THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

APPEAL NO.: 2D21-3823
LOWER CASE NO.: 2017-CA-1446

AVATAR PROPERTIES, INC.,

Appellant

v.

NORMAL GUNDEL, ET AL.,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT, IN AND FOR POLK COUNTY, FLORIDA

BRIEF OF *AMICUS CURIAE* COMMUNITY ASSOCIATIONS INSTITUTE ON BEHALF OF APPELLEES

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STATEMENT OF INTEREST [1]

Founded in 1973, amici COMMUNITY ASSOCIATIONS INSTITUTE (hereinafter, "CAI"), is an international organization dedicated to providing information, education, resources and advocacy for community association leaders, members, and professionals with the intent of promoting successful communities through effective, responsible governance and management. CAI is comprised of over 43,000 members, and includes homeowners, board members, association managers, community management firms, developers and other professionals who provide services to community associations. CAI is the largest organization of its kind.

The 2020-2021 Statistical Review performed by the Foundation for Community Association Research revealed there are 74.1 million

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[1] For reference purposes:

"Master Declaration"	=	the Amended and Restated Master Declaration for Solivita
"Club Plan"	=	the Amended and Restated Solivita Club Plan
"Association"	=	Solivita Community Association, Inc.
"Avatar"	=	Appellant, Avatar Properties, Inc.
"HOA Act" or "Act"	=	Chapter 720, Florida Statutes

homeowners who live in more than 355,000 community associations in the United States. Florida community associations are largely organized as not-for-profit corporations led by volunteer homeowners elected by the members to serve on the board of directors once the developer relinquishes control.[2]

Community associations share basic characteristics:

(1) Membership in the association is a mandatory condition of ownership of property;

(2) Legal documents recorded against the property bind owners to land-use restrictions and requirements administered by the association;

(3) Property owners pay assessments to fund association operations/obligations; and

(4) A member's failure to pay assessments may result in recordation of a lien against the property.

[2] All homeowners' associations created after October 1, 1995 in Florida must be incorporated as a Florida corporation. §720.303(1), Florida Statutes.

In 2021, eighty-two percent (82%) of new single-family houses sold in the United States were sold within homeowners' association communities.[3]

More Florida homeowners are connected to a community association than those who are not. Recent, accurate, and reliable statistics show that 67.3% of Florida homeowners are linked to community associations, with this figure eclipsing the percentages seen in other states.[4] Florida has the second highest number of community associations. *Id*.

CAI has a substantial interest in advancing community association governance and desires to submit this brief to ensure:

(1) Homeowner's associations operate for the best interests of their members;

(2) Rights and protections, secured by legislative enactments for the benefit of homeowners, are preserved through court decisions; and

(3) That the legislature's intent is not subverted by developers or other service providers who use homeowners' association liens as a conduit to collect unlimited profits in perpetuity.

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[3] 2021 American Housing Survey U.S. Census Bureau

[4] https://ipropertymanagement.com/research/hoa-statistics

SUMMARY OF ARGUMENT

In this case, the Master Declaration and the Club Plan create a governing structure that circumvents the Homeowners' Associations Act. This structure permits a private developer (or other entity) to charge homeowners a separate assessment, for no other purpose other than to reap a profit. This separate assessment (extra charge) is in addition to assessments paid by homeowners for the ownership expenses of management, maintenance, and operation of property and improvements bargained for with the purchase of a residence. In this case, the governing documents bestow upon a private for-profit entity an absolutist control of property and facilities, but at the same time, lack corresponding assurances to homeowners of what property and/or facilities will remain available to them in the future. (R. 21944-46). (Club Plan §§ 5.1-5.4, 6.3).

The Master Declaration excludes the Club Property and improvements from common area ownership rights of the homeowners but yet obligates the members to inure to the benefit to the Club Owner a subsidy to cover the Club Owner's debt service and depreciation for the Club Owner's property, over and above the costs for operating and maintaining the club, and the profits for managing the club, which are

embedded within the required Club Membership Fee. R21944. (Club Plan §4.5). This burden is a never-ending obligation that lasts forever. *Id*.

The Club is an "integral part of the Solivita community". (R. 21944). (Club Plan §4.7). The Club Plan constitutes a covenant running with all of the land comprising Solivita. (Club Plan, Recitals). This covenant binds each present and future property owner. The Club is located within Solivita. R21944. (Club Plan §4.6). However, a covenant that lasts in perpetuity, without control to those bound in servitude is against public policy and is contrary to American common law.

A residential developer's attempt to burden home purchasers with payment of a never-ending profit, enforceable via lien and foreclosure, through covenants and restrictions that run with the land cannot stand. Developers are not entitled to unfettered power to craft development schemes that strip home buyers of rights established by Florida law. More fundamentally, the governing documents compels home buyers, attracted to a housing product replete with amenities, to become indebted to pay profits to a developer in perpetuity, in addition to all expenses and carrying costs, when it is those amenities and services that commanded a premium sales price for the housing. Florida law prohibits a private developer from

extracting endless profits from home buyers through assessments for use of the same amenities aggregated with the housing.

STANDARD OF REVIEW

The standard of review for an order entered by a Trial Court on a motion for summary judgment is *de novo*. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126 (Fla. 2000).

The review of a Trial Court's interpretation of a declaration is *de novo*. *Lenzi v. Regency Tower Ass'n, Inc.,* 250 So. 3d 103 (Fla. 4th DCA 2018); *IconBrickell Condo. No. Three Ass'n, Inc. v. New Media Consulting, LLC*, 310 So. 3d 477 (Fla. 3d DCA 2020).

The Trial Court's interpretation of a statute is reviewed *de novo*. *Ham v. Portfolio Recovery Assocs., LLC*, 308 So. 3d 942 (Fla. 2020).

ARGUMENT

In *Palm Bay Towers Corp. v. Brooks,* 466 So. 2d 1071, 1074 (Fla. 3d DCA 1984) the Court stressed the importance of invalidating contractual provisions that run afoul of legislative safeguards bestowed upon homeowners as consumers. Contracts that cannot be performed without violating Florida law are routinely invalidated as illegal and void. *Gables Insurance Recovery, Inc. v. Citizens Property Insurance Corporation,* 261 So. 3d 613 (Fla. 3d DCA 2018) *citing, Local No. 234 of United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus. of U.S. & Canada v. Henley & Beckwith, Inc.,* 66 So. 2d 818, 821 (Fla. 1953).

I: The Trial Court correctly determined the Club Membership Fee constitutes an assessment in contravention of section 720.308, Florida Statutes.

Avatar recorded the governing documents, including the Master Declaration and Club Plan, against the residential parcels, binding future property owners and advancing its Development Plan. [5] The Club Plan is

[5] *See*, Order Granting Plaintiff's Motion for Reconsideration and/or Clarification Regarding Ruling on Affirmative Defenses 7, 8, and 9 dated July 15, 2021, and Striking Same. (R.26393-95).

incorporated in to the Master Declaration, both by its own terms and as Exhibit “5” thereto. (R. 21957-58). (Club Plan §27)

It is a long-standing principle in Florida that statutory language must be interpreted using its plain and ordinary meaning. *Barnett v. Dept. of Fin. Servs.*, 303 So. 3d 508, 513 (Fla. 2020). Likewise, “where a contract is clear and unambiguous, it must be enforced pursuant to its plain language.” *Hahamovitch v. Hahamovitch,* 174 So. 3d 983 (Fla. 2015). The Master Declaration and Club Plan constitute contracts; interpretation thereof is a matter of law. *Argoff v. Rainberry Bay Homes Ass'n*, 828 So. 2d 399, 401 (Fla. 4th DCA 2002); *Royal Oak Landing Homeowner's Ass'n v. Pelletier*, 620 So. 2d 786, 788 (Fla. 4th DCA 1993).

This case is simple. There is no need to consider anything beyond the plain language of the statutes and governing documents to prove Club Dues are “assessments”. Florida’s Homeowner’s Association Act defines “assessment” or “amenity fee” as the:

> [S]um or sums of money payable to the association, to the developer or other owner of common areas, or to recreational facilities and other properties serving the parcels by the owners of one or more parcels as authorized in the governing documents, which if not paid by the owner of a parcel, can result in a lien against the parcel.

Section 720.301(1), Fla. Stat.

Club Dues fall squarely within this definition.

Club Dues are the monetary charges payable by parcel owners to the owner of the recreational facilities serving the parcels. (R. 21940-43). (Club Plan §3). Club Dues constitute a "continuing first lien" encumbering each home and all personal property thereon. (R. 21950). (Club Plan §11). Section 720.308(1)(a), Fla. Stat. clearly restricts assessments to the "member's proportional share of expenses." The limitations in section 720.308(1)(a), Fla. Stat. are not exclusive to assessments levied by homeowners' associations. Rather, the statute regulates assessments derived from either an "annual budget" or "special assessment" authorized by the governing documents. The Club Plan mandates and Avatar's brief confirms the Club Owner adopts an annual budget to establish Club Dues. (R. 21950). (Club Plan §10.2). Club Dues, originating from the Club's annual budget, payable to the owner of the recreational facilities cannot be considered anything other than "assessments" as defined §720.308(1).

Both the Master Declaration and the Club Plan allow Avatar to saddle the Association with the obligation to enforce the Club Owner's lien to collect Club Dues. Avatar asserts the lien for Club Dues is not reliant upon the HOA Act and yet the Club Plan indicates its lien relates back to the original recording date similar to §720.3085(1)(a), Fla. Stat., inexplicably

includes a late fee that mirrors §720.3085(2)(a), Fla. Stat., and includes language requiring a homeowner "to pay a reasonable rental" if they remain in possession after foreclosure, corresponding to §720.3085(1)(e), Fla. Stat. (R. 21950). (Club Plan §§ 11.1, 11.5). Avatar likewise fails to account for Association enforcement of the lien. All conditions precedent and procedural safeguards must be satisfied, including the amounts sought to be collected. Failure to comply with the Act, including the apportionment of expenses, invalidates the lien[6].

Moreover, the Club Plan, as a governing document, conflicts with §720.308, Fla. Stat. since it fails to describe each owner's proportionate share with any definitiveness. The Club Owner has the perpetual, unilateral right to pick and choose what each owner will pay, despite the Club Membership Fee Schedule. (R. 21947). (Club Plan §7.4).

[6] *See*, *generally*, the contents of the lien must comply with §720.3085(1)(a); the lien cannot secure late fees in excess of that permitted by §720.3085(3)(a); the lien cannot secure amounts that exceed the limits posed by §720.3085(2)(c). *Catalina West Homeowners Ass'n, Inc. v. Federal National Mortgage Ass'n,* 188 So. 3d 76 (Fla. 3d DCA 2016); *United States v. Forest Hill Gardens East Condominium Ass'n, Inc*. 990 F.Supp.2d 1344 (S.D. Fla. 2014).

Avatar criticizes Appellant's failure to cite authority for the proposition the term "expenses" excludes profit. This argument is beyond the pale. Club Expenses are unmistakably defined in the Club Plan, in part, as:

> "Club Expenses" shall mean **all costs (as such term is used in the broadest sense)** of owning (**including Club Owner's debt service and depreciation**), operating, managing, maintaining, insuring the Club, whether **direct or indirect** **including, but not limited to** trash collection, utility charges, maintenance, legal fees of Club Owner relative to the Club, cost of supervision, management fees, **reserves**, repairs, replacement, refurbishments, payroll and payroll costs, insurance, working capital, ad valorem or other taxes (excluding income taxes of Club Owner), **assessments, costs, expenses, levies and charges of any nature** which may be levied, imposed or assessed against, or in connection with, the Club. **By way of example, and not as a limitation**, the following expenses shall be included within Club Expenses: liability, casualty and business interruption insurance (with such deductibles as Club Owner deems appropriate); real property taxes, personal property taxes and taxing and community development district assessments; roof repair and replacement; and all other costs associated with changing or enhancing Club Facilities after initial construction. …

Club Plan §3 (emphases supplied). (R. 21940-43).

It is hard to imagine a more complete, detailed and definitive explanation of Club Expenses.

II: The Final Judgment espouses the intent and purpose of the Homeowners' Association Act.

While planned developments, planned communities and shared-facility housing projects proliferated throughout Florida during the 1970's and 1980's, homeowners' associations were not recognized in Florida law until 1992 after a series of consumer complaints prompted sweeping reforms to The Florida Condominium Act (Chapter 718). Homeowners pleaded for laws requiring, *inter alia*, adequate disclosures, timelines for transition of association control from developers to homeowners, the right to inspect financial documents, regulation of assessments, budgets, financial reporting and limits on developer guarantees/deficit funding to The Residential Planned Development Study Commission in 1984[7]. It became increasingly clear that tactics utilized by condominium developers binding associations to long-term lucrative management contracts and oppressive land or recreational leases were finding their way into single-family home developments. Courts offered little, if any, protection against sweetheart deals created by developers to fatten their or affiliated private businesses' coffers in the absence of legislation reigning in these maneuvers.[8]

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[7] Final Report by The Residential Planned Development Study Commission (Ch. 84-368, Laws of Florida).

[8] See generally, *Fountainview Association, Inc. v. Bell*, 203 So. 2d 657 (Fla. 3d DCA 1967) *aff'd.,* 214 So. 2d 609 (Fla. 1968); *Wechsler v. Goldman*, 214 So. 2d 741 (Fla. 4th DCA 1968); *Point East Management*

Those initial laws, found in the Florida Not-For-Profit Corporation Act, were limited in scope and did not apply to associations under developer control. §617.302, Fla. Stat. (1992). In order to avoid history repeating itself, the Florida legislature recognized prospective homeowners needed advance notice of intended charges for use of recreational or other facilities before entering into a purchase and sale agreement.[9] §617.306, Fla. Stat. (1992). A few years later, §617.302(1) explained an objective of enacting laws governing homeowners' associations was "to protect the rights of ***association members*** without unduly impairing the ability of such associations to perform their functions." §617.302(1), Fla. Stat. (1995) [Emphasis added.] The 1995 legislation imposed a "fair and reasonable" standard for any agreements, grants or reservations made prior to transition from developer control; limited "assessments and charges" to the member's disclosed proportionate share; required developers or owners of recreational facilities to account for revenue generated from

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Corp. v. Point East Condominium Corp., 258 So. 2d 322 (Fla. 3d DCA 1972), *aff'd in part*, 282 So. 2d 628 (Fla. 1973), *cert. denied*, 415 U.S. 921 (1974); *Fleeman v. Case*, 342 So. 2d 815 (Fla. 1976).

[9] Ch. 92-49, Laws of Florida

maintenance/amenity fees and furnish owners with an itemization of expenditures made from said fees.[10]

Disputes concerning home buyers' rights with respect to the development of homeowners' associations communities and governance thereof continued. On June 27, 2006, Governor Jeb Bush's veto of House Bill 391 directed the Department of Business and Professional Regulation (DBPR) to, among other things, recommend legislative changes affording members of mandatory homeowners' associations consumer protections enjoyed by condominium owners.[11] The Department described further desirable safeguards, prompting immediate action on the part of the legislature. Efforts to achieve parity have not subsided.

a. Avatar's attempt to purposely evade consumer protection measures designed to protect the rights of home buyers and homeowners runs afoul of the public interest.

Avatar deliberately attempts to overcome blatant illegality by stating the purchase of home and membership in the club is a 'single product'. (R. 21944). (Club Plan §4.7). Committing purchasers to burdensome

[10] Chapter 95-274, Laws of Florida

[11] DBPR Report and Recommendations, House Bill 391 Study.

obligations to a for-profit enterprise for everlasting services is an iniquitous business practice that harms consumers.

By advertising and selling the recreational facilities as an essential feature of the housing through a governing document entitled Club Plan, Avatar purposely attempts to:

(1) Avoid the requirement for the obligation to be 'fair and reasonable' as required by § 720.309(1), Fla. Stat.;

(2) Obviate the association's right of first refusal conferred by § 720.31(1), Fla. Stat.;

(3) Permit the Club Owner to glean profits without any financial commitments, creating an infinite income stream in perpetuity[12] further burdening homeowners contrary to the intent of §720.31(5), Fla. Stat.;

(4) Avoid disclosure obligations set forth in §720.3086, Fla. Stat.;

[12] The vast majority of homeowners will pay rising Club Membership Fees through 2031. Club Membership Fees increase on a yearly basis for homeowners within Solivita Phases IH, F5-Unit 1, and 7G-Unit 1 through 2042 and continue in perpetuity thereafter.

(5) Reserve the unilateral right to amend the governing documents in violation of §720.3075(1), Fla. Stat. (R. 21959). (Club Plan §30);

(6) Burden homeowners by augmenting Club Expenses for Adjacent Facilities contrary to the intent of §720.31(6), Fla. Stat. (R. 21952). (Club Plan §12);

(7) Utilize capital contribution fees without restriction as mandated by §§720.308(4)(b) and (6) (R. 21949). (Club Plan §9);

(8) Allow the Club Owner to collect specific profit margins without the corresponding obligation to offer specific services or amenities (Club Plan §§ 5.2-5.4); ***unless***

(9) Homeowners pay more than three times the appraised value of the Club through the issuance of bonds and payments to Community Development Districts[13].

Laws were enacted, in part, to prevent developers from taking advantage of homebuyers. In *Wechsler v. Goldman*, 214 So. 2d 741 (Fla 3d DCA 1968) the Court lamented "it is not without some reluctance that we hold the plaintiff condominium associations do not have a cause for

[13] *Gundel v. AV Homes, Inc.*, 264 So. 3d 304 (Fla. 2d DCA 2019) at 307.

relief against the claimed exorbitant lease rental obligation imposed on them." … "What occurred in this instance and in the *Fountainview*[14] case may indicate a need for legislative action to amend the Condominium Act (Ch. 711, Fla. Stat., F.S.A.) to prevent unfair dealing by promoters of condominium associations." *Id.* at 744. The Florida Legislature heeded the call, first to benefit condominium associations and later enacting similar protections for homeowners' associations.

b. Housing development will not suffer as a result of adherence to the law

The arguments raised by the Florida Home Builders Association in its *amicus* brief claiming compliance with the Act will "negatively impact and increase the upfront costs of development" or maintenance of recreational amenities by homeowners' associations, rather than a for-profit entity, will lead to "a decrease in home values and homeowners' satisfaction" are disingenuous. Zogby Analytics conducted a 2022 nationwide survey for the Foundation of Community Association Research and found that 89% of

[14] *Fountainview Association, Inc., No. 4 v. Bell*, 203 So. 2d 657 (Fla. 3d DCA 1967), *cert. discharged, Fountainview Association, Inc. (No. 4) v. Bell*, 214 So. 2d 609 (Fla. 1968).

residents rated their experience in a community association as very good, good or neutral; 87% said the members elected to serve on the board of directors of the community association absolutely or for the most part strive to serve the best interests of the community as a whole[15].

Florida single-family home sales increased every year since 2018 and rose close to thirteen (13%) percent in 2021.[16] More than twice the number of single-family homes completed in 2021 were subject to governance by a homeowners' association.[17] This reflects builders prefer developing homes in planned communities. Builders offer amenities to home buyers in homeowners' association communities to enhance sales prices and Avatar defrayed some of the cost of building infrastructure, landscaping, roads and amenities in Solivita through creation of Community Development Districts. (Master Declaration §§12-13). Single-family home prices in Florida went up by 17.7% as of October, 2021 compared to the

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[15] *Community Associations Remain Preferred Places to Call Home,* 2022 Homeowner Satisfaction Survey, Foundation for Community Association Research

[16] Florida Residential Market Sales Activity reports produced by Florida REALTORS© with data from Florida multiple listing services.

[17] 2021 American Housing Survey U.S. Census Bureau

previous year.[18] Florida's population grew by 348,338 residents between 2020 and 2021, with all net growth due to migration according to the Florida Office of Economic and Demographic Research (EDR).[19] EDR expects an average of 294,756 net new residents per year between 2022 and 2027, resulting in significant housing demands.[20]

Club Membership Fees are merely one source of Avatar's profit from the Club. Avatar is entitled to 100% of the revenue from rent, fees or payments made by third parties for use of the Club Facilities, without offset or reduction of Club Dues payable by homeowners. R21946. (Club Plan §§5.5, 6.2). Since Club Dues include all "expenses associated with the Club", rent payments, fees and the like constitute pure profit. (R. 21948). (Club Plan §8.1). The same is true with respect to revenue from vending machines, video archive machines, special events and entertainment. (R. 21948-49). (Club Plan §8.9).

[18] Report issued by Florida REALTORS™.

[19] *Econographic News*, Volume 1, 2022; The report reveals natural increase (the excess of births over deaths) was negative.

[20] *Executive Summary*, Demographic Estimating Conference, Office of Economic and Demographic Research

A statute designed to protect the public as well as the individual cannot be waived by the individual. *S.J. Business Enterprises, Inc. v. Colorall Technologies, Inc.,* 755 So. 2d 769 (Fla. 4th DCA 2000). Florida Courts routinely held several provisions of the Florida Condominium Act were inalienable as consumer protection measures. [e.g. *Asbury Arms Development Corp. v. Florida Dept. of Business Regulations*, 456 So. 2d 1291 (Fla. 2d DCA 1984) (waiver of 15-day voidability period void against public policy; right designed to protect the public from high pressure condominium sales); *Dwork v, Executive Estates of Boynton Beach HOA, Inc.,* 219 So. 3d 858 (Fla. 4th DCA 2017) (invalidating claim of lien filed by homeowners' association when notice furnished thirteen, rather than fourteen days prior to hearing); *Coastal Caisson Drill Co., Inc. v. American Cas. Co. of Reading, PA,* 523 So. 2d 791 (Fla. 2d DCA 1988) (right to contract is limited by public policy, where agreement has a tendency to be injurious to the public, it is void against public policy).

CONCLUSION

The arguments raised herein are critical not only to this case, but to homeowners' associations throughout and beyond Florida. For the reasons set forth herein CAI, as *Amicus* in support of Appellees, requests this Court to uphold the Final Judgment.

Respectfully submitted,

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I HEREBY CERTIFY that a true copy of the foregoing *Appellants' Initial Brief* has been filed electronically with the Clerk of Court and to all parties this 5th day of October, 2022 to:

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I HEREBY CERTIFY that the foregoing complies with the font requirements of Rule 9.045(e) and Rule 9.210(a)(2), Florida Rules of Appellate Procedure. It was prepared using Arial 14-point font and that this computer-generated amicus curiae brief contains 4,697 words.

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