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,

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.
_____/

CASE NO. 05-CA-2718
CLASS REPRESENTATION

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFFS' RIGHT TO ACQUIRE THE CLUB FACILITIES

Defendants, LANDSOURCE HOLDINGS, INC., f/k/a LENNAR LAND PARTNERS ("LLP"), LENNAR HOMES, INC. ("Lennar Homes"), LENNAR LAND PARTNERS SUB, INC. ("LLP Sub"), LNR LAND PARTNERS SUB INC. ("LNR Sub"), and E. BING HACKER ("Mr. Hacker"), KINGS RIDGE L.L.C. ("Kings Ridge L.L.C."), MORTGAGE ADVISORS, INC. ("Mortgage Advisors") and J. FRANK SURFACE, JR. ("Mr. Surface") (collectively, the Defendants"), through their undersigned counsel, move for entry of Final Summary Judgment in their favor and against the Plaintiffs as to Plaintiffs' right to acquire pursuant to the applicable

statutory provisions. Pursuant to section 617.31, Florida Statutes (now renumbered as 720.31), and the only case in Florida that interprets the language contained in the statute, an event triggering the Plaintiffs right to acquire the Kings Ridge Clubhouse (the "Club Facilities or Clubhouse") never occurred. The Plaintiffs have previously failed to advance a legally cognizable basis for the Court to ignore the plain language of the statute, as mandated by the Florida Legislature, and the Second District Court of Appeal's interpretation of such language. Instead, Plaintiffs have advanced preposterous takes on the statutory language. No genuine issue of material fact exists, and the Court does not need to weigh testimony or interpret the intentions of the parties. The Court also need not give any weight to the unusual interpretations of law advanced by the Plaintiffs in a thinly veiled attempt to avoid summary judgment. Defendants are entitled to and this Court must enter summary judgment in favor of Defendants and against Plaintiffs on all Plaintiffs' claims

MEMORANDUM OF LAW[1]

I. INTRODUCTION

This action was filed by nine named representatives on behalf of a certified class of Kings Ridge Community Club Members ("Class Members") and by the Kings Ridge Community Association ("The Association") (collectively, "the Plaintiffs"). The Plaintiffs' Amended Complaint[2] alleges LLP wrongfully conveyed the 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 Plaintiffs' Complaint, replete with conspiracy theories, stale claims, and other irrelevant allegations, should be viewed with an eye towards

[1] In the interest of conserving resources and not resubmitting documents previously filed a number of times in this action, all documents referred to herein as contained in the Appendix ("App) are contained as referenced in Defendants' Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment served November 21, 2007.

[2] Plaintiffs' Amended Complaint shall be referred to herein as the Complaint.

resolution of the key point that the Court can resolve with finality – whether, pursuant to section 617.31, Florida Statutes, the negotiations between the Lennar Defendants and the Kings Ridge Defendants triggered Plaintiffs' right to acquire the Clubhouse.[3]

The right to acquire provision contained in the Declaration and at issue here incorporates section 617.31(1), Florida Statutes, which provides that if the facility owner intends to make an offer -- a "solicitation by the facility owner directed to the general public" -- the facility owner must first provide the Club Members with an "option to purchase." Because LLP never offered the Club Facilities for sale to the general public, or made a solicitation directed to the general public, as defined by section 617.31, the obligation to provide the Plaintiffs with a right to acquire never occurred. Alternatively, section 617.31(2) provides that in the event that the facility owner receives an offer, it only needs to notify the Club Members that a sale is taking place. Accordingly, under section 617.31(1), the Plaintiffs' right to acquire never accrued and they lack a basis in law or fact to recover in this action. Under section 617.31(2), no obligation to sell the Clubhouse to the Plaintiffs exists, therefore, Plaintiffs lack a factual or legal basis to claim any damages resulting from the sale of the Clubhouse to Kings Ridge L.L.C.

II. STATEMENT OF UNDISPUTED FACTS

A. Relevant Definitions

Pursuant to the original Declaration, "Club Owner" was defined as "Kings Ridge Recreation Corporation, its successors and assigns. The Club Owner is an affiliate of Declarant." (Decl. Art. I §14.) The Declaration further defines "Declarant" as follows:

> Lennar Homes, Inc., its specific designees, successors and assigns. Declarant is a Developer within the meaning of F.S. 617.301(5). The term "Declarant" shall include any

[3] The right to acquire was granted expressly to the Club Members and Defendants contend the Association was never granted a right to acquire the Clubhouse. However, for purposes of this motion, it is irrelevant to whom the right was granted, as the triggering event never occurred.

> person or entity which succeeds to the rights and liabilities of the person or entity that created the Community served by the Community Association, provided that such is evidenced in writing.

(Decl. Art. I § 24.)

The Declaration provides that the Declarant possessed a unilateral right to amend the Declaration *at any time* prior to the completion of the community. Article II, Section 2 provides in relevant part:

> Section 2. Amendment. The Declarant shall have the right, at any time until the Community Completion Date, to amend this Community Declaration as it in its sole discretion, deems appropriate.

(Decl. Art. II. § 2.)

On October 31, 1997, Lennar Homes conveyed the real property to be developed as Kings Ridge, including the Club Facilities, to LLP.[4] On October 31, 1997 Lennar Homes also executed the Fourth Amendment to the Declaration[5] to delete in its entirety and replace the definition of "Club Owner" as follows:

> "Club Owner" shall mean the owner of the real property comprising the Club. At this time, Lennar Land Partners, a Florida general partnership ("LLP") is Club Owner. *Club Owner may change from time to time (e.g., LLP may sell the Club).*

(emphasis added). Further, by virtue of an assignment dated October 31, 1997, Lennar Homes assigned all of its rights as Declarant under the Declaration to LLP.[6]

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[4] Appx. Ex. 8.
[5] Appx. Ex. 9. The Fourth Amendment was recorded on March 19, 1998.
[6] Appx. Ex. 10.

B. Right to Acquire Provision

The 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[7] the rights to acquire the Club Facilities[8] pursuant to the provisions of F.S. 617.31 as it exists as of the date hereof.

(Decl. Art. VI § 24.) Pursuant to the right to amend set forth in the Declaration at Article II, Section 2, on August 30, 2000[9], 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.[10] The relevant portions of the Sixth Amendment provide:

> 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 as it exists as of the date of initial recording of the Declaration.

(Italicized words indicate words added to the relevant portions of the Declaration by the Sixth Amendment).

C. Section 617.31, Florida Statutes

Section 617.31, Florida Statutes, which governs the right to acquire granted to Plaintiffs, provides in relevant part:

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[7] 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.)

[8] 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.)

[9] In the Complaint, Plaintiffs alleged that the Sixth Amendment was executed on August 31, 2000. (Compl. ¶ 30.) The Sixth Amendment, however, plainly indicates August 30, 2000 as the execution date.

[10] 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).

(c) If 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, the homeowners' association will have an additional 10 days to meet the price and terms and condition of the facility owner by executing a contract. (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.***

(3) (a) As used in subsections (1) and (2), the term "notify" means the placing of a notice in the United States mail addressed to the president of the homeowners' association. Each such notice shall

be deemed to have been given upon the deposit of the notice in the United States mail.

(b) As used in subsection (1), ***the term "offer" means any solicitation by the facility owner directed to the general public.***

(emphasis added)

D. The Conveyance of the Clubhouse & Assignment of Club Owner Rights

Since 1990, Mr. Surface has been in the business of financing and structuring deals relating to the purchase of community recreational facilities and homeowners' obligations with respect to those recreational facilities. (Frank Surface Depo. 12-13, 16.)[11] In 1998, Mr. Surface was contacted by Bank of America loan officers to provide financing for a group of neighborhood homeowner's associations intending to purchase a clubhouse asset and the separate club facilities fees asset in the Lennar-built community of Doral Park. (Surface Depo. 24-25.) In the process of structuring the deal and providing financing for the Doral Park transaction, Mr. Surface was introduced to the Lennar Treasurer, Mr. Waynewright Malcolm (*Id.*)

In early 2000, after the successful completion of the Doral Park deal, Mr. Surface approached Mr. Malcolm about whether Mortgage Advisers could provide financing for other Lennar projects. (*Id.* at 25-27.) In response to Mr. Surface's request, Mr. Malcolm inquired whether Mr. Surface "would like to try to work on monetizing" the Club Facilities at Kings Ridge. (*Id.* at 29.) Mr. Malcolm testified: "Frank wanted, after the Doral Park transaction, wondered if there was any other ways we could do business together." (Waynewright Malcolm Depo. 36.)[12]

[11] Appx Ex 12. All depositions cited herein have been previously filed with the Court
[12] Appx Ex 13

As the deal progressed, Mr. Surface, Mr. Wright, and Mr. Lester created Purchase Term Sheets that summarized "where the parties were" in negotiations. (Surface Depo. 144-46, 178.) The June 23, 2000 Purchase Term Sheet set forth the material terms and conditions of the offer including identification of the two separate assets of the Club Facilities and Contract Rights for a total purchase price of $8,375,572. (June 23, 2000 Purchase Term Sheet.)[13] 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. (Surface Depo. p. 178; July 17, 2000 Purchase Term Sheet.)[14]

On August 31, 2000, LLP conveyed the Clubhouse to KINGS RIDGE L.L.C. (Compl. ¶ 28.)[15] On the same day, LLP and Kings Ridge Recreation Corporation assigned all of their right, title, and interest as Club Owner in the Club Facilities, including the right to collect the Club Facilities Fees, to KINGS RIDGE L.L.C.[16]

E. Summary of Plaintiffs' Causes of Action

The Complaint alleges (incorrectly) a wrongful conveyance that purportedly breached the right to acquire provided by the Declaration and section 617.31:

> [T]he Declaration and [Section 617.31, Florida Statutes] required the Club Owners to offer the Association and/or Club Members the right of first refusal upon any offer made to sell the Club Property and further required the Club Owners to inform the Association and Club Members of any offer made to purchase the Club Property and to entertain an offer by the Association and/or Club Members to purchase the Club Property (hereafter collectively referred to as the Right to Acquire").

(Compl. ¶ 25.) The Complaint mischaracterizes the Declaration and section 617.31, Florida Statutes.

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

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). 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).

Where the interpretation of an unambiguous written contract is at issue, summary judgment is appropriate. "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).

Further, questions regarding statutory construction and interpretation are questions of law. *GTC, Inc. v. Edgar,* 32 Fla. L. Weekly S546, 2007 WL 2492349 (Fla. Sept. 6, 2007); *Daniels v. Fl. Dept. of Health,* 898 So. 2d 61, 64 (Fla. 2005). Statutory construction is a question of law and, therefore, subject to resolution on motion for summary judgment. *See Holzhauer-Mosher v. Ford Motor Co.*, 772 So. 2d 7, 10 (Fla. 2d DCA 2000).

Finally, it is well settled that legislative intent guides a court's statutory construction analysis. *See State v. Rife,* 789 So. 2d 288, 292 (Fla. 2001); *McLaughlin v. State*, 721 So. 2d 1170, 1172 (Fla. 1998). In determining that intent, we have explained that "we look first to the statute's plain meaning." *Moonlit Waters Apartments, Inc. v. Cauley*, 666 So. 2d 898, 900 (Fla.

1996). Normally, "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Holly v. Auld,* 450 So. 2d 217, 219 (Fla. 1984) (*quoting A.R. Douglass, Inc., v. McRainey,* 137 So. 157, 159 (1931)). The Florida Supreme Court instructs that "the plain meaning of statutory language is the first consideration of statutory construction." *Clines v. State*, 912 So. 2d 550, 555 (Fla. 2005) (quotations omitted). "[T]he legislature is presumed to know the meaning of the words it utilizes and to convey its intent by use of specific terms." *Brate v. Chulavista Mobile Home Park Owners Assoc., Inc.*, 559 So. 2d 1190, 1193 (Fla. 2d DCA 1990), *rev. denied*, 574 So. 2d 140 (Fla. 1990).

IV. ARGUMENT

A. The Right to Acquire Provision set forth in Section 617.31 Does Not Afford the Plaintiffs a Remedy

1. The Right to Acquire Provision set forth in Section 617.31(1)(a) does not Apply in the Instant Case

Section 617.31(1)(a), Florida Statutes does not apply to the negotiations between LLP and Mr. Surface to purchase the Clubhouse. Further, it does not apply to the agreement to sell the Clubhouse that LLP and Kings Ridge L.L.C. eventually reached. Instead, it provides that "the facilities *may not be offered for sale unless the [Club Members have] the option to purchase the facilities . . .* " If the Club Owner "offered" the Club Facilities for sale, it must first have provided "an option to purchase" to the Club Members.[17] Therefore, the threshold question is

[17] Initially, Plaintiffs contend that the right to acquire was granted to either the Association or the Club Members because while the right to acquire expressly refers to "Club Members," section 617.31 references "homeowners' association." As more fully set forth below, Defendants maintain the right to acquire was granted expressly only to the Club Members. Nevertheless, assuming *arguendo* this Court determines a right to acquire was bestowed upon either the Club Members or the Association, then LLP's obligation remained the same, i.e. before offering the Club Facilities for sale to the general public, LLP must have first provided an option to purchase to either the Club

whether LLP as Club Owner "offered" the Club Facilities for sale Further, there is no reason to guess what type of "offer" triggers any right to acquire, as it is specifically defined as one "made to the general public".

In *Brate*,[18] a case strikingly similar to the instant case, the Second District addressed whether the owners of a mobile home park had "offered" the park for sale to the general public as set forth in section 723.071, Florida Statutes so as to trigger the association's right to purchase the park. The language and structure of section 723.071 mirrors section 617.31 (later renumbered to section 720.31). This is particularly true with respect to the definition of "offer." Section 723.071 provides in relevant part:

> (1)(a) *If a mobile home park owner offers a mobile home park for sale, she or he shall notify the officers of the homeowners' association* created pursuant to ss. 723.075-723.079 of the offer, stating the price and the terms and conditions of sale.
> (b) *The mobile home owners, by and through the association defined in s. 723.075, shall have the right to purchase the park, provided the home owners meet the price and terms and conditions of the mobile home park owner* by executing a contract with the park owner within 45 days, unless agreed to otherwise, from the date of mailing of the notice and provided they have complied with ss. 723.075-723.079. If a contract between the park owner and the association is not executed within such 45-day period, then, unless the park owner thereafter elects to offer the park at a price lower than the price specified in her or his notice to the officers of the homeowners' association, the park owner has no further obligations under this subsection, and her or his only obligation shall be as set forth in subsection (2).
>
> (c) If the park owner thereafter elects to offer the park at a price lower than the price specified in her or his notice to the home owners, the home owners, by and through the association, will have an additional 10 days to meet the price and terms and conditions of the park owner by executing a contract.

Members or the Association. Conversely, if the Club Facilities were not "offered" for sale to the general public, LLP had *no* obligation to first provide a right to acquire to either the Club Members or the Association.

[18] "In the absence of interdistrict conflict, decisions of the district courts of appeal represent the law of the state, and are binding on all Florida trial courts." *West v. State*, 915 So. 2d 257, 258 (Fla. 5th DCA 2005)

> (2) *If a mobile home park owner receives a bona fide offer to purchase the park that she or he intends to consider or make a counteroffer to, the park owner's only obligation shall be to notify the officers of the homeowners' association that she or he has received an offer and disclose the price and material terms and conditions upon which she or he would consider selling the park and consider any offer made by the home owners, provided the home owners have complied with ss 723.075-723.079. The park owner shall be under no obligation to sell to the home owners or to interrupt or delay other negotiations and shall be free at any time to execute a contract for the sale of the park to a party or parties other than the home owners or the association*
> (3)(a) As used in subsections (1) and (2), the term "notify" means the placing of a notice in the United States mail addressed to the officers of the homeowners' association. Each such notice shall be deemed to have been given upon the deposit of the notice in the United States mail.
>
> ***(b) As used in subsection (1), the term "offer" means any solicitation by the park owner to the general public.***

Fla. Stat. § 723.071 (emphasis added).

Section 723.071(1)(a) and (b) provides a "right to purchase" that contains the identical provisions as § 617.31(a)(1)'s "option to purchase." Likewise, section 723.071(3)'s definition of "offer" is identical to section 617.31(3)'s definition with the exception that the former is directed to park owners and the latter is directed to facility owners.

In *Brate*, the homeowner's association brought an action alleging that the owners sold the mobile home park to a third party without first offering the association its right to acquire. *Brate*, 559 So. 2d at 1191. In analyzing the case, the *Brate* Court stated succinctly:

> the threshold concern-was the sale to Neptune the outgrowth of an offer by Britt and Brate to sell the park to the general public? If it were not such an offer, the Association would not acquire a right of first refusal.

Brate, 559 So. 2d at 1192.

In its legal analysis, the court first acknowledged Florida's strong public policy in favor of the free alienation of property. *Id*; *see, e.g., VOSR Indus., Inc. v. Martin Props., Inc.*, 919 So. 2d 554, 556 (Fla. 4th DCA 2005) ("Florida has a strong public policy favoring the free right of transfer of interests in real property."); *Brown v. Rice*, 716 So. 2d 807, 812 (Fla. 5th DCA 1998) ("[A] restraint on alienation is not favored by the courts."). Due to the statute's restraint upon the alienation of property, the relevant portions of the statute were to be viewed "in a light most favorable to the [owners]." *Brate*, 559 So. 2d at 1192.

In addition, the court applied the well-established presumption that the Florida Legislature intends to know the plain meaning of the words it utilizes:

> [S]ince the legislature is presumed to know the meaning of the words it utilizes and to convey its intent by use of specific terms, we must apply the plain meaning of those words, if they are ambiguous.

Id. at 1193. The court found that there was "absolutely no ambiguity in section 723.071(3)(b)'s use of the word 'offer' which, in turn, is definitionally dependent upon the meaning of the word 'solicitation.'" *Id.* The court looked to the dictionary definition of solicitation as: "earnest request; a seeking to obtain something from another." *Id.* (citing Webster's New Universal Unabridged Dictionary (2d ed. 1983).

In applying the law to the facts of the case, the court first considered that the third party was "engaged in the business of acquiring mobile home parks" and that well before the conveyance had taken place, the third party had previously purchased a park from the owners. *Id.* at 1192. In other words, the sale was a private transaction—not public—in that it evolved from a pre-existing relationship from which a similar transaction had taken place. The court also considered that the broker was never "given a listing agreement to sell the property nor did he advertise the property for sale." *Id.* at 1192. Further, the court noted that "no signs were posted

at or near the property, there were no for-sale notices placed in newspapers". *Id.* From these facts, the court concluded:

> We find *no substantial competent evidence* from which it can be said that [the owners] *held their park out to the general public for sale*.

Id. (emphasis added).

The controlling question for the court was whether the owners had *"held their park out to the general public for sale" Id.* (emphasis added). Significant to the Court's analysis was: (1) whether signs had been posted at or near the property; and (2) whether for-sale ads had been placed in newspapers. *Id.* The court held that the record did "not support a finding of solicitation *or* an offer to the general public." *Id.* at 1193 (emphasis added). Accordingly, the Second District reversed and remanded for the entry of a final judgment dismissing the compliant. *Id.* The homeowner's association sought review of the Second District's decision by the Florida Supreme Court. *Chulavista Mobile Home Park Owners Ass'n, Inc. v. Brate*, 574 So 2d 140 (Fla. 1990). The Florida Supreme Court denied review. *Id*

As in *Brate*, the threshold question in the instant case is: *was the sale to Kings Ridge L.L.C. the outgrowth of an offer by LLP to sell the park to the general public?* If it was not such an offer, then pursuant to the express terms of the right to acquire, the event triggering Plaintiffs' right to acquire did not occur. Plaintiffs' right to acquire was not triggered because it was not such an offer. Neither the parties nor the Court need to speculate or interpret what the legislature intended by the word "offered." Placing paramount significance upon this term as it relates to section 617.31(1), the Florida Legislature specifically defined "offer":

> As used in *subsection (1)*, the term "offer" means any *solicitation* by the facility owner *directed to the general public*.

§ 617.31(3)(b) (emphasis added).

There is no factual dispute as to the origin and character of the negotiations leading to the conveyance and whether the discussions amounted to LLP making an "offer" to Kings Ridge L.L.C. In fact, both parties cite the same deposition testimony. Therefore, there is no issue of fact for a jury's determination. Nevertheless, that analysis lacks any significance for purposes of this motion. Even if LLP's actions did amount to a solicitation directed to Kings Ridge L.L.C., the Plaintiffs do not allege and ***no evidence*** exists that establishes LLP offered the Clubhouse for sale ***to the general public*** as required by section 617.31. The Plaintiffs, in their strained attempts to avoid the application of the statute, instead suggest that an offer to any single member of the public constitutes an offer to the "general public" as a whole. In all events, the Plaintiffs are wrong.

The discussions between LLP and Kings Ridge L.L.C. did not constitute an "offer" as contemplated by section 617.31(1) because the statute requires that the solicitation must be "*directed to the general public*." The common meaning of "general" is:

1. involving, applicable to, or affecting the whole
2. involving, related to, or applicable to every member of a class, kind, or group
3. not confined by specialization or careful limitation

Merriam Webster's Collegiate Dictionary, 520 (11th ed. 2005).

In a case considering the definition of "general public," the court offered the following definition of "general":

> From the Latin word genus. It relates to the whole kind, class, or order. . . . universal, not particularized, as opposed to special; principal or central, as opposed to local; open or available to all, as opposed to select; obtaining commonly, or recognized universally, as opposed to particular; universal or unbounded, as opposed to limited; comprehending the whole or directed to the whole, as distinguished from anything applying to or designed for a portion only. Extensive or common to many.

Good v Iowa Civil Rights Comm'n, 368 N.W.2d 151, 156 (Iowa 1985)(citing *Black's Law Dictionary* 812 (rev. 4th ed. 1968).

The term "public" means:

> 1a: exposed to general view: OPEN
> b: WELL-KNOWN, PROMINENT
> 2a: of, relating to, or affecting all the people or the whole area of a nation or state

Merriam Webster's Collegiate Dictionary 1005 (11th ed. 2005). "Public" has also been defined as "of, relating to, or affecting the people as an organized community." *Good*, 368 N.W.2d at 156.

Section 617.31(1)'s requirement that the offer had to have been made to the "general public" to trigger the right to acquire has stumped the Plaintiffs. Nevertheless, in a strained attempt to distinguish the binding Legislative and judicial interpretations, they have taken the position that "general public" means any single person or entity. This despite the fact that the adoption of such a narrow definition as asserted by the Plaintiffs would render other pieces of legislation, such as those concerning civil rights, ADA compliance, Medicaid and Medicare, and the sale of securities, meaningless. The suggestion that an offer to one person constitutes an offer to the general public is wholly unsupportable. Further, It is nonsensical for Plaintiffs to argue that the offer to purchase the Clubhouse was made to the "general public" but simultaneously argue that Defendants concealed the negotiations and the sale so as to toll the statute of limitations.

An electronic search of the term "general public" within the database "Florida Statutes Annotated" generates 436 entries. At no time has the Florida Legislature (or the legislature of any other state so far as the Defendants can determine) been inclined to specifically define "general public." Nor has the legislature defined "ocean," or "sand" or "sun," yet Floridians

manage to go about their business without widespread confusion. The same is true for "general public," a term that is associated 436 times with legislative action with no, until the filings of the Plaintiffs, misunderstanding or incomprehension.

A solicitation to the "general public," is open, ***indiscriminate***, and available to the whole. *See, e.g., Dept. of Revenue v. Merrit Square Corp.*, 334 So. 2d 351, 353 (Fla. 1st DCA 1976) (discussing meaning of "public" utility and noting that it must general and indiscriminate); *see also Fletcher Prop., Inc. v. Fla. Pub. Serv. Comm'n*, 356 So. 2d 289, 291 (Fla. 1978) (approving definition of "public" as available to all individuals in general without discrimination). For example, Section 252.36, Florida Statutes, relates to the emergency powers of the Governor. The statute instructs that an executive order "shall be promptly disseminated by means calculated to bring its contents to the attention of the general public . . . ." No reasonable human being could possibly conclude that the legislature would deem this statute satisfied by dissemination of such an order to one person, but that is the very argument Plaintiffs implore this Court to adopt.

In the instant case, the Defendants, as well as the Florida Legislature and the *Brate* court, agree that an important distinction exists between "general public" and "any member of the public." Further, in another case concerning the definition of "public," The First District Court of Appeal determined that commercial contacts with limited numbers did not constitute public sales. *Dept. of Revenue v. Merritt Square Corp.*, 334 So. 2d 351 (Fla. 1st DCA 1976). "[I]t seems apparent that a private utility is one which sells energy to a limited segment or group, such as to its own tenants, and not the public at large. To conclude otherwise would require us to say that the legislature, in exempting private utilities, established a meaningless exemption. It should never be presumed that the legislature intended to enact purposeless and, therefore, useless legislation." *Id.* at 354.

In the instant case, the legislature specifically defined "offer" as one made to the "general public." If, as the Plaintiffs suggest, the legislature meant to "any member of the general public," it would have had no reason to include any definition of the terms. To effectuate the statute, therefore, the solicitation must have "affect[ed] the whole"; i.e., the solicitation must have been "exposed to general view" and "open" to "all the people or the whole area." As such, the solicitation required by the statute would be in the form of a public sign or advertisements in newspaper, radio, or television. This interpretation of the term "offer" to the general public is confirmed by the court in *Brate*. 559 So. 2d at 1192 (holding that mobile home park was not held "out to the general public for sale"; finding that "[n]o signs were posted at or near the property," "there were no for-sale notices placed in newspapers," and the broker involved was "not given a listing agreement to sell the property nor did he advertise the property for sale"). *Id*

Further, the evidence is undisputed and Plaintiffs concede that the sale of the Club Facilities from LLP to Kings Ridge L.L.C. originated from a pre-existing business relationship and discussions between LLP and Mr. Surface subsequent to the Doral Park deal. (Plaintiffs' Motion for Partial Summary Judgment, 8.) After completing the Doral Park deal, Mr. Surface spoke with Lennar about additional financing opportunities for his company, Mortgage Advisors. (Surface Depo. 26-29; 37-39; 47; 145-146.)

Thereafter, Mr. Surface's group created the Purchase Term Sheets and supplied the specific terms of the transaction structure. (Surface Depo. 144-146, 178; Malcolm Depo. 80-81; 107-108.)

Additionally, as set forth in the Affidavit of Waynewright Malcolm, who was Treasurer and Vice President for Lennar Homes and authorized agent and officer for LLP during 2000, the

Clubhouse was never offered for sale to the general public.[19] The negotiations and ultimate sale of the Clubhouse to Kings Ridge L.L.C. did not originate as the result of an offer to sell the Clubhouse to the general public. (Malcolm Aff. ¶ 6.) The Clubhouse was never offered for sale to the general public. (Malcolm Aff. ¶ 7.) The Clubhouse was never listed for sale in any newspaper or other sales periodical. (Malcolm Aff. ¶ 8.) A "for sale" sign was never posted at the Clubhouse. (Malcolm Aff. ¶ 9.) The Club Facilities were never listed for sale with a broker or realtor. (Malcolm Aff. ¶ 10.)

The class representatives have acknowledged as much. In Mr. Holman's deposition:

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Q. Are you aware of any offer made by the owner of the club as of August 30th, 2000, the day before the transaction occurred to the general public that the owner wanted to sell the club?

MR. D'ANIELLO: Objection to form.

THE WITNESS: I think you have to classify that. In his deposition, his second deposition

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Frank Surface was asked how many other people out there could have performed the purchase or been prepared to purchase. He said he couldn't think of any. So in effect that was a general offer. He would be the only one who would be out there.

BY MR. SAMPSON:

Q. Do you have any facts that Lennar, Lennar Land Partners which owned the club as of August 30th, 2000, made some offer to the general public?

MR. D'ANIELLO: Objection to form.

THE WITNESS: I just answered that. The general public is a difficult term to define. Did they put a sign out on the front of the place saying clubhouse for sale? They wouldn't dare.

BY MR. SAMPSON:

Q. Do you have any facts that Lennar did that?

A. No.

Q. Do you have any facts that Lennar Land Partners advertised to anyone that, anyone that it wanted to sell the clubhouse?

A. No.

Q. Do you have any facts to dispute that Mr. Surface

[19] Appx. Ex. 17

and Lennar through Wainwright Malcolm because of the prior deal they had done arrived at another deal, namely, the purchase of the Kings Ridge clubhouse?

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MR. D'ANIELLO: Objection to form.
THE WITNESS: I lost the question on that.
BY MR. SAMPSON:
Q. I think I did, too. Let me try again. Do you have any facts that contradict the testimony from Mr. Malcolm and from Mr. Surface that this deal to purchase the Kings Ridge clubhouse emerged from their prior business relationship?
MR. D'ANIELLO: Objection to form
THE WITNESS: You have to state it again.
BY MR. SAMPSON:
Q. Okay.
A. Try to make it a positive rather than a negative, it would be easier.
Q. Your testimony I believe was that your understanding is Mr. Surface and one of his entities had prior business dealings with Lennar.
A. Correct.
Q. Is that correct?
A. Yes.
Q. What is your understanding of what those business dealings were?
A. They had -- Frank Surface either purchased or in some way acquired a clubhouse in South Florida that was a Lennar property.

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Q. That was the Dural clubhouse?
A. Yes, I think that's the one.
Q. That deal, is it your understanding, was an arrangement by Mr. Surface to finance the purchase by the club, by the homeowners?
A. That's correct.
Q. The next deal that Mr. Surface did with Lennar was the Kings Ridge clubhouse purchase.
A. That's correct.
Q. Do you have any facts that contradict the idea that the Kings Ridge deal emerged, came out of the prior business dealings between Mr. Surface and Lennar?
MR. D'ANIELLO: Objection to form.
THE WITNESS: I don't know what you mean by facts. In his testimony Frank Surface said that they were interested in doing other deals at the time. Wainwright Malcolm, I guess it was, said

there was nothing on the board and then he came back and said at some later date, I don't know how long, how much further it was, maybe we can do something. We have something available. Yeah.
BY MR. SAMPSON:
Q. Are you aware of any facts that Mr. Malcolm or anyone from Lennar advertised to anyone other than Mr. Surface that Lennar wanted to sell the Kings Ridge

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clubhouse?
A. No, but that doesn't preclude the right to offer it to us at the same time, to the members.

(Holzman Depo. Vol. II, p. 120-124.

Further, as in *Brate*, the right to acquire statute in the homeowners' association context must be read in a light most favorable to the Club Owner. As in *Brate*, the option to purchase is only triggered if LLP offered the Club Facilities for sale to the "general public." As in *Brate*, this case involves a purchaser that had previously done a similar transaction with the seller, and the subject conveyance evolved directly from that relationship. And, as in *Brate*, the Club Facilities were at no time "held out to the general public for sale" through newspaper ads, signs, listing agreements, or a similar type of public medium. Finally, as in *Brate*, no evidence exists that supports a finding that LLP ever offered the Club Facilities for sale to the general public.

Because LLP did not offer the Club Facilities to the general public, at no time during the subject transaction was LLP obligated to provide Plaintiffs with an "option to purchase" or right to acquire. Accordingly, summary judgment is proper in favor of Defendants and against Plaintiffs as to all of Plaintiffs' claims.

2. Section 617.31(2) Does Not Provide Plaintiffs with a Right to Acquire

In contrast, section 617.31(2) provides that if LLP had received an offer to purchase the Clubhouse, then its only obligation was to notify the Plaintiffs of the offer. To the extent that the Complaint can be read as alleging a breach of section 617.31(2) and the record evidence supports

such a claim, that provision does **not** provide Plaintiffs with a right to acquire **at all**. Instead, section 617.32(2) provides:

> (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*.

(emphasis added). Section 617.32(2) does not provide a right to acquire to Plaintiffs nor does it impose any restriction upon LLP's ability to sell the Club Facilities to Kings Ridge L.L.C. or any third party. At most, this provision merely requires the owner "notify" the Club Members that they had received an offer and to "consider any offer made" by the Club Members. However, even if Plaintiffs had met the terms and conditions of any offer received by LLP, LLP was "under no obligation to sell" to the Club Members.

In fact, in *Brate*, the Second District concluded that the mobile park owner had violated section 723.071(2), which as shown above is virtually identical to section 617.32(2). *Brate*, 559 So. 2d at 1193. However, the Second District held that "subsection (2) d[id] not impose any restriction upon the park owners' ability to sell the park." *Id.* Therefore, "the park owners' freedom under subsection (2) to alienate the park *is as unrestrained as it would be if subsection (2) did not exist*." *Id.* (emphasis added). Thus, there was no obligation for the park owners to sell the park, therefore, plaintiffs had no legally recognizable claim. The *Brate* Court remanded

to the trial court for final judgment dismissing plaintiffs' complaint. *Id* at 1193. As stated previously, the Florida Supreme Court denied appellate review. *Brate*, 574 So. 2d at 140.

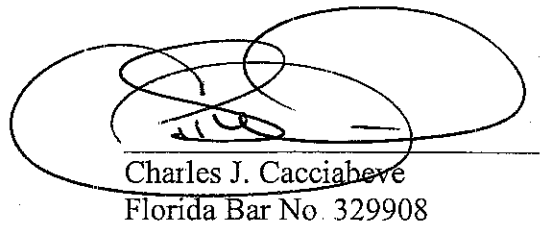
Because section 617.32(2), Florida Statutes does not provide Plaintiffs with a right to acquire or otherwise obligate the Club Owner to sell the Club Facilities to the Plaintiffs, this Court must grant summary judgment in favor of Defendants and against Plaintiffs on all Plaintiffs' claims.

3. Section 617.31 is a Restraint on the Alienation of Property and, as such, Must be Read in a Light most Favorable to the Club Owner

Additionally, from the outset, section 617.31, Florida Statutes, which places certain obligations and limitations upon a facility owner's right to transfer the recreational facilities, functions as a restraint on the alienation of property. *Brate*, 559 So. 2d at 1192. "Florida has a strong public policy favoring the free right of transfer of interests in real property." *VOSR Indus., Inc. v. Martin Props., Inc.*, 919 So 2d 554, 556 (Fla. 4th DCA 2005). Due to Florida's policy favoring the free alienation of property, the Court must view section 617.31 in a light most favorable to the property owner, which in this case was LLP. *Brate*, 559 So. 2d at 1192.

IV. CONCLUSION

For all of the foregoing reasons, the Defendants respectfully request this Court enter summary judgment in their favor and against the Plaintiffs as to all Plaintiffs' claims.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished this 5th day of June, 2008, by HAND DELIVERY to Robert Anthony and Phil D'Aniello, Fassett, Anthony & Taylor, P.A., 1325 West Colonial Drive, Orlando, FL 32804; and by U.S. Mail to Phillip S. Smith, McLin & Burnsed, P.A., P.O. Box 491357, Leesburg, Florida 34749-1357 and Don H. Lester, Lester & Mitchell, P.A., 1035 LaSalle Street, Jacksonville, FL 32207