority to act. In particular, the "as to that premises" phrase is simply part of the land trust identification under which the trustee was acting.

1. The section 712.03(1) exception.

With emphasis added, section 712.03(1), Fla. Stat., provides that Clipper Bay's marketable record title shall not affect or extinguish:

> **Estates** or interests, easements and use restrictions **disclosed by** and defects inherent in **the muniments of title on which said estate is based beginning with the root of title**; **provided however, that a general reference in any of such muniments to** easements, use restrictions or other **interests created prior to the root of title shall not be sufficient to preserve them unless specific identification by reference to book and page of record** or by name of recorded plat **be made therein to a recorded title transaction which imposed, transferred or continued such** easement, use restrictions or other **interests**; subject, however, to the provisions of subsection (5).

As discussed next, the 1981 Trustee's Deed was not established to be a muniment of title on which Clipper Bay's estate is based. And, even if deemed a muniment, that deed's reference to the 1965 deed is not a reference to a record title transaction which imposed, transferred or continued FDOT's competing fee estate.

2. The nature of the 1981 Trustee's Deed: it is not a muniment of title on which Clipper Bay's estate is based.

FDOT failed to carry its burden of proving that the 1981 Trustee Deed in Clipper Bay's chain of title is a muniment of title on which Clipper Bay's estate is based. Applying the definition of a "muniment of title" as articulated in

Cunningham v. Haley, 501 So. 2d 649, 652 (Fla. 5th DCA 1986), there is no competent, substantial evidence that this deed "carries" any title or is otherwise a "vital link" in Clipper Bay's chain of title. As Clipper Bay argued below, the elimination of the warranties in the 1981 Trustee's Deed makes it clear that this deed executed long after the prior conveyance is no more than a curative, quitclaim deed. R. at XI-2105. As such, this deed simply clarified that whatever interest, if any, the trustee may have had in the property due to any insufficiency in the 1965 deed's identification of the trust, was "remised, released, and conveyed" to the subsequent owner, Escambia Shores, Inc. Answer Br. Appx. 7; R. at VIII-1527.

Execution of such a deed does not necessarily mean the grantor actually possesses an interest in the land, and if the grantor has no interest at the time of conveyance, the quitclaim conveys nothing to the grantee. *Miami Holding Corp. v. Matthews*, 311 So. 2d 802, 803 (Fla. 3rd DCA 1975). Without such evidence, the trial court's rejection of this exception was not clearly erroneous. FDOT simply failed to prove that this deed was "a muniment of title on which (Clipper Bay's) estate is based." § 712.03(1), Fla. Stat.

3. The substance of the two deeds: neither deed "imposed, transferred or continued" FDOT's competing fee estate.

The "estates or interests, easements and use restrictions" that section 712.03(1) preserves are those typically imposed by recorded plats, separately

recorded development restrictions, or deed restrictions. These easements, use restrictions or other interests are carried forward by specific references in subsequent conveyances. For example, a "lot and block" description is followed by a clause stating: Subject to the covenants, conditions and restrictions recorded at OR Book 545, Page 363, in public records in and for Santa Rosa County, Florida.

It was such use easements, use restrictions, and interests that were at issue in the two cases FDOT relies on. *Cunningham, supra* and *Sunshine Vistas Homeowner's Assoc. v. Caruana*, 623 So. 2d 490 (Fla. 1993). For example, the muniments of title on which Caruana's estate was based specified that the land was being conveyed subject to certain covenants, easements, or use restrictions and referenced the SUNSHINE VISTAS plat. On that basis, this Court held that section 712.03(1) applied to except the recorded use restrictions from extinguishment.

Unlike *Caruana*, there is no specific statement in the 1981 Trustee's Deed that the Parcel was conveyed subject to FDOT's fee estate. Stated otherwise, there is no language in the 1965 or 1981 deeds that "imposed, transferred or continued" FDOT's competing fee estate. Tellingly, FDOT does not argue otherwise. Instead of arguing satisfaction of the statutory terms, FDOT's statement of Issue II asserts that its competing fee estate cannot be extinguished because the 1981 deed refers

by book and page number to the 1965 pre-root deed "which **confirmed**" its estate." (emphasis added). FDOT then argues that the 1981 Trustee's Deed "**recognized the existence of the Department's fee estate** and should foreclose any suggestion that the fee estate was extinguished by operation of Section 712.02, Fla. Stat." (emphasis added). Initial Br., pp. 46-47. Even if one assumes this representation is true, confirmation or recognition is not what section 712.03(1) dictates.

The 1981 Trustee's Deed is from the grantee in a 1965 deed, Central Plaza Bank and Trust Company, to Escambia Shores, Inc., the grantee in Clipper Bay's root of title. R. at XI-2092, 2095, 2105. This deed describes Central Plaza Bank and Trust Company as a trustee and this description of the trustee and its authority to execute the deed does not disclose a "recorded title transaction which imposed, transferred or continued" an "easement, use restriction or other interest" pertaining to FDOT. It simply advises that the trustee was deeded the property in 1965, identifies the land trust related to that conveyance (Land Trust Agreement #8051), and quit claims to the current owner, Escambia Shores, Inc., any interest the trustee may have in the property. Viewed in the proper light on appellate review, this deed was likely obtained to clear any uncertainty caused by an earlier conveyance not fully identifying the trust under which Central Plaza Bank and Trust Company was serving as trustee.

As for the reference to the 1965 deed, it is not a "recorded transaction which imposed, transferred or continued" FDOT's estate. The 1965 deed has no "subject to" or any other language indicating that the estate being conveyed was subject to any easement, use restriction or other interest. Instead, the very long legal description in that pre-root deed simply contains a "less and except" clause that excludes "prior conveyances to the State of Florida of the following [described] property." Initial Br. Appx. 3; R. at XI-2096.

FDOT's assertion that lower courts erred by not finding that the exception in section 712.03(1) applies has no merit. Addressed, this Court should affirm.

CONCLUSION

The "easements and rights-of-way" exception in section 712.03(5) is intended to preserve properly established and used rights-of-way across any property to which marketable title is otherwise granted under MRTA. FDOT failed to prove that its interest in the Parcel was anything other than a competing fee estate. FDOT's competing fee estate is properly declared null and void by operation of MRTA. § 712.04, Fla. Stat.

As to the conflict question, section 712.03(5) plainly preserves established rights-of-way, not fee estates held for the purpose of rights-of-way. The *Dardashti* approach should be affirmed as consistent with the statute. The First District's

broader approach, driven by its improper infusion of its own public policy to provide special protection to public right-of-ways, must be rejected.

Respectfully submitted,

/s/ *Kenneth B. Bell*
KENNETH B. BELL
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original has been electronically filed and that a true and correct copy of the foregoing has been furnished to the following via electronic delivery, this 1st day of October, 2013.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Respondent's Answer Brief has been submitted in Times New Roman 14-point font, in compliance with Fla. R. App. P. 9.210.

Dated this 1st day of October, 2013.

/s/ Kenneth B. Bell
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