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May 15, 2014

Mr. Jay Carlson
Carlson and Soforth
P.O. Box 511232
Punta Gorda, FL 33951-1232

Re: Section 23 Property Owners' Association Declaration of Restrictions

Dear Mr. Carlson:

You retained the Farr Law Firm to review, analyze, and provide our opinion regarding the Declaration of Restrictions of Section 23 Property Owners' Association. This is a complex undertaking because it is a cumulative process. We summarize our review, research, and conclusions as follows.

The concern is which of the following Declarations of Restrictions are in effect:

- 11/16/92 Assignment of Rights to Enforce Declaration of Restrictions ("1992 Assignment)
- 2/26/97 Property Owner's Association Amendments to the Declaration of Restrictions—Single Family Residential -1997 ("1997 Restrictions")
- 10/28/98 Property Owner's Association Amendments to the Declaration of Restrictions—Multi-Family ("1998 Restrictions")
- 1/20/99 Section 23 Property Owner's Association, Inc., Amendment to the Declaration of Restrictions Single Family Residential ("1999 Restrictions")
- 1/27/04 Section 23 Property Owner's Association, Inc., Amendment to the Declaration of Restrictions OR Single Family Residential ("January 2004 Restrictions")
- 11/17/04 Section 23 Property Owner's Association, Inc., Amendment to the Declaration of Restrictions Single Family Residential ("November 2004 Restrictions")
- 12/08/08 Section 23 Property Owner's Association, Inc., Amendment to the Declaration of Restrictions Single Family Residential ("2008 Restrictions")

Historical Facts

Section 23 Property Owner's Association, Inc., ("Association") is a homeowner's association created in 1984 to govern the Deep Creek Community in Punta Gorda Isles, Florida. An organization by the name of Take Back Section 23 is contesting the validity of certain Association documents.

The original Declaration of Restrictions ("Declaration") governing the community were recorded in 1972 by the developer, Punta Gorda Isles, Inc., ("Developer") and subsequently amended several times before the Association was created. In the Declaration, the Developer purported to reserve the right to "hereafter, from time to time, amend, modify, add to or delete from any part or all of the foregoing restrictions without notice to or consent from the grantee on any lands owned by the Grantor" ("Reservation"). In the 1992 Assignment, the Developer purported to assign all of its rights and duties under the Declaration to the Association.

In 1997, the Association, through the Board of Directors with "the advice and consent of the property owners," purported to amend the portion of the Declaration recorded in the Official Records of Charlotte County, Florida, Book 393, pages 600 through 607 as subsequently amended ("Single-Family Restrictions"), thereby replacing the Single-Family Restrictions with the 1997 Restrictions. In 1998, in the same manner, the Association purported to amend the portion of the Declaration recorded in the Official Records of Charlotte County, Florida, Book 393, page 608 ("Multi-Family Restrictions"), thereby replacing the Multi-Family Restrictions with the 1998 Restrictions. The 1999 Restrictions, January 2004 Restrictions, November 2004 Restrictions, and 2008 Restrictions all purport to amend the 1997 Restrictions.

The Association's initial Articles of Incorporation were filed May 22, 1984 and amended partially in 1991 and 1992 ("Initial Articles"). On December 2, 1997, the Initial Articles were amended substantially and replaced with restated Articles of Incorporation ("1997 Articles"), which were then amended partially on November 29, 1999.

The Association is currently operating under the Amended and Restated Articles of Incorporation dated March 19, 2002 ("2002 Articles") and the Substantial Rewording of the Bylaws dated August 14, 1992 ("1992 Bylaws"). Although other forms of and amendments to the 1992 Bylaws have existed, a 2001 court order, recorded in Official Record Book 1947 page 2053, (the "2001 Order") held those amendments *void ab initio*. The Association is governed by Florida Statutes Chapter 720, enacted in 2000, and Florida Statutes Chapter 617.

Summary Conclusion

In order to determine the validity of the contested documents, it is first necessary to determine the validity of the Developer's Reservation. Under Florida law, the Reservation was likely valid as long as the reserved powers are exercised in a reasonable manner as not to destroy the general scheme or plan of development of the community.

The next step of the analysis is to determine whether the Developer validly assigned its rights under the Declaration, including its rights under the Reservation, to the Association in the 1992 Assignment. The 1992 Assignment was most likely a valid assignment of the Developer's rights and duties under the Declaration. If the 1992 Assignment was valid, the Association may exercise those rights, including the right to "amend, modify, add to or delete from any part or all of the [Declaration] without notice to or consent from the grantee on any lands owned by the [Developer]" as long as the rights under the Reservation are exercised in a reasonable manner as not to destroy the general scheme or plan of development.

Therefore, we submit that the Association validly amended the Declaration with the 1997 Restrictions, as long the amendments are deemed reasonable under Florida case law, discussed below. We also submit that the 1998 Restrictions are valid as long the amendments are deemed reasonable under Florida case law, discussed below.

The validity of the 1999 Restrictions, January 2004 Restrictions, November 2004 Restrictions, and 2008 Restrictions ("Subsequent Restrictions") depends on whether the amendment clause of the 1997 Restrictions is valid. If the amendment clause is valid, the Subsequent Restrictions were validly adopted if they were adopted "with the advice and consent of a majority of the property owners in good standing, present and voting or voting by absentee ballot at an annual meeting, or properly noticed special meeting called for the purpose."

We submit that the amendment clause in the 1997 Restrictions is valid. A review of meeting minutes indicates the proper vote was noticed and called for the 1999, January 2004, November 2004, and 2008 Restrictions, and therefore they are valid.

Detailed Analysis

I. 1997 Restrictions

a. Validity of the Developer's Reservation

In order to determine the validity of the contested documents, it is first necessary to determine the validity of the Developer's Reservation.

Under Florida law, the Reservation was likely valid as long as the reserved powers are exercised in a reasonable manner as not to destroy the general scheme or plan of development. A developer may include a clause in a declaration of restrictive covenants reserving to itself "the right to alter, amend, repeal or modify" the restrictive covenants "at any time in its sole discretion," as long as the power is "exercised in a reasonable manner as not to destroy the general scheme or plan of development." *Flamingo Ranch Estates, Inc. v. Sunshine Ranches Homeowners, Inc.*, 303 So. 2d 665, 666 (Fla. 4th DCA 1974). The reserved power must be exercised in a manner that does not destroy the general plan or scheme imposed on the community by the restrictive covenants. *Nelle v. Loch Haven Homeowners Assn., Inc.*, 413 So. 2d 28, 29 (Fla. 1982). The reasonableness restriction on the reserved power provides the mutual burden and benefit between grantor and grantees required to sustain the restrictive covenants. *Id.* Under the reasonableness requirement, the reserved power must be exercised so that the community "will substantially retain the character and restrictions contemplated by the grantor and each grantee at the conveyance." *Id.*

Amendments that can be shown to be originally within the contemplation of the grantor and grantees are a reasonable exercise of such a reserved amendment power. *Holiday Pines Property Owner's Assn., Inc., v. Wetherington,* 596 So. 2d 84, 87 (Fla. 4th DCA 1992). An example of an acceptable use of such power is the creation of a voluntary homeowners' association to enforce restrictive covenants when enforcement of the covenants was originally contemplated and therefore, the amendment was merely an administrative or procedural change in the enforcement mechanism. *Id.* The court in Holiday Pines held that it was also reasonable to allow the created homeowners' association to "make and amend regulations governing the use of property in the subdivision so long as such regulations were not in conflict with restrictions or limitations in the declarations of protective covenants." *Id.* at 86. Under certain circumstances, the establishment of an architectural review board is a reasonable use of reserved amendment power. *Id.*

Changing a voluntary homeowners' association to a mandatory homeowner's association with the power to assess liens, among other powers, is not a reasonable exercise of reserved amendment power. *Id.* Another example of an invalid amendment is one that "impermissibly changes the burdens between the parties." *Flescher v. Oak Run Assn.*, 111 So. 3d 929, 933 (Fla. 5th DCA 2013). In *Flescher*, the court invalidated an amendment that would have eliminated a developer's duty to use funds collected from homeowners for community services and would have allowed the developer to pocket the excess funds.

Florida case law contains additional examples of cases analyzing whether various reservations of powers to amend restrictive covenants were exercised reasonably. However, such a determination is fact intensive and made on a case-by-case basis. Therefore, an individual assessment of the reasonableness of each of the amendments to the Declaration under Florida case law is beyond the scope of this memorandum.

b. Validity of the 1992 Assignment

The next step is to determine whether the Developer validly assigned its rights under the Declaration, including its rights under the Reservation, to the Association in the 1992 Assignment. The 1992 Assignment was most likely a valid assignment of the Developer's rights and duties in the Declaration under Florida law.

Contract rights are generally assignable unless the rights involve "obligations of a personal nature, or there is some public policy against the assignment, or an assignment is specifically prohibited by the contract." *Price v. RLI Ins. Co.*, 914 So. 2d 1010, 1013 (Fla. 5th DCA 2005). In an assignment, the assignee steps into the shoes of the assignor and receives "all the interests and rights of the assignor in and to the thing assigned." *Prescription Partners, LLC v. State*, 109 So. 3d 1218, 1222 (Fla. 1st DCA 2013).

Unless otherwise provided in the restrictive covenants at issue, a developer may assign its rights under restrictive covenants to a homeowners' association. *Nieto v. Mobile Gardens Ass'n of Englewood, Inc.*, 2013 Fla. App. LEXIS 5903 (Fla. 2d DCA Apr. 12, 2013) (stating that a homeowners' association has standing to sue to enforce restrictive covenants if it is an assignee of the developer's rights to enforce the restrictive covenants); see *Palm Point Property Owners' Ass'n v. Pisarski*, 626 So. 2d 195, 196 (Fla. 1993) (stating that the property owners' association would have had standing to enforce the restrictive covenants if "the developer had expressly assigned its right of enforcement to [the association] in the original subdivision documents"); *Isle of Catalina Homeowners Ass'n v. Pardee*, 739 So. 2d 664, 665 (Fla. 5th DCA 1999) (finding that a homeowners' association did not succeed to the developer's power to amend restrictive covenants because, among other reasons, the developer had assigned its reserved rights to another person); *Ritchie v. Carriage Oaks Homeowners Ass'n*, 592 So. 2d 361, 362 (Fla. 5th DCA 1992) (holding that a homeowners' association did not succeed to a developer's rights under a declaration of restrictive covenants because there was no evidence that the developer transferred its rights "under the Declaration or by separate instrument," thereby implying that such a transfer would have been valid).

c. Analysis of the 1997 Restrictions' Validity

Therefore, the Association likely has the power to exercise the Developer's rights under the Declaration, including the right to "amend, modify, add to or delete from any part or all of the [Declaration] without notice to or consent from the grantee on any lands owned by the [Developer]," as long as the rights under the Reservation are exercised in a reasonable manner as not to destroy the general scheme or plan of development. The Association could most likely amend the Declaration with the 1997 Restrictions without the consent of the property owners, as long the amendments are deemed reasonable under Florida case law.

As stated above, a determination of reasonableness of each of the provisions of the 1997 Restrictions is beyond the scope of this memorandum. However, in any such analysis it should be noted that the Declaration, on page 597, contemplated the formation of a mandatory homeowners' association to maintain common property and assume Developer's rights under the Declaration. Under the reasonableness analysis described above, this should weight in favor of concluding that certain amendments to the Declaration were within the contemplation of the grantor and grantees and therefore are reasonable.

If the Developer's Reservation or the 1992 Assignment are held to be invalid, then the 1997 Restrictions would have to be approved by "the affirmative vote of two-thirds of the voting interests of the association" in order to be valid. Fla. Stat. § 617.306(1)(b) (1997); § 720.306(1)(b) (2000). For a discussion of this statutory law, see the section on Subsequent Restrictions below.

The 1997 Restrictions are not known to be questioned. The validity of the 1997 Restrictions has important implications for the validity of the 1999 Restrictions, January 2004 Restrictions, November 2004 Restrictions, and 2008 Restrictions.

II. The 1998 Restrictions

The 1997 Restrictions contain an amendment provision stating that "this Declaration of Restrictions [may be amended] with the advice and consent of a majority of the property owners in good standing, present and voting or voting by absentee ballot at an annual meeting, or properly noticed special meeting called for the purpose." If valid, the amendment provision likely does not apply to the process required for the 1998 Restrictions because the 1997 Restrictions purported to amend the Single-Family Restrictions and the 1998 Restrictions purport to amend the Multi-Family Restrictions. In such a case, the 1998 Restrictions would be subject to the same analysis as the 1997 Restrictions discussed above.

However, if the amendment provision was held to apply to the Multi-Family Restrictions as well as the Single-Family Restrictions, then the 1998 Restrictions would be required to be amended "with the advice and consent of a majority of the property owners in good standing, present and voting or voting by absentee ballot at an annual meeting, or properly noticed special meeting called for the purpose."

Lastly, if the Developer's Reservation or the 1992 Assignment are held to be invalid, and the 1997 Restrictions are also held to be invalid or inapplicable to the 1998 Restrictions, then the 1998 Restrictions would have to be approved by "the affirmative vote of two-thirds of the voting interests of the association" in order to be valid. Fla. Stat. § 617.306(1)(b) (1997); § 720.306(1)(b) (2000). For a discussion of this statutory law, see the section on Subsequent Restrictions below.

III. Validity of the Proxy Provisions in the 1997 Restrictions and 1998 Restrictions

The 1997 Restrictions and the 1998 Restrictions contain the following provision: "Voting by proxy is prohibited." The 2001 Order held a similar provision invalid in the Association's 1999 Amended and Restated Articles due to the following provision in the original 1984 Articles regarding the requirements for amending the 1984 Articles: "No amendment shall make any changes in . . . the voting rights of members without approval in writing by all members."

The applicable law at the time of the restrictions provided that "A member who is entitled to vote may vote in person or, unless the articles of incorporation or the bylaws otherwise provide, may vote by proxy executed in writing by the member or by his or her duly authorized attorney in fact." Fla. Stat. § 617.0721(2) (1997). Therefore, the provisions prohibition proxy voting in the 1997 Restrictions and the 1998 Restrictions are invalid and of no effect because members entitled to vote could do so "unless the articles of incorporation or the bylaws otherwise provide," and here only the restrictions provided otherwise. *Id.*

However, the provision invalidating proxy voting in the 1997 Restrictions and the 1998 Restrictions is most likely severable from the other restrictions contained therein, which are subject to the reasonableness analysis described above to determine their individual validity. Both the 1997 Restrictions and the 1998 Restrictions contain the following severability clause: "Invalidity of any of these covenants, conditions, and restrictions by a court of competent jurisdiction shall in no way affect any of the other covenants, conditions, and restrictions which shall remain in full force and effect." Declarations of restrictions are construed according to contract principles and invalid provisions are severable if the declaration at issue contains a severability clause. *Martin's Landing Found., Inc. v. Landing Lake Assocs.*, 707 F.2d 1329, 1333 (11th Cir. 1983) (stating that although a provision was invalid, the rest of the declaration remained enforceable because "the original Declaration contains a severability clause"); *Whitley v. Royal Trails Prop. Owners' Ass'n*, 910 So. 2d 381, 383 (Fla. 5th DCA 2005) (interpreting a declaration of restrictions according to contract principles). Therefore, even if invalid, the proxy provisions are severable and do not affect the validity of the remaining provisions.

IV. The Subsequent Restrictions

The 1999 Restrictions, January 2004 Restrictions, November 2004 Restrictions, and 2008 Restrictions ("Subsequent Restrictions") all purport to amend the 1997 Restrictions. None of the Subsequent Restrictions describe or change the process required to amend the Declaration. Of the Association's governing documents, only the Declaration, the 1997 Restrictions, and the 1998 Restrictions purport to set forth a procedure for amending the Declaration. The 1997 Restrictions and 1998 Restrictions state that the Association may amend "this Declaration of Restrictions with the advice and consent of a majority of the property owners in good standing, present and voting or voting by absentee ballot at an annual meeting, or properly noticed special meeting called for the purpose." The Subsequent Restrictions each state that the respective amendment was approved by the Association's membership but do not state how or by what percentage of the membership. We were provided the meeting minutes for each applicable year.

Conclusion—The 1997 Restrictions are Valid and All Subsequent Restrictions Properly Adopted

The validity of the Subsequent Restrictions depends in part on whether the amendment clause of the 1997 Restrictions is valid under the analysis described above. We submit the amendment clause is valid, and the Subsequent Restrictions were validly adopted if they were adopted "with the advice and consent of a majority of the property owners in good standing, present and voting or voting by absentee ballot at an annual meeting, or properly noticed special meeting called for the purpose." We reviewed the annual meeting minutes that demonstrated a vote of the membership on each amendment.

We trust that this is fully responsive to your inquiry. If you require any additional review or analysis, please advise.

Regards,

Darol H.M. Carr
For the Firm

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