IN THE CIRCUIT COURT FOR THE FIFTH JUDICIAL CIRCUIT
IN AND FOR LAKE COUNTY, FLORIDA

KINGS RIDGE COMMUNITY ASSOCIATION, INC., SEYMOUR HOLZMAN, MAYNARD L. TIRRELL, ROY B. GORDON, WILLIAM CAMPBELL, ROBERT A. FOWLER, DONALD L. POLK, HOWARD W. RANDALL, DONALD W. SANTEE and MARQUETTE L. FLOYD,

CASE NO. 05-CA-2718

Plaintiffs,

vs.

LENNAR LAND PARTNERS, LENNAR HOMES, INC , LENNAR LAND PARTNERS SUB, INC., LNR LAND PARTNERS SUB INC., KINGS RIDGE L.L.C., E. BING HACKER, MORTGAGE ADVISORS, INC., J. FRANK SURFACE, JR., JOHN DOE DEFENDANTS and UNKNOWN CO-CONSPIRATORS,

Defendants.
_____/

DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFF KINGS RIDGE COMMUNITY ASSOCIATION, INC.'S STANDING TO BRING CLAIMS PURSUANT TO THE RIGHT TO ACQUIRE

The Defendants, LENNAR HOMES, INC. ("Lennar Homes") and E. BING HACKER ("Mr. Hacker") (collectively, the "Lennar Defendants"), and KINGS RIDGE L.L.C., MORTGAGE ADVISORS, INC. and J. FRANK SURFACE, JR. ("Mr. Surface") (collectively, the "Kings Ridge Defendants"), through their undersigned counsel, move for Partial Summary Judgment on Plaintiff Kings Ridge Community Association, Inc.'s ("the Association") standing to pursue any causes of action in this matter. The Defendants are entitled as a matter of law to

summary judgment in their favor, as discovery is complete and no genuine issue of material fact exists as to the Association's lack of standing to bring any claims related to the right to acquire as set forth in Counts 1, 3, 5, 7, 9, 11, 13, and 15 of Plaintiffs' Complaint.[1]

MEMORANDUM OF LAW

I. INTRODUCTION

This action, commenced by nine named representatives on behalf of a certified class of Kings Ridge Community Club Members ("Class Members") and the Association (collectively, "the Plaintiffs"), alleges that LLP conveyed the Kings Ridge Clubhouse ("Club Facilities") in violation of a "right to acquire" provision contained in the Declaration and that the other Defendants participated in and/or facilitated the wrongful conveyance. The Association asserts the same causes of action as the individual class Plaintiffs, who note the possibility in each alternative count of the Complaint that they assert such claims "in the event that it is determined that the Association does not have standing to represent all of the Club Members." (see, e.g., Complaint ¶ 66)

The Association has no standing to proceed on its causes of action. By the plain terms of the Declaration, the right to acquire was granted to the Club Members—not to the Association. Moreover, even if the Declaration, when read as a whole, is found to be ambiguous as to whom the right to acquire was conferred upon, Florida's longstanding canons of statutory construction make clear that the right belongs solely to the Club Members. Even the Plaintiffs question the Association's standing to sue. Because the Association was never granted the right to acquire, it lacks standing to bring the causes of action alleged in the Complaint.

[1] Plaintiffs' Amended Complaint shall be referred to herein as the "Complaint" or "Compl.".

II. STATEMENT OF UNDISPUTED FACTS

A. The Kings Ridge Community

In the mid 1990's, Lennar Homes began developing Kings Ridge, a retirement community located in Clermont, Florida. (Compl. ¶ 16)[2] In connection with the development, Lennar Homes, King Ridge Recreation Corporation, Kings Ridge Golf Corporation, and the Association entered into the Declaration.[3] (Id. at ¶ 18) The Declaration was recorded in the Lake County public records on February 16, 1996 at OR Book 1417, Page 225 et seq. (Id. ¶ 17)

Pursuant to the Declaration, all residents of Kings Ridge are members of the Association. (Decl. Art. I. § 17; Hacker Depo. p. 137[4]) The Declaration provides for the construction of Club Facilities consisting of a multi-function social facility and related amenities. (Decl. Art. VI. § 3) Membership to the Club Facilities is elected on a voluntary basis at the time of the initial purchase of a home site. (Decl. Art. VI. § 2) Thereafter, club membership is irrevocable, and the rights and obligations of membership run with the land. (Id.) There are 2088 home sites, of which 2041 are subject to club memberships. (Seymour Holzman Aff. ¶ 7[5]; John Hart Aff. ¶ 5[6]) Accordingly, some Association members are not Club Members.

B. Right to Acquire Provision

The express terms of the right to acquire provision contained in the Declaration provided that the *Club Members* had a right to acquire the Club Facilities pursuant to section 617 31, Florida Statutes as follows:

> Section 24. Right to Acquire. Although the Club arrangement is not a lease of recreation facilities, the Club Owner grants to the *Club Members* the rights to acquire the

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[2] Appendix ("Appx.") Ex. 1. In the interest of conserving resources, all documents referred to herein as contained in the Appendix were previously filed with this Court and are contained as referenced in the Appendix to Defendants' Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment served November 21, 2007.
[3] Appx. Ex. 2. The Declaration is cited as "Decl."
[4] Appx. Ex. 3.
[5] Appx. Ex. 4.
[6] Appx. Ex. 5.

Club Facilities pursuant to the provisions of F.S. 617.31, Florida Statutes as it exists as of the date hereof.

(Decl. Art. VI § 24)(emphasis added)

The Declaration defines Club Member as: "Each Owner who elects, in its contract to purchase a Homesite, to be a member of The Club and bound by the provisions hereof relating thereto." (Decl. Art. I § 11) The Declaration defines "Club Facilities" as: "The real property and facilities provided to the Club Members pursuant to the provisions of this Community Declaration, also known as 'The Club.'" (Decl. Art. I § 9) (emphasis added) Neither definition in the Declaration includes the Association as a Club Member.

Pursuant to the unilateral right to amend set forth in the Declaration at Article II, Section 2, on August 30, 2000, LLP amended section 24 of the Declaration to amend the definition of Club Member and the right to acquire by executing the Sixth Amendment to the Declaration.[7] The relevant portions of the Sixth Amendment provide:

> 4. The definition of "Club Member" set forth in Article I section 11 is amended as follows:
>
> Each owner who elects, in its contract to purchase a Homesite or in any other document, to be a member of The Club and bound by the provision hereof relating thereto and all succeeding Owners of such Homesite.
>
> 7. Section 24 of Article VI is amended to read as follows, with amended language in italics:
>
> Right to Acquire. Although the Club arrangement is not a lease of recreation facilities, the Club Owner grants to the Club Members the rights to acquire, *following the Community Completion Date*, the Club Facilities pursuant to the provisions of F.S. 617.31, Florida Statutes as it exists as of the date of initial recording of the Declaration.

The amended definition of "Club Member" does not include the Association.

C. Section 617.31, Florida Statutes

Section 617.31, Florida Statutes provides in relevant part:

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[7] Appx. Ex. 11.

617.31 Recreational leaseholds; right to acquire; escalation clauses --

(1) Any lease of recreational or other commonly used facilities serving a community, which lease is entered into by the association or its members before control of the homeowners' association is turned over to the members other than the developer, must provide as follows:

(a) That the facilities may not be offered for sale unless the homeowners' association has the option to purchase the facilities, provided the homeowners' association meets the price and terms and conditions of the facility owner by executing a contract with the facility owner within 90 days, unless agreed to otherwise, from the date of mailing of the notice by the facility owner to the homeowners' association. If the facility owner offers the facilities for sale, he or she shall notify the homeowners' association in writing stating the price and the terms and conditions of sale.

(b) If a contract between the facility owner and the association is not executed within such 90-day period, unless extended by mutual agreement, then, unless the facility owner thereafter elects to offer the facilities at a price lower than the price specified in his or her notice to the homeowners' association, he or she has no further obligations under this subsection, and his or her only obligation shall be as set forth in subsection (2).

* * *

(2) If a facility owner receives a bona fide offer to purchase the facilities that he or she intends to consider or make a counteroffer to, his or her only obligations shall be to notify the homeowners' association that he or she has received an offer, to disclose the price and material terms and conditions upon which he or she would consider selling the facilities, and to consider any offer made by the homeowners' association. The facility owner shall be under no obligation to sell to the homeowners' association or to interrupt or delay other negotiations, and he or she shall be free at any time to execute a contract for the sale of the facilities to a party or parties other than the homeowners' association.

D. <u>The Conveyance of the Clubhouse & Assignment of Club Owner Rights</u>

In early 2000, Mr. Surface approached Mr. Malcolm about whether Mortgage Advisers, Inc. could provide financing for other Lennar projects. (Id. at 25-27) As the negotiations progressed, Mr. Surface, Mr. Wright, and Mr. Lester created Purchase Term Sheets that summarized "where the parties were" in negotiations. (Surface Depo pp. 144-46, 178) The June 23, 2000 Purchase Term Sheet set forth the material terms and conditions of the conveyance including identification of the two separate assets of the Club Facilities and Contract Rights for a

total purchase price. (June 23, 2000 Purchase Term Sheet)[8] Thereafter, Mr. Surface, Mr. Wright, and Mr. Lester created a July 17, 2000 Purchase Term Sheet that set forth an updated version of the offer to LLP including terms and conditions of the deal. (Surface Depo. p. 178; July 17, 2000 Purchase Term Sheet)[9] On August 31, 2000, Kings Ridge L.L.C. purchased from LLP both the Club Facilities and the right to collect the Facilities Fees. (Compl. ¶ 28)[10],[11]

E. Summary of Association's Causes of action

The Complaint alleges a wrongful conveyance of the Club Property that breached the right to acquire provided by the Declaration and section 617.31, Florida Statutes. The Association asserts causes of action identical, but in the alternative to, the causes of action advanced by the individual Class Members. In their complaint, the Plaintiffs acknowledge the applicability of, and sue pursuant to, Article VI, Section 24 of Declaration, which pertains to the right of Club Members, not the Association, to acquire the Club Facilities. In the Complaint, Plaintiffs acknowledge that the Association may lack standing. (see, e.g., Compl. ¶ 66)

III. STANDARD OF REVIEW

Florida Rule of Civil Procedure 1.510(c) provides that summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Where the facts are such that, if established, there could be no recovery, or where the undisputed facts as such would preclude recovery, then the question becomes one of law for the determination of the Court and a proper matter for disposition by summary judgment. Yost v. Miami Transit Co., 66 So. 2d 214, 215 (Fla. 1953).

[8] Appx. Ex. 14
[9] Appx. Ex. 15.
[10] The Warranty Deed was recorded on October 9, 2000. (Compl. ¶ 28, 30)
[11] Appx. Ex. 16.

The existence of nonmaterial issues of fact will not preclude the entry of summary judgment. Cristol v. City of Miami Beach, 246 So. 2d 595, 596-97 (Fla. 3d DCA 1971). When only one conclusion can be drawn from the admitted facts, then the question of liability becomes one of law. Lofton v. McGregor, 14 So. 2d 574, 575 (Fla. 1943).

Interpretation of an unambiguous written contract is appropriate on a motion for summary judgment. "Where the determination of the issues of a lawsuit depends upon the construction of a written instrument and the legal effect to be drawn therefrom, the question at issue is essentially one of law only and determinable by entry of summary judgment." Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla 2000); Hammond v. DSY Developers, LLC, 951 So. 2d 985, 988 (Fla. 3d DCA 2007).

IV. ARGUMENT

Kings Ridge Community Association, Inc. Lacks Standing to Proceed

As a matter of law, the Association lacks standing on its own behalf to bring the causes of action alleged in the Complaint. Standing exists only if a party suffered injury in fact for which relief is likely to be provided. The crux of this case is whether the Defendants breached the "right to acquire" provision in Art. VI, Section 24 either contained in the original Declaration or as amended. Regardless, the plain terms of both the Declaration and the Sixth Amendment confer a right to acquire on the "Club Members," not on the Association. Moreover, even in the unlikely event the Declaration, when read as a whole, is found to be ambiguous as to who has the right to acquire, Florida's longstanding canons of statutory construction make clear that the right belongs solely to the Club Members. The Association was never granted nor did it otherwise possess a right to acquire. It lacks standing and should not have been named as a party Plaintiff nor be permitted to continue as one.

As the Plaintiffs stated at the Motion to Dismiss Hearing, the Court is "going to have to make a ruling as to [sic] the [sic] matter of law as to whether the Homeowners Association is the proper party or whether the club members as a class action is the proper party." (Motion to Dismiss Hearing Transcript at p. 30)[12] The Defendants agree with Plaintiffs' concerns about the Association's standing, and submit that the Association is not a proper party in this case.

1. The Association

The Association comprises *every* homeowner in the Kings Ridge community. (Decl. Art. I § 7; Art. IV § 3) Membership in the Association is a mandatory condition of owning a lot in Kings Ridge, and each homeowner is obligated to pay assessments to the Association. (Decl. Art. I § 17) In contrast, Club Membership does not include every homeowner in Kings Ridge; rather, membership must be voluntarily elected by the original purchaser of a home site.[13] (Decl. Art. I § 11; Art. VI § 2; and the Sixth Amendment) Once elected, Club Membership is thereafter irrevocable and runs with the land. (Decl. Art. VI § 2) Out of the 2088 home sites in Kings Ridge, 2041 are subject to Club Memberships. (Holzman Aff. ¶ 7; Hart Aff. ¶ 5) Therefore, 47 homes in the Kings Ridge community elected not to become Club Members.

Therefore, a grant of the right to acquire to the Association *would grant the right to purchase the Clubhouse to Kings Ridge residents who are not even members of the Club*, a nonsensical result.

2. The Association Has Shown No Injury in Fact

To establish standing, the Association must show "injury in fact for which relief is likely to be redressed." Peregood v. Cosmides, 663 So. 2d 665, 668 (Fla 5th DCA 1995) (citing Valley Forge Christian College v. Ams. United for Separation of Church and State, Inc., 454 U.S 464,

[12] Appx. Ex. 18.

[13] The Declaration defines Homesite in relevant part as "the parcel of real property conveyed by Declarant to an Owner upon which a Home has, or will, be constructed." (Decl. Art. I. § 32)

471 (1982)); Assoc. of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970)). "The injury must be distinct and palpable." Id. (citing Warth v. Seldin, 422 U.S. 490, 501 (1975)). "It may not be abstract, conjectural or hypothetical." Id. (citing Allen v. Wright, 468 U.S. 737, 741 (1984)). For the reasons set forth herein, the contractual right to acquire was never granted to the Association. As such, any alleged breach of the right to acquire cannot be the injury that forms the basis for the Association's legal standing.

3. The Plain Language of Declaration and/or the Sixth Amendment Grants the Right to Acquire to the Club Members

The Association asserts that the following provision in the Declaration gives them standing to bring this suit:

> Section 24. Right to Acquire. Although the Club arrangement is not a lease of recreation facilities, the Club Owner grants to the Club Members the rights to acquire the Club Facilities pursuant to the provisions of F.S. 617.31, Florida Statutes as it exists as of the date hereof.

(Decl. Art. VI § 24)[14] Regardless of whether the original Declaration or the Sixth Amendment controls, Article VI section 24 does not reference the Association, but instead refers only the "Club Members", a specifically defined term pursuant to the Declaration. The Association argues that the reference to section 617.31, Florida Statutes grants to the Association, as opposed to the Club Members, the right to acquire. However, the reference to section 617.31, Florida Statutes does not identify to whom the right to acquire is granted, instead it merely outlines the procedure for triggering and invoking the right to acquire.

Throughout the Declaration there are repeated and continuous distinctions made with regard to the rights and obligations of the Association and its members, on the one hand, and the rights and obligations associated with the Club Owner and Club Members, on the other. Such

[14] Again, unrelated to the standing issue addressed herein, section 24 was amended by the Declaration's Sixth Amendment.

distinctions were required by the circumstances, because until 2005, Lennar Homes controlled the Association. It would have been wholly illogical for Lennar Homes to grant to itself or an affiliate the right to acquire the Club Facilities. For that reason, the Lennar Defendants contemplated that the right to acquire provision would apply after the community was completed, and when the totality of the Club Members had been established.

Notwithstanding section 24's plain language granting the right to acquire to the Club Members, the Association maintains it is the recipient of the right to acquire by virtue of section 24's incorporation of section 617.31, which references a "homeowners' association" as the entity receiving an option to purchase (§ 617.31(1)(a)) and as the entity entitled to receive notice of a bona fide offer of sale (§ 617.31(1)(a) & (2)). What the Association misses, however, is that section 24 makes clear that section 617.31, Florida Statutes must be read in light of, and secondarily to, the express terms of the Declaration. Moreover, absence the guidance provided by Article VI, Section 24, the Plaintiffs would lack a cause of action, because the facilities were never leased to the Association as required by section 617.31, Florida Statutes.

Article VI, Section 24 begins by acknowledging that the leasehold arrangement contemplated by the statute is inapplicable ("Although the club arrangement is not a lease of recreational facilities . . ."). Then, section 24 grants the right to acquire to the Club Members, not the Association.

The leasehold arrangement contemplated by the statute is inapplicable because the statute starts from the presumption that the developer has leased the "commonly used facility" to the homeowners' association. Fla. Stat. § 617.31(1). As such, the statute directs its language at a hypothetical homeowners' association. In this case, the Association is not the lessee of the Club Facilities; instead, the Club Facilities is owned and controlled by the separate Club Owner and

membership comprises separate, voluntary Club Members. It follows that the statute's "option to purchase the facilities" must be directed at the Club Members, not at the Association.[15]

The Declaration used the statute to define how the right to acquire would be carried out, not who would be granted the right to acquire. The Plaintiffs cannot dispute that parties who are not subject to a statute may choose to use parts of the statute to define their relationship without bringing the full force of the statute to bear. Craddock Intern. Inc. v. W.K.P. Wilson & Son, Inc., 116 F.3d 1095, 1107-08 (5th Cir. 1997); Ralston Purina Co. v. Barge Juneau & Gulf Caribbean Marine Lines, 619 F 2d 374, 376 (5th Cir. 1980). Thus, reading section 24 and section 617.31, Florida Statutes together, it is clear that the Club Members (not the Association) were granted a right to acquire the Club Facilities.

To interpret the plain language of section 24 as suggested by Plaintiffs would cause the referenced statute to trump the clear and straightforward language of section 24; worse, it would do so despite the caveat in section 24 that section 617.31, Florida Statutes is not wholly applicable. Such a reading would circumvent the plain intent of the Declaration. It would also lead to the unintended result of causing Association members who are not also Club Members to participate in an action concerning, and, in the unlikely event the Plaintiffs prevail, acquisition of, the Club Facilities.

4 Even if there is Ambiguity, Florida's Rules of Construction Make Clear that the Right to Acquire Belongs to the Club Members

As set forth above, the clear intent of section 24 is wholly reconcilable with section 617.31, Florida Statutes and, as such, there is no occasion for this Court to resort to a strained construction of the statute or the Declaration. Harris v. School Bd. of Duval County, 921 So. 2d

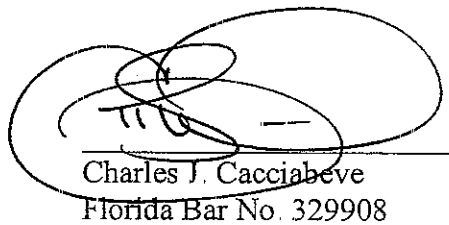
[15] Alternatively, if the Plaintiffs wish to persist in their argument that the Association is the proper party, the entirety of the case should be dismissed, because all parties agree the Club Facilities were never leased to the Association. Consequently, no liability exists under the statute.

725, 733 (Fla. 1st DCA 2006) (explaining that apparently conflicting contractual clauses should first be attempted to be reconciled before resorting to judicial construction). Nonetheless, even if the Court were to find an ambiguity, Florida's canons of contractual construction demonstrate that the Declaration provided only the Club Members with a right to acquire. "When a conflict arises under a contract, and such conflict requires construction of possibly inconsistent provisions thereof, the general rule of construction requires that provisions stated in general terms must yield to those stated in specific terms." Cypress Gardens Citrus Prods., Inc. v. Bowen Bros., Inc., 223 So. 2d 776, 778 (Fla. 2d DCA 1969). Here, the Declaration's specific grant of the right to acquire to the Club Members must govern, while the terms of the statute, incorporated generally by reference, must yield. Any other result destroys the contracting parties' clear intent, a consequence that the Court must avoid.

V. CONCLUSION

Plaintiffs elected to plead alternative causes of action. Given the scant legal bases to persist with or prevail on the cause of action, Plaintiffs pursued every possible legal option, no matter how untenable. However, now that discovery is complete, the time has arrived for the Court to narrow Plaintiffs' Complaint by half. No doubt exists that the Association lacks standing. To the extent any party was granted a right to acquire, it was the Club Members. Because the Association lacked any right to acquire, and has not suffered any damages for the alleged breach, the Court should grant partial summary judgment in favor of Defendants and against the Association as to Counts 1, 3, 5, 7, 9, 11, 13, and 15.

WHEREFORE, the Defendants respectfully request this Court enter Partial Summary Judgment in their favor and against the Association on the issue of the Association's standing to bring its claims in this action.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via HAND DELIVERY this 10th day of June, 2008 to:

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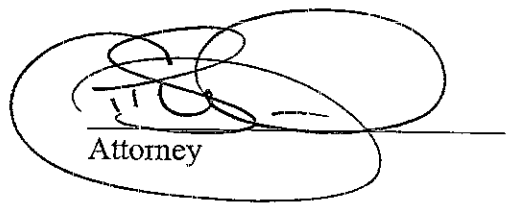

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