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

KINGS RIDGE COMMUNITY ASSOCIATION, INC.; et al.,

Plaintiffs,

vs.

LENNAR LAND PARTNERS; et al.,

Defendants.
_____/

Case No. 05-CA-2718
Class Representation

PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT DETERMINING THAT LENNAR DEFENDANTS BREACHED DECLARATION

Plaintiffs hereby file this reply to Defendants' Response in Opposition to Plaintiffs' Motion for Summary Judgment Determining that Lennar Defendants Breached the Declaration and state:

I. INTRODUCTION

As noted in Plaintiffs' Motion, there are no disputed issues of fact as to the existence of the Plaintiffs' Right to Acquire in the Declaration and the actions of LLP and its Partners in breaching the Declaration. Defendants' Response asserts that summary judgment must be denied because the case of Brate v. Chulavista Mobile Home Park Owners Assoc., Inc., 559 So.2d 1190 (Fla. 2d DCA 1990) requires that Plaintiffs establish that LLP made an open and notorious "offer" to the entire "general public" at large.

Defendants' assertions cannot defeat Plaintiffs' Motion because: (1) the Brate case is inapplicable to the matter before this Court because Brate was decided under "Clause 2" of the right of first refusal provision of the Florida Mobile Home Act,[1] whereas the Plaintiffs' Motion seeks relief under "Clause 1" of the right of first refusal provision of the Homeowners Association Act, (2) Brate is not good law according to the plain meaning and intent of the statute and where the Florida Supreme Court case of Harris v. Martin Regency, Ltd., 576 So.2d 1294, 1298 n. 4 (Fla. 1991) ruled that an interpretation of the statute as stated in Brate would defeat the purpose and intent of the law,

[1] Florida Statutes § 723.001, *et seq.*

(3) Defendants' argument is contrary to the plain meaning and intent of the statute and its legislative history, and (4) the Defendants themselves believed that the statute applied to the Transaction.

Specifically, this Court must enter summary judgment upon the Plaintiffs' Motion because:

1. Brate is not applicable to the facts of the case presently before this Court since:
   a. The holding in Brate was construing a *different* statutory clause and facts.
   b. The Brate case only dealt with offers by the purchaser under Clause 2 of the Mobile Home Act and the definition of "offer" only applies to Clause 1.
   c. The interpretation of an "offer" in Brate was mere *dicta* where the Court was not construing an "offer" made by the mobile home park owner.
   d. The Plaintiffs are seeking summary judgment upon a breach of a contract claim which must be construed against the Declarant as the drafter of the contract and the Brate case did not construe a contractual right.
2. The statutory intent of Florida Statutes § 617.31(1) is clear and the interpretation called for by the Defendants is not permissible where:
   a. The Florida Supreme Court has held that such an interpretation *would defeat the purpose and intent of the law*. Harris v. Martin Regency, Ltd., 576 So.2d 1294, 1298 n. 4 (Fla. 1991).
3. Defendants' argument is contrary to the plain meaning and intent of the statute and its legislative history where:
   a. Defendants' interpretation of the definition of "offer" would lead to an absurd result and render the statute meaningless and defeat its purpose.
   b. The legislative history of the statute indicates an intent to require a right of first refusal to "any offer".
   c. The only reasonable interpretation of the definition of offer is to include any solicitation to any member of the general public and to exclude only a limited class of sales.
4. The record facts clearly indicate that the Defendants believed that the Right to Acquire applied to the Transaction since:
   a. They executed the Sixth Amendment in an attempt to retroactively evade the Right to Acquire.
   b. They repeatedly wanted the title company to issue title insuring against the Club Members' Right to Acquire.
   c. LLP's attorneys refused to write a legal opinion that the Right to Acquire provision was not applicable and instead issued an opinion indicating that the Transaction was subject to any rights the Club Members may have.
   d. The Defendants' sales people informed Club Members that they had a right to acquire and continued to inform new buyers that they had such a right.

Even assuming this Court determined that the statute only applies to offers made to the general public, there would be a question of fact as to whether or not the offers made to Surface would be considered offers to the general public. Finally, even if this Court determined that there was not an "offer" made to the "general public" under § 617.31(1), the Plaintiffs' complaint also asserts a breach of contract claim for the Defendants' failure to notify the Plaintiffs under § 617.31(2).

II. LEGAL ARGUMENT

1. *Brate* is Not Applicable

Summary judgment must be entered in Plaintiffs' favor where the Brate decision does not apply to the matter before this Court because the Brate case involved a different statutory provision and did not involve a solicitation made by the land owner and was decided on different statutory grounds. Further, in a case reviewing additional provisions of the Mobile Home Act, the Florida Supreme Court has determined that the Defendants' interpretation of Brate would violate the intent of the law.

a. Different Factual Background

The Brate Court decision is not binding on this Court where the Second District Court of Appeal was construing a different statute and was dealing with substantially different facts. As described in the Plaintiffs' Motion, this case involves the sale of recreational facilities preceded by an offer made by the owner of the facilities to sell the Club. The record indicates that Surface was not aware of Kings Ridge, had not heard of Kings Ridge, and was not seeking to purchase any recreational facilities at the time that he was presented with the opportunity to purchase the Club. Surface Depo 25-29; Malcolm Depo 36, 62-63, and 78-80; Motion p. 8-9 and 16. As such, LLP made the initial offer to sell the Club to Surface.

In contrast, the Brate case dealt with circumstances where the owners of a mobile home park were not in the market to sell, did not want to sell, and *never made any offers to sell.* In fact, the park

owners (Britt and Brate) had to be convinced to sell the park based upon offers made by the purchaser (Neptune). The facts are clearly stated in Brate as follows:

> ...at a time well prior to the sale to Neptune, a limited partnership engaged in the business of acquiring mobile home parks, Neptune had purchased a park from Britt and Brate. Following that transaction Brate was convicted of a felony ... (and) needed money for his defense, and ... his family... Neptune, **without inspiration from Britt and Brate, transmitted several offers** during a nine month period to Britt and Brate in an attempt to purchase the park. Britt and Brate, however, were not in agreement as to whether the park should be sold. Neptune communicated its offers through Weis ... of Steve Weis Realty, Inc., who attempted on several occasions to put the deal together. Weis was not, however, given a listing agreement to sell the property nor did he advertise the property for sale. Weis testified that he had offered to list the property on several occasions and Brate consistently refused. Further, Weis stated that **it was Neptune who communicated with him for the purpose of purchasing the park**. We find no substantial competent evidence from which it can be said that Britt and Brate held their park out to the general public for sale. No signs were posted at or near the property, there were no for-sale notices placed in newspapers and, indeed, **it appears that Britt was unwilling to sell the park until the moment of closing**.

Brate 559 So.2d at 1192 (emphasis added).

The Defendants' Response puts undue emphasis on the Brate Court's notation that the park owners never advertised or listed the property for sale or posted a sign at the property. However, the Brate Court never intended to find that publicly holding the park out for sale by listing and advertising the park for sale and posting signs on the property would be the threshold test to determine whether a park owner could be held to have made an offer. Instead, the Court's emphasis was on the fact that *the park owners never made any kind of an effort to sell the park* and absent such effort, the sale did not fall under the section of the mobile home park statute that required the park owner to provide the residents with a right of first refusal.

The Defendants want this Court to take the language used in Brate entirely out of context and find that the Brate Court somehow defined the only parameters under which an owner could be held to have offered a property for sale to the general public. Such a conclusion simply was not made and cannot be reasonably inferred from the facts.

b. Different Statute and Provision

The Brate Court's decision is not binding upon this Court where it construed a similar but different statute and where the case was decided upon entirely different statutory grounds. This Court is faced with a record which reveals that LLP first offered the Club to Surface and therefore the transaction falls under the first subsection of Florida Statutes § 617.31 ("Clause 1"). Conversely, in the Brate case, the Court was presented with *owners that never offered the park for sale*, but rather, were pursued for nine months by buyers who made offers to them and therefore was decided under the *second subsection* of the Mobile Home Act ("Clause 2"). The Brate Court concluded that the first subsection of the statute was irrelevant and the facts brought the case squarely within the *second subsection.* Where there were no facts suggesting that the owner ever held the park out for sale or made an offer to the buyers the Brate Court stated:

> we are led to the conclusion that Neptune's purchase of the property ***is subject only to subsection (2) of section 723.071.*** Unlike subsection (1), however, subsection (2) does not impose any restriction upon the park owners' ability to sell the park.

Brate 559 So.2d at 1193 (emphasis added).

This distinction shows that the Brate case has no bearing upon the facts presented to this Court by the Plaintiffs' Motion under Clause 1. A review of the two statutes reveals that under Clause 1, *the owner must first offer* the property for sale to trigger the residents' right of first refusal, but under Clause 2, the owner need only provide notice if it receives an offer. The two statutes are follows:

Florida Statute § 617.31 (1996)	**Florida Statute § 723.071**
(1)(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 ... 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.	(1)(a) If a mobile home park owner ***offers*** a mobile home park for sale, he shall notify the officers of the homeowners' association ... of his ***offer,*** 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 ... then, unless the facility owner thereafter elects to **offer** the facilities at a price lower than the	(b) The mobile home owners... 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 ...If a contract between

price specified in his or her notice to the homeowners' association, he or she has no further obligations ... (except) as set forth in subsection (2).	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 his notice ... he has no further obligations ... (except) 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.	**(2)** If a mobile home park owner receives a bona fide offer to purchase the park that he intends to consider or make a counteroffer to, his only obligation shall be to notify the officers of the homeowners' association that he has received an offer and disclose the price and material terms and conditions upon which he would consider selling the park and consider any offer made by the homeowners.
(3)(b) **As used in subsection (1)**, the term "offer" means <u>any solicitation</u> by the facility owner directed to the general public.	(3)(b) **As used in subsection (1)**, the term "offer" means <u>any solicitation</u> by the facility owner directed to the general public.

The Plaintiffs' Motion is premised upon a violation of the first subsection of § 617.31 where LLP clearly "*offered*" the Club for sale to Surface, whereas the <u>Brate</u> Court's ruling was premised upon the fact that absent any form of an offer made by the owner, the case must be determined solely under the second subsection of § 723.071.

Also, unlike § 723.071, the first subsection of § 617.31 contains *two* separate provisions. The first provision is a clear statement that the Club may not be "offered" for sale unless the homeowners are given an opportunity to purchase on the same terms and conditions. The use of the word "offer" is not contained within this first provision and the statute is making an unequivocal determination that the facilities cannot be "offered" for sale without giving the association the opportunity to purchase. Then, for further clarification, the statute goes on to mimic the only provision provided for in § 723.071 by stating that if the owner "offers" the property for sale, the residents will have a right of first refusal. The wording of the two statutes makes it clear that the legislature intended to create even greater protections for residents dealing with the sale of recreational facilities. It is also noted that the first provision of the statute utilizes the term "offered" as opposed to "offer" and such term is not defined anywhere within the statute and thus cannot be said to be limited in any manner.

c. Interpretation is Non-Binding Dicta

The Defendants' reliance upon Brate is misplaced where any interpretation of the definition of an "offer" was **merely non-binding dicta** since the Court was not construing an offer made by the mobile home park owner. The Brate Court simply recognized that there were no facts suggesting that the owners had ever made *any* kind of offer and as such, the matter could only be determined under subsection two of § 723.071. Thus, any comments in Brate, which are applicable to a Clause 1 situation are mere dicta because Brate was a Clause 2 case.

However, even if the Brate Court intended to express a belief that the definition of "offer" only applied to offers that were open and notorious and made to the general public as a whole rather than any member of the general public, the conclusion is not binding on this or any other Court where it was mere dicta. Coastal Petroleum Co. v. American Cyanamid Co., 492 So.2d 339, 344 (Fla. 1986) (a court's statements upon a matter that is not at issue are "dicta and non-binding"); Miracle Center Associates v. Scandinavian Health Spa, Inc., 889 So.2d 877 (Fla. 3d DCA 2004) ("statements (that) are not necessary to ... holding ... which was the sole issue before the court ... (are) mere dicta, not binding on either party"); State ex rel. Biscayne Kennel Club v. Board of Business Regulation, 276 So.2d 823, 826 (Fla. 1973) ("the statement of the District Court of Appeal ... was not essential to the decision of that court and is without force as precedent").

Once the facts of Brate became clear that there was never any kind of offer made by the park owners, the case had to be decided under the second subsection of § 723.071 and the plain language of the statute indicates that the definition of "offer" only applies to matters coming within the purview of the first subsection of § 723.071. As such, there was no need to interpret the definition of what constitutes an offer and any inference that the Brate Court intended to interpret the scope of the definition of offer is merely non-binding dicta.

d. Plaintiffs Assert a Breach of Contract

The Court's decision in Brate is not applicable to the facts before this Court where the Plaintiffs are seeking relief based upon a right granted within the Declaration. The claims in Brate did not arise out of a breach of a contractual right, but rather related only to the residents' assertion of their statutory rights. However, the Plaintiffs are enforcing a *contractual* right which clearly grants them the "Right to Acquire" the facilities and merely references a statutory provision which describes the procedural mechanism to enforce that right.

The grant of the Right to Acquire was contained in the Declaration, not the statute. The Declaration states that the Club Owner "grants" the Club Members a right to acquire the Club Property as follows:

> 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 as it exists as of the date hereof.

Declaration Art. VI § 24 (emphasis added). The reference to § 617.31 merely incorporates the procedures to be used and the statute does not actually grant the Right to Acquire.

There is no limitation on the grant of the right and this Court must construe the Declaration against LLP as the drafter of the contract. Goodwin v. Blu Murray Ins. Agency, Inc., 939 So.2d 1098, 1102 (Fla. 5th DCA 2006) (contracts must be strictly construed against the drafter). Conversely, the Brate Court was only construing a statutory provision and was bound to construe such provision in favor of private property rights. Brate at 1192 ("our sensitivity to any limitation upon the alienation of real property induces us to view the relevant portions of chapter 723 in a light most favorable to the vendors").

As such, the right that is granted by the Declaration, when construed against the drafter, indicates that the Lennar Defendants intended to convey an absolute right to acquire the Club upon the Plaintiffs and provided that such right was governed by the procedures contained within the provisions of Florida Statutes § 617.31 (1996). Those procedures would include the right to a 90 day

notice period and the requirement that the terms be matched exactly by the Plaintiffs. At no time could it be suggested that the Plaintiffs' right was limited in any manner.

2. Supreme Court Rejects *Brate* Interpretation

As this Court recognized at oral argument, the plain meaning and intent of the statute at issue was to ensure that the residents have a right of first refusal for any offers to sell the recreational facilities at issue. To interpret the definition of "offer" in the manner in which the Defendants suggest was spurned by the Florida Supreme Court in a case construing provisions of the Mobile Home Act.

The Florida Supreme Court has held that an interpretation of the definition of term "offer" under the mobile home statute in the manner suggested by Defendants would allow the owner to evade the right of first refusal provision and *would defeat the purpose and intent of the law* and would not be allowed. Harris v. Martin Regency, Ltd., 576 So.2d 1294, 1298 n. 4 (Fla. 1991). In the Harris case, the Supreme Court was called upon to decide if the eviction of the residents of a trailer park in order to convert the park into vacant land and then sell the land would violate the provisions of the mobile home act. Under Florida Statutes § 723.061, a park owner can only evict tenants if it intends to change the use of the land. In Harris, the owner of the park contended that converting the property to vacant land was in fact a change in the use of the property and thus permissible under the statute. Harris at 1296. The Supreme Court agreed, but only to the extent that the purpose of the change in use was not to sell the land and evade § 723.071's right of first refusal provision and remanded the case for a factual determination of whether the purpose of converting the land was so that it could be sold while evading § 723.071. Id. at 1298 ("it would be illogical to conclude that the legislature intended the 'change in use' provision of § 723.061(1)(d) to be applied broadly to allow a park owner to evade the requirements of § 723.071(1)").

In response, it was suggested by the park owner that § 723.071 could not apply where it "has not technically offered" the park for sale by making an offer to the general public in accordance with

Brate. Id. at 1298 n.4. The Supreme Court rejected this argument by stating that the lower court's broad interpretation of the change of use provision "allows a park owner to purposefully circumvent the mobile home owner protections of § 723.071(1) by merely not making an 'offer' until it evicts all the tenants." Id. Thus, the Supreme Court rejected the application of Brate to any facts where the purpose and intent of the owner's actions would be to evade its obligation to offer the property to the residents. Applying the same logic to the case before this Court, if the Defendants' argument were to be applied because LLP did "not technically" make an offer to the entire general public in accordance with the Defendants' interpretation of Brate, then the Defendants would be allowed to evade the provisions of § 617.31 simply by conducting a back-room negotiation without the Plaintiffs' knowledge. As the Supreme Court stated, any subterfuge intended "merely to sell the property and evade" the right to acquire provisions is not allowed and the Plaintiffs may seek to void the Transaction.

3. Statute Applies to Any Offer

The Defendants' argument is contrary to the plain meaning and intent of the statute and its legislative history where the Defendants' interpretation of the definition of "offer" would lead to an absurd result and render the statute meaningless and defeat its purpose and be contrary to its legislative history and where the only reasonable interpretation of the definition of offer is to include any solicitation to any member of the general public.

a. Interpretation Must Not Lead to Absurd Result

The Plaintiffs' Motion must be granted and the Defendants' interpretation of the definition of "offer" must be rejected because such an interpretation would nullify the purpose of the statute and lead to an absurd result. Courts must avoid interpreting a statute in a manner that would lead to an absurd result. Sierra Club v. St. Johns River Water Mgmt., 816 So.2d 687 (Fla. 5th DCA 2002); Ferre v. Florida, 478 So.2d 1077, 1081-82 (Fla. 3d DCA 1985) (where strict adherence to the

definition of a term in a statute would lead to nullify the provisions of the statute, the "definition should not be employed").

Plaintiffs urge this Court to find that the statute logically requires the Defendants to provide notice of any offer made to *any* member of the general public. Conversely, Defendants want this Court to hold that the definition of "offer" in § 617.31 requires that the owner first make an open and notorious offer to sell the facility to the *entire* general public, including placing signs at the property and listing the property for sale before the Plaintiffs' right would be triggered. Such an interpretation would defeat the purpose of the statute, which is to ensure that residents have a right of first refusal to buy the facilities. If Defendants' position were adopted, it would lead to an absurd result that would permit any facility owner to sell facilities without notifying the residents simply by conducting secret and undisclosed negotiations with a purchaser. Further, if the Defendants' position was adopted, the requirement that the offer be open and notorious to the extent of requiring the property to be listed and advertised and to have a sign placed at the property would obviate the need to provide "notice" to the residents.

"A fundamental rule of statutory interpretation is that the courts should avoid a construction that would render part of a statute meaningless." United Specialties of America v. Department of Revenue, 786 So.2d 1210 (Fla. 5th DCA 2001). "Courts should avoid readings that would render part of a statute meaningless." Florida v. Goode, 830 So.2d 817, 824 (Fla. 2002); Golf Channel v. Jenkins, 752 So.2d 561, 565 (Fla. 2000).

In interpreting a statutory provision, a Court must look to the purpose and intent of a statute as well as the language used by the legislature to ensure that the literal language used conveys the intent. Florida v. Calderon, 951 So.2d 1031, 1032-33 (Fla. 2007) ("A literal interpretation of a statute need not be given when to do so would lead to an unreasonable conclusion"). A statute should be construed to give effect to the legislative intent, *even if the result seems contradictory* to rules of construction and the strict letter of the statute *since the spirit of the law must prevail over the letter of*

the law. Garner v. Ward, 251 So.2d 252 (Fla. 1971). Where a statute is susceptible of more than one interpretation, a Court must interpret the statute in the manner that most closely resembles the intent of the law. Id. Even where the statute's language appears clear and unambiguous, it should not be interpreted in such a manner as to produce absurd results and it is proper to depart from the letter of the law. Id.; DR Lakes, Inc. v. Brandsmart U.S.A., 819 So.2d 971, 974 (Fla. 4th DCA 2002).

Here, the *intent* of the statute is obviously to prevent a developer from selling recreation facilities to an unrelated entity without giving the residents the ability to purchase and control those facilities. In doing so, the homeowners would have the ability to operate and control their own facilities without being at the mercy of an unaffiliated third party. Allowing the Defendants to interpret the statute in a manner as to allow a sale through undisclosed negotiations would defeat the purpose and intent of the statute and render the statute meaningless. As such, this Court must interpret the statute to intend that any offer made to any member of the general public would trigger the Plaintiffs' Right to Acquire.

b. Legislative History

Plaintiffs' Motion must be granted where the legislative history and purpose of § 617.31 indicates that the legislature intended the provision to require a "right of first refusal" to "any offer" regardless of whether the offer was open and notorious. To ascertain the legislative intent, a court may consider the legislative history of the act. Sheffield-Briggs Steel Products, Inc. v. Ace Concrete Service Co., 63 So.2d 924, 926 (Fla. 1953). Where the intent of a statute is unclear, the legislative history of the statute is an important source to determine the legislative intent in enacting a statute. American Home Assurance Co. v. Plaza Materials Corp., 908 So.2d 360, 367-68 (Fla. 2005); Gelzer v. Diamond, 920 So.2d 1235 (Fla. 5th DCA 2006).

Notably, the legislative history is one of four possible factors to be looked at beyond the language of the statute in construing a statute. "In ascertaining the legislative intent, the courts will consider (1) the history of the Act, (2) the evil to be corrected, (3) the purpose of the enactment, and

(4) the law then in existence bearing on the same subject." State Bd. of Accountancy v. Webb, 51 So.2d 296, 300 (Fla. 1951); DeBolt v. Dept. of HRS, 427 So.2d 221, 224 (Fla. 1st DCA 1983). These four factors all weigh in favor of protecting the homeowners from abuses visited upon them as a result of mandatory homeowner associations which the homeowners do not yet control and to prevent the facilities used by the homeowners from being sold to an unaffiliated third party.

Florida Statute § 617.31 was enacted by Laws 95-274 § 60 and was signed into law on June 14, 1995 after legislative analysis and became effective on January 1, 1996.[2] In construing a statute, "it is appropriate to focus on legislative staff analyses and staff summaries as significantly important in determining legislative intent." Badaraco v. Suncoast Towers V Associates, 676 So.2d 502, 503 (Fla. 3d DCA 1996). Pursuant to the Florida Legislative Staff Analyses for Florida Laws 95-274, the purpose of the bill was stated as follows:

> This section creates s. 617.31, F.S. and **extends the right of first refusal** to members of the association to purchase properties which are leased to the community association for recreational or other purposes.

Laws 95-274, House Committee on Judiciary, Final Bill Analysis and Economic Impact Statement, p. 12 (H.B. 1687) (emphasis added).

> Any lease of recreational or other commonly used facilities which was entered into prior to transfer of control must provide that the facilities may not be offered for sale unless the association has the option to purchase the facilities on the same terms and conditions as ***any*** **offer for sale.**

Laws 95-274, Senate Committee on Judiciary, Staff Analysis and Economic Impact Statement, p. 6 (S.B. 1714) (emphasis added).

As such, it is inescapable that the purpose and intent of § 617.31 was to apply to all offers made to sell recreational facilities. In addition to the history of Laws 95-274, it is noted that the purpose of the Homeowner Association Act is stated as follows:

> The purposes of ss. 617.301-617.312 are to give statutory recognition to corporations that operate residential communities in this state, to provide procedures for operating homeowners' associations, and **to protect the rights of association members** without unduly impairing the ability of such associations to perform their functions.

Fla. Stat. 617.302 (emphasis added).

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[2] A copy of Laws 95-274 and incorporated legislative analyses are attached hereto for the Court's convenience.

Thus, the legislative history recognizes an intent to create a right of first refusal for any offer and the stated purpose of the legislative scheme is to protect the rights of the associations' members. It can also be inferred that the "evil" to be corrected was the abuse of the homeowners' ability to control their own facilities where such facilities are sold without their knowledge and the legislative history informs us that there was no prior law on the subject where such provisions were enacted for the "first time". House Committee on Judiciary, Final Bill Analysis and Economic Impact Statement, p. 2 (H.B. 1687).

c. Any Means All

The only reasonable interpretation of the definition of offer contained with § 617.31(3) is that it includes *any offer made to any member of the general public*. The statute states that an "offer" that will trigger the right is "any solicitation by the facility owner directed to the general public." Fla. Stat. § 617(3). "The term 'any,' when used in a statute is 'all-inclusive' and unambiguous." Florida v. Mark Marks P.A., 833 So.2d 249, 251 (Fla. 4th DCA 2002), *citing* Clark v. State, 790 So.2d 1030, 1032 (Fla. 2001). As noted in the Brate case, the term solicitation refers to any "earnest request; a seeking to obtain something from another." Brate at 1193. In that regard, "any solicitation" can only reasonably refer to *any request* made to *any member of the general public*.

The interpretation that the Defendants want this Court to adopt is one that suggests that the offer must be made to the general public as a whole -- which is an almost impossible standard to reach and disregards the intent of the statute and the Right to Acquire provision. A more reasonable interpretation of the statute is that the term "general public" only refers to a small class of the general public that would ever entertain purchasing a clubhouse facility and Surface is certainly part of that small set of parties within the general public that the statute is intended to apply to. "It is the duty of the trial court to attempt to reconcile inconsistencies in a contract in a manner that renders the contract meaningful." Critchlow v. Williamson, 450 So.2d 1153, 1156 (Fla. 4th DCA 1984) (a reasonable interpretation is preferred to an unreasonable one).

Defendants' argument that the statute only applies when the sale of a recreational facility lease is offered to all of the general public is ridiculous and completely guts the intent of the law because recreational facility leases are never offered for sale to all of the general public. The general public does not buy recreational facility leases. Only a small, highly specialized investment community would ever consider buying a recreational facility lease. Accordingly, the only logical interpretation of the statute is that it applies when an offer is made to those in the general public (unaffiliated with a seller) who are in the business of buying such leases.

It must also be remembered that the statute is incorporated into the contractual provisions of the Declaration and as noted above, the terms of the Declaration must be construed against LLP as the drafter of the contract. Goodwin, 939 So.2d at1102. However, to the extent that this Court finds that the term "general public" as used in the context of the Declaration and statute is ambiguous because it is susceptible to more than one reasonable interpretation, then such ambiguity would present a question of fact for the jury. Critchlow, at 1156; State Farm Fire & Cas. Co. v. De Londono, 511 So.2d 604, 605 (Fla. 3d DCA 1987) (holding that the term "regularly rented" in an insurance policy was not defined and there was a question of fact as to whether it applied to multiple rentals or a one-time long-term rental). As such, under any reasonable interpretation of the term "general public" this Court must enter summary judgment in the Plaintiffs' favor, but to the extent that this Court is unable to reconcile the parties' interpretations of the term, a question of fact is presented for the jury to decide unless this Court finds that the parties' intent is governed by their course of conduct as discussed below.

4. Defendants Believed the Right Applied to the Transaction

The Plaintiffs' Motion must be granted where the record is clear that the Defendants own actions indicated that they themselves believed that the Plaintiffs' Right to Acquire as provided for by the Declaration applied to the Transaction.

The cardinal rule of contract interpretation is to ascertain the intention of the parties. Sound City, Inc. v. Kessler, 316 So.2d 315 (Fla. 1st DCA 1975). A court should arrive at a contract interpretation consistent with reason, probability and the practical aspect of the transaction between the parties. Bay Management, Inc. v. Beau Monde, 366 So.2d 788 (Fla. 2d DCA 1978). The parties' interpretation of their own contract will be followed unless it is contrary to the law. Welsh v. Carroll, 378 So.2d 1255 (Fla. 3rd DCA 1979). Further, the parties' actions may be considered as indicating their interpretation of its meaning. Spindler v. Kushner, 284 So.2d 481 (Fla. 3d DCA 1973).

In construing a contract, the actions of the parties should be considered as a means of determining the interpretation that they themselves placed upon the contract. Lalow v. Codomo, 101 So.2d 390, 393 (Fla. 1958). "Where the terms of a written agreement are in any respect doubtful or uncertain, or if the contract contains no provisions on a given point, or if it fails to define with certainty the duties of the parties with respect to a particular matter or in a given emergency, and the parties to it have, by their own conduct, placed a construction upon it which is reasonable, such construction will be adopted by the court, upon the principle that it is the duty of the court to give effect to the intention of the parties where it is not wholly at variance with the correct legal interpretation of the terms of the contract." Blackhawk Heating & Plumbing Co. v. Data Lease Financial Corp., 302 So.2d 404, 407 (Fla. 1974).

The record reflects that the Defendants' actions indicate that they believed that the Right to Acquire applied to the Transaction. Most notably, the Defendants took the extraordinary step of executing the Sixth Amendment in an attempt to evade the effect of the statute. Had the Defendants believed that the Right to Acquire provision did not apply to the Transaction, there would not have been a need for the Sixth Amendment and all of the legal maneuvering related to it.

In addition, the Kings Ridge Defendants believed that it was necessary to include provisions within the Sale Agreement that called not only for the Sixth Amendment, but also for a title policy written by Lennar's title company that would "affirmatively insure that residents do not have the right or option to purchase the facility" after the execution of the Sixth Amendment. Lester Depo 183-186.

Specifically, Lester testified about the concern with the Right to Acquire provision and the need to "clarify" that it would not apply until after the community completion date as provided by the Sixth Amendment as follows:

> Q. And what was your intent in adding that language?
>
> A. I think that's consistent with what we were talking about before, where one of the options -- **by this time I had seen the declaration. I saw that the declaration appeared to give the club owners ... the right to acquire the underlying facility.** And so this was one of the things that we talked about that covered that issue, one of the possibilities.

Lester Depo 186.

Further, the Defendants had insisted that Lennar's attorneys provide a legal opinion stating that the Right to Acquire provision did not apply to the Transaction. However, Lennar's attorneys consistently refused to give such an opinion. Lennar's attorney, Martin Schwartz, testified that his working notes about the transaction created within a week of the closing on or about August 25, 2000, stated as follows:

> Owner's Purchase Right - Wants assurance in title commitment .. or legal opinion. **Title Company will not insure and we cannot give.**

August 30, 2007 Martin Schwartz Deposition ("Schwartz Depo) p. 38-45.

In the end, Lennar's attorneys instead issued a legal opinion which stated that the Transaction was "**subject to the purchase rights, if any .. in favor of Club Members.**" Schwartz Depo 94-95. The attorney handling the Transaction for the Lennar Defendants went on to testify that the opinion letter specifically intended to state that the Transaction was subject to any rights of the Club Members under the Right to Acquire provision as follows:

> Q. What are you referring to when you refer (in the opinion letter) to purchase rights, if any, of club members here?
>
> A. ... we're referring to the provision... in the Declaration of covenants.
>
> Q. ...**what you're saying here**, just to be clear, **is that the purchaser is taking this transaction, this property subject to any purchase rights that may exist under the Declaration?**
>
> A. **I think that's a fair characterization.**

Schwartz Depo 95-96.

Finally, as was noted in the Motion, the Lennar Defendants clearly believed that the Club Members had a right to acquire the Club prior to the Transaction when they repeatedly informed new Club Members that they would have an option or a right of first refusal to purchase the Club. (Affidavits of Campbell ¶ 2 and Floyd ¶ 2) and directing Lennar's representatives and sales associates to tell Club Members and prospective buyers that nothing had changed and that the residents had a right to purchase the Club (Greenberg Depo 196-212, Joint Depo Ex. 186).

III. CONCLUSION

Plaintiffs' Motion should be granted because the Brate decision does not apply to the matter before this Court since the Brate case involved a different statutory provision and did not involve a solicitation made by the land owner and was decided on different statutory grounds. Further, the Florida Supreme Court has determined that the Defendants' interpretation of Brate would violate the intent of the law and the Defendants themselves believed that the statute applied to the Transaction.

Respectfully submitted on **December 3, 2007**, by:

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Certificate of Service

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished to the parties listed below via U.S. Mail on **December 3, 2007**, by:

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