IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,981

SUNSHINE VISTAS HOMEOWNERS' ASSOCIATION, a Florida not-for-profit corporation,

Petitioner/Appellant,

vs.

LOUIS CARUANA, et al.,

Respondents/Appellees.
_____/

RESPONDENTS' BRIEF ON THE MERITS

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OVERVIEW

This case involves a question of statutory construction. The statute involved is Florida's Marketable Record Title Act. The provision to be construed is section 712.03 concerning exceptions to marketability. The question is whether use restrictions contained in a 1925 subdivision plat were extinguished by the Act. The trial court held that the plat restrictions were extinguished because none of the muniments of title[1] proceeding from the root of title contained a sufficiently specific reference to the recorded plat to survive the effect of Florida's Marketable Record Title Act. The Third District Court of Appeal agreed with the trial court's ruling. The result reached below was required by the plain terms, the expressed intent and the history of the Act.

JURISDICTION

Petitioner seeks to invoke this Court's discretionary jurisdiction pursuant to Rule 9.030(a)(2)(A)(v), Florida Rules of Appellate Procedure. The Third District Court of Appeal certified the following question to be one of great public importance:

> Whether the Florida Marketable Record Title Act has the effect of extinguishing a plat restriction which was created prior to the root of title where the muniments of title in the chain of title describe the property by its legal description which makes reference to the plat and the muniments of title state that the conveyance is given subject to covenants and restrictions of record.

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[1] A "muniment of title" is "any documentary evidence upon which title is based. . . . [Muniments] do more than merely `affect' title; they must carry title and be a vital link in the chain of title." Cunningham v. Haley, 501 So. 2d 649, 652 (Fla. 5th DCA 1986). Deeds are muniments of title. Id.

Sunshine Vistas Homeowners' Ass'n v. Caruana, 597 So. 2d 809, 811 (Fla. 3d DCA 1992).

Despite the Third District's certification of the above question, petitioner has failed to demonstrate the nature of the question's importance.[2] See Sunshine Vistas Homeowners' Ass'n v. Caruana, 597 So. 2d at 811 (Schwartz, C.J., dissenting) ("It will simply not do to say that an issue is of `great public importance' just because, for reasons which may be worthy but are not reflected in the constitution, it is thought that the Supreme Court should hear the case. The end does not justify the means even in questions of appellate review."). "The situations contemplated by [certification] are those in which the public may have an intense concern, although such situations may arise out of private litigation." 2 Fla. Jur. 2d Appellate Review § 480 (1978).

The Third District's decision simply applies the statutory requirements of section 712.03, Fla. Stat., to the facts of this case. By addressing a question of first impression, the decision fosters certainty in the law. Since Florida District Courts of Appeal are the constitutionally designated courts of last resort, the Third District's decision is controlling precedent over all lower courts throughout the state. See Pardo v. State, 17 F.L.W. S194 (Fla. March 26, 1992) (in the absence of interdistrict conflict, district court decisions bind all Florida trial courts).

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[2] Petitioner has not specifically addressed the jurisdictional issue in its brief to this Court.

Moreover, the decision clarifies the rights of real property owners.

There is absolutely no authority for the assertion advanced by petitioner that this Court should accept review to resolve a conflict which the Third District's decision creates with Title Standards[3] and Title Notes published by the Florida Bar's Real Property, Probate and Trust Law Section and Attorneys' Title Insurance Fund, respectively. See Petitioner's Brief on the Merits at 7. Understandably, the guidelines are drafted to advance the most conservative approach to applying Florida's Marketable Record Title Act and provide the greatest protection to real estate practitioners. These institutional practice guidelines are merely internal interpretations of existing law and practice which do not possess the formal approval of any court or legislative body. See Preface, The Florida Bar Real Property, Probate and Trust Law Section, Uniform Title Standards, reprinted in 1 R. Boyer, Florida Real Estate Transactions (1991) [hereinafter Uniform Title Standards]; Preface, Attorneys' Title Insurance Fund, Fund Title Notes [hereinafter Fund Title Notes]. It is anticipated, and expected, that the guidelines will be updated and revised as case law develops. See Forward to the 1981 Revision, Uniform Title Standards, supra; Synopsis of 1990 Revisions to Fund Title Notes,

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[3] The title standard cited by petitioner, Standard 11.6, The Florida Bar Real Property, Probate and Trust Law Section, Uniform Title Standards, is not even located in the chapter which discusses the effect of the Marketable Record Title Act. See Uniform Title Standards, supra, Chapter 17. Rather, Standard 11.6 is located in Chapter 11, which addresses plats generally.

Fund Title Notes, supra. There can be no "conflict" between case law and these institutional guidelines since it is the legislature and the courts that direct Florida law. Moreover, the fact that the Fund and the Real Property Section will have to amend their guidelines does not elevate the issue involved to a matter of great public importance.

Concededly, the decision is extremely interesting to real estate practitioners, as well as to the present litigants. However, such personal interests alone do not justify a conclusion that the issue involved is one of great public importance over which this Court should exercise its discretionary jurisdiction.

STATEMENT OF THE CASE AND FACTS

Respondents, Louis Caruana and Townsend Construction Corporation, defendants below,[4] file this brief in support of the final summary judgment entered in favor of Townsend in a declaratory judgment action brought by petitioner Sunshine Vistas Homeowners' Association, and affirmed by the Third District Court

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[4] In this brief, Respondents Louis Caruana and Townsend Construction Corporation will be referred to collectively as "Townsend." Petitioner, Sunshine Vistas Homeowners' Association will be referred to as "Sunshine Vistas" or "petitioner." Amicus Curiae, Attorneys' Title Insurance Fund, Inc., will be referred to as "the Fund." The following abbreviations will be used:

"R." - Record on Appeal
"P.B." - Petitioner's Brief on the Merits
"A.B." - Attorneys' Title Insurance Fund Amicus Curiae Brief.

of Appeal in Sunshine Vistas Homeowners' Ass'n v. Caruana, 597 So. 2d 809 (Fla. 3d DCA 1992).[5]

Townsend purchased Lots 16 & 17 of Block 5 in the Sunshine Vistas subdivision located in Coconut Grove, Florida, in June 1990. [R. 63]. The subdivision was platted April 28, 1925. [R. 51-52]. The plat contained the following restrictions, reservations and conditions:

> 1. No residence shall be erected within said subdivision of a less cost than Four thousand (4,000.00) dollars for actual construction, no part thereof to be paid for fees in connection therewith, and no more than one residence shall be erected on any one lot.
>
> 2. Every building in said subdivision shall whenever occupied be adequately connected for sewerage purposes with an efficient septic tank.
>
> 3. No lot in said subdivision, nor any building that may be erected therein shall be used for any business purpose but only for residential purposes and purposes properly incidental thereto; but this restriction shall not operate against the erection in this subdivision of apartment houses or hotels.
>
> 4. No lot or building within said subdivision shall be occupied by any person not of the caucasion [sic] race, except servants or employees of the occupants of any residence therein and no title or interest in any real estate in said subdivision shall be valid if acquired by any person not of the caucasion [sic] race, or any firm or corporation not under the control of persons of the caucasion [sic] race.

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[5] The presentation of the facts contained in petitioner's brief is incomplete in certain particulars. For this reason, Townsend sets forth its own statement of the case and facts.

> 5. No buildings erected on any lot in said subdivision shall be placed nearer any street line than twenty-five (25) feet.
>
> 6. No hogs, poultry, horses, cows, sheep, or goats shall be kept on said premises.
>
> 7. That all buildings erected in said subdivision shall be constructed of fire resistant materials and that no frame buildings shall be erected on the premises.
>
> 8. That no small living quarters shall be erected and occupied on any lot in said subdivision previous to the completion of the main residential building.

[R. 51].

In February 1991, Townsend began construction of a building on Lot 17 which allegedly extended beyond the setback requirements contained in paragraph five of the plat restrictions. [R. 4-5, 6]. Sunshine Vistas brought suit seeking a declaration that Townsend violated the restrictions created in the 1925 plat.[6] [R. 2-12]. There was no alleged violation of local building and zoning law. Townsend moved to dismiss the complaint on various grounds including Sunshine Vistas' failure to allege facts to support a claim that the plat restrictions remained in effect. [R. 13]. The trial court orally denied the motion but never rendered a ruling thereon.

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[6] Sunshine Vistas also made mention of a 1940 document purporting to impose residential and other restrictions on certain lots remaining in the landowner's possession as of August 13, 1940. Sunshine Vistas has not attempted to argue that the restrictions contained therein were preserved pursuant to the requirements of Florida's Marketable Record Title Act. It is undisputed that no specific reference is made to this document by official book and page number anywhere within the chain of title proceeding from the root of title. Accordingly, this document has no relevance to the issues currently before this Court.

Subsequently, Townsend moved for summary judgment on the sole ground that the plat restrictions had been extinguished under the Marketable Record Title Act. [R. 42-50]. Townsend asserted that nowhere in the chain of title from Townsend's root of title forward are the plat restrictions preserved. [R. 43, 45-49]. The root of title begins with a Warranty deed from John H. Heuer and Helen L. Heuer, his wife, to James D. Pasco, Jr., dated October 6, 1951. [R. 60]. The deed from Heuer to Pasco describes the property by reference to the Sunshine Vistas plat. [R. 60]. Elsewhere in the deed appears the statement: "This conveyance is given subject to covenants and restrictions of record and subject to taxes for 1951 and subsequent years." [R. 60].

The next title transaction consists of a warranty deed from James D. Pasco, Jr. to David Block, dated December 2, 1977. [R. 62]. The deed from Pasco to Block describes the property by reference to the Sunshine Vistas plat. [R. 62]. In another place on the document appears the statement: "SUBJECT TO: limitations, restrictions and easements of record, if any, applicable zoning ordinances and regulations and taxes for the year 1978 and subsequent years." [R. 62].

Finally, Townsend received a warranty deed from David Block and Sandra K. Ashton Block, his wife, dated June 29, 1990. [R. 63]. The deed from Block to Townsend also describes the property by reference to the Sunshine Vistas plat. [R. 63]. However, there is no statement that the transfer is made subject to restrictions of record.

The trial court granted Townsend's motion for summary judgment specifically holding: "that none of the muniments of Defendant Townsend Construction Corporation's root of title contains a sufficiently specific reference to the recorded plat to allow the plat restrictions to survive the effect of the Florida Marketable Record Title Act. In reaching this conclusion, the Court has considered that Ch. 712, Florida Statutes, is to be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions." [R. 75]. Following the entry of final summary judgment, Sunshine Vistas appealed to the Third District Court of Appeal. [R. 76]. In a unanimous decision, the Third District affirmed and held:

> The express purpose of the Act is to simplify and facilitate "land title transactions by allowing persons to rely on record title as described in s. 712.02 subject only to such limitations as appear in s. 712.03." Section 712.10, Fla. Stat. (1989).
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> . . . .
>
> Pursuant to Section 712.03, use restrictions which were created prior to the root of title are not preserved unless a muniment of title in the chain of title specifically discloses the restriction or a general reference to the restriction is identified "by reference to book and page of record or by name of recorded plat be made therein to a recorded title transaction which imposed, transferred or continued such . . . use restriction." Section 712.03, Fla. Stat. (1989). In the instant case, two of the muniments of title in Townsend's chain of title were made subject to restrictions of record. This general reference to restrictions of record failed to identify the restrictions by the record title transaction which imposed, transferred or continued the use restrictions, as required by Section

712.03. Therefore, the restrictions contained in Sunshine Vistas' plat were not preserved.

597 So. 2d at 810-11. Subsequently, Sunshine Vistas filed a motion for certification, which was granted. Accordingly, Sunshine Vistas seeks to invoke this Court's discretionary jurisdiction to address the following question which the Third District certified as being of great public importance:

> WHETHER THE FLORIDA MARKETABLE RECORD TITLE ACT HAS THE EFFECT OF EXTINGUISHING A PLAT RESTRICTION WHICH WAS CREATED PRIOR TO THE ROOT OF TITLE WHERE THE MUNIMENTS OF TITLE IN THE CHAIN OF TITLE DESCRIBE THE PROPERTY BY ITS LEGAL DESCRIPTION WHICH MAKES REFERENCE TO THE PLAT AND THE MUNIMENTS OF TITLE STATE THAT THE CONVEYANCE IS GIVEN SUBJECT TO COVENANTS AND RESTRICTIONS OF RECORD.

SUMMARY OF THE ARGUMENT

Under Florida's Marketable Record Title Act, use restrictions created prior to Townsend's root of title are extinguished, unless, after the date of the root of title, some muniment in Townsend's chain of title specifically identifies the restrictions or generally refers to the restrictions with a specific reference to their location. Since there is no specific reference to the restrictions contained on the Sunshine Vistas Plat within Townsend's chain of title, the plat restrictions are no longer enforceable. By extinguishing the obsolete use restrictions, the Act performs its desired function of enhancing the marketability of land title.

Both petitioner and the Fund rely primarily upon pre-Act law in seeking to overturn the Third District's decision. However, this Court has previously recognized the special nature and purpose of the Act. It is intended to effect a departure from pre-existing

common law concerning restrictions on land titles. Pursuant to the Act, the only exceptions to marketability are those which are anticipated by the Act. Otherwise, it is the express intent that title be "free and clear of all claims." § 712.02, Fla. Stat. The Third District, in rendering it decision, properly relied upon the ultimate authority - the Act itself.

ARGUMENT

THE PLAT RESTRICTIONS WERE EXTINGUISHED BY THE PLAIN TERMS OF THE MARKETABLE RECORD TITLE ACT WHERE THE MUNIMENTS OF TITLE BEGINNING WITH THE ROOT OF TITLE FAILED TO CONTAIN THE REQUIRED REFERENCE TO THE PLAT RESTRICTIONS

A. The Florida Marketable Record Title Act Is Intended To Extinguish All Restrictions Not Specifically Identified Or Referenced In The Muniments Of Title Beginning With The Root Of Title.

The express purpose of Florida's Marketable Record Title Act (hereinafter the "Act") is to simplify and facilitate land title transactions. § 712.10, Fla. Stat. (1989). To that end, the Act "shall be liberally construed to effect the legislative purpose." Id. The Act operates by establishing marketable record title in any person who alone or together with his predecessors has been vested with an estate in land of record for thirty years or more. § 712.02, Fla. Stat. Such marketable record title is free and clear of all claims except as specifically set forth in section 712.03, Fla. Stat.

While Sunshine Vistas asserts that "[t]he Act is silent . . . as to how the muniment of title must specifically disclose the use restriction or how that restriction must be identified by reference to the book and page of the recorded plat," P.B. at 11, the

contrary is true. Section 712.03, Fla. Stat., provides in relevant part:

> **Exceptions to marketability.** -- Such marketable record title shall not effect or extinguish the following rights:
>
> (1) Estates or interests, easements and use restrictions disclosed by and defects inherent in the muniments of title on which said estate is based beginning with the root of title; provided, however, that a general reference in any such muniments to easements, use restrictions or other interests created prior to the root of title shall not be sufficient to preserve them unless specific identification by reference to book and page of record or by name of recorded plat be made therein to a recorded title transaction which imposed, transferred or continued such easement, use restrictions or other interests . . . .

Accordingly, use restrictions disclosed by the muniments of title[7] are preserved only if the restriction is specifically disclosed, or if a general reference to a use restriction is accompanied by specific identification of the record title transaction[8] which imposed, transferred or continued the use restriction. § 712.03, Fla. Stat. If the relevant title transaction is a plat, "specific identification" requires that the plat be identified by name when referring to the use restrictions. Id.

For example, a deed which contained a statement to the effect that a transfer is made "subject to no buildings being erected on

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[7] A "muniment of title" is defined supra at 1 n.1.

[8] A "title transaction" is defined by the Act as any recorded instrument which affects title to any estate or interest in land and describes the land sufficiently to identify its location and boundaries. § 712.01(3), Fla. Stat.

any lot in said subdivision nearer any street line than twenty-five (25) feet," would preserve the restriction by specifically disclosing it. A deed which contained a statement to the effect that the transfer is made "subject to the restrictions contained in the Sunshine Vistas plat," would preserve the restriction by combining a general reference to restrictions with specific identification of the record title transaction which imposed the use restriction.

A general reference in a muniment that the estate is "subject to restrictions of record" is not sufficient to preserve restrictions created prior to the root of title. Id. In discussing the insufficiency under the Act of a general reference, the Florida Title Standards, adopted by the Real Property, Probate & Trust Law Section of The Florida Bar, state that a reference in a deed that the conveyance is "subject to conditions and limitations of record" does not satisfy section 712.03.

> Problem 2: Same facts as Problem 1 except that the 1940 deed, or a subsequent deed, contained a provision that the conveyance was "subject to conditions and limitations of record." Were the rights thereby preserved?
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> Answer: No. Interests disclosed by the muniments of title, beginning with the root of title, are preserved but F.S. 713.03(1) requires that a general reference to such interests include specific identification by reference to book and page of record or by name of recorded plat.

The Florida Bar Real Property, Probate and Trust Law Section, Uniform Title Standards, § 17.3, reprinted in, 1 R. Boyer, Florida Real Estate Transactions § 14.15 (1991). The Act draws no

distinction between the treatment of restrictions occurring in deeds versus plats. Any use restriction not preserved as outlined by § 712.03 is expressly "declared to be null and void." § 712.04, Fla. Stat.

B. Reference To A Plat In The Portion Of A Deed Describing The Property Does Not Preserve Use Restrictions Contained In The Plat.

Having failed to establish either a specific disclosure or a general reference combined with a specific reference to the plat in the Townsend chain of title, Sunshine Vistas asserts that the restrictions were preserved either by (1) reading the general reference that the deed is "subject to covenants and restrictions of record" in combination with the property description, or (2) incorporating the plat verbatim into the deed by virtue of its citation in the property description. To apply Sunshine Vistas' reasoning is to render the Act's requirements meaningless.

The history of the Act makes clear that it is intended to extinguish all plat restrictions unless the specific steps outlined in section 712.03 are employed. Unlike most Florida legislation, the Act possesses a substantial legislative history. Florida's Act is modeled after the Model Marketable Title Act (hereinafter the "Model Act") authored primarily by Professor Lewis Simes. In fact, the writers of the Florida Act relied specifically upon Simes' book, The Improvement of Conveyancing by Legislation (1960), the definitive treatise on the Model Act, in drafting Florida's Act. See Sickler, Real Estate: Marketable Title Acts, Case & Com. 3, 4

& nn. 17, 19 (March-April, 1986); Catsman, A Proposed Marketable Record Title Act For Florida, 13 U. Fla. L. Rev. 334, 340 (1960).

In drafting the Model Act, Professor Simes was of the opinion that restrictive covenants contained in residential plats lose their social utility and become obsolete by the time a subdivision is forty years old. Simes, supra at 225. There was no doubt in Professor Simes' mind that plat restrictions would be extinguished under the Act by the passage of time unless such restrictions were continued by following the provisions outlined in the exceptions to marketability or notice filing sections of the Act. Simes, supra at 225-26. In commenting on the Model Act and its requirement that, in order to preserve plat restrictions, every owner in a subdivision would have to include the required reference to the restrictions in its muniments of title, he recommended an amendment to the notice filing provision to facilitate the continued enforcement of plat restrictions should such action be desired. Simes, supra at 228.[9] While the amendment was not adopted, his

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[9] The suggested amendment reads:

> If any person claims the benefit of an equitable restriction or servitude, which is one of a number of substantially identical mutual restrictions on the use of tracts in a platted subdivision, the plat of which is recorded as provided by law, and the subdivision plan provides for an association, corporation, or committee, empowered to determine whether such restrictions are to be terminated or continued at the expiration of the stated period of time, not to exceed forty years, and by the terms of such provision, it is determined that such restrictions are not to be terminated, or that the restrictions are

(continued...)

discussion clearly illustrates that the model act is intended to extinguish plat restrictions which do not meet the exceptions to marketability requirements.

Likewise, Florida's own Ralph Boyer recognizes that plat restrictions are wiped out by the broad sweep of interests eliminated by the Act. Boyer includes easements and servitudes in his discussion of interests that are obliterated by the Act.[10] Boyer & Shapo, Florida's Marketable Title Act: Prospects And Problems, 18 U. Miami L. Rev. 103, 113-115 (1963). In writing on this subject, Boyer, like Simes, recommended an amendment to "permit the filing of notice of an equitable servitude on behalf of all owners in a subdivision by an officer of a subdivision association" to make preservation easier. Id. at 115. Implicit in this discussion is a recognition that plat restrictions are automatically extinguished by the passage of time unless one of the methods for continuation is invoked. Florida has not adopted

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[9](...continued)

> to be continued because no determination to terminate has been made, then the officer or other person authorized to represent such association, corporation or committee may preserve and keep effective all such restrictions, not otherwise excepted from the operation of this Act, by filing a notice as provided in subsection (a) hereof, on behalf of all owners of land in the subdivision for the benefit of which such restrictions exists.

Simes, supra at 228.

[10] Use restrictions contained in a subdivision plan are considered equitable servitudes. Board of Public Instruction of Dade County v. Town of Bay Harbor Islands, 81 So. 2d 637 (Fla. 1955).

Boyer's suggested amendment. Therefore, plat restrictions are only preserved by compliance with the exceptions to marketability or notice filing sections of the Act.

A brief examination of the restrictions contained in the Sunshine Vistas' plat demonstrates how accurate Simes was when he noted the uselessness of carrying plat restrictions forward in a wholesale manner. The Sunshine Vistas' plat contains use restrictions concerning minimum construction investments ($4,000), sewage disposal, residential usage, race restrictions, setbacks, prohibited animals, building standards and prohibited temporary structures. Of these restrictions, six of the areas covered are today addressed by governmental codes and zoning ordinances; one is completely obsolete (the $4,000 home); and, the remaining is illegal. By extinguishing all of these plat restrictions, the Act performs the meritorious service it was designed to achieve; it eliminates obsolete restrictions which diminish the value of land. Any supposed regulatory void is filled by the application of current codes and ordinances which reflect today's standards.

Sunshine Vistas relies upon New Mexico law professor Walter Barnett for the contrary proposition that restrictive covenants contained in subdivision plats are not extinguished if plats generally are referred to in the transfer of property. As a preliminary matter, Professor Barnett specifically acknowledges that his reading of the Model Act is contrary to the interpretation placed upon the Act by its author Professor Simes in the text immediately preceding the quote appearing on page 16 of

Petitioner's Brief on the Merits. See Barnett, Marketable Title Act -- Panacea or Pandemonium?, 53 Cornell L. Rev. 45, 75 (1967). Furthermore, by Barnett's own admission, the interpretation he places upon the Act results in an unjust operation of the Act. Id. Barnett simply "presumes" wrong and his commentary is not an authority that should be relied upon by this Court.

In addition, Sunshine Vistas, as well as the Fund, cites to an Attorneys' Title Insurance Fund Title Note as authority for its proposition that plat restrictions are preserved by reference to the plat in the property description. P.B. at 15; A.B. at 6. While the Title Notes are largely followed by attorneys who prepare title insurance policies, the Notes are not binding. See Preface, Fund Title Notes, supra. Rather, they are suggested guidelines for attorneys to follow in writing insurance. Id. No doubt, in drafting § 28.03.01, which implies that use restrictions on a plat by which property is described are not extinguished, the Fund adopted the position that would provide the greatest protection to itself and its practitioners in the writing of insurance. Nonetheless, the note is contrary to the plain language and intent of the Act as articulated by the Third District.

Finally, reference to the plat in the deed's property description for descriptive purposes does not incorporate the plat restrictions into the deed. While the law prior to the enactment of Florida's Marketable Record Title Act may have been that reference to a plat in a deed incorporated the terms of the plat therein, this is not the law under the Act. As noted above, the

Act intends that all plat restrictions be extinguished unless the specific requirements of section 712.03, Fla. Stat., are followed.

In Marshall v. Hollywood, Inc., 236 So. 2d 114 (Fla. 1970), cert. denied, 400 U.S. 965, 91 S. Ct. 336, 27 L. Ed. 2d 384 (1970), the petitioner similarly argued that under case law predating the Act, the court should allow him to assert a claim arising out of a transaction predating the root of title even though he failed to qualify under any of the exceptions listed in section 712.03. In response, this Court held:

> In view of the special nature of this Act and its special purpose, the assertion that its construction and application must be bound by precedents relating to less comprehensive acts does not make good sense and cannot make good law. The clear legislative intention behind the Act, as expressed in F.S. § 712.10, F.S.A., was to simplify and facilitate land title transactions by allowing persons to rely on a record title as described by F.S. § 712.02, F.S.A., subject only to such limitations as appear in F.S. § 712.03, F.S.A. To accept petitioner's arguments would be to disembowel the Act through a case dealing with a factual situation of a nature precisely contemplated and remedied by the Act itself. This we cannot do.

Id. at 120 (emphasis supplied). The Act is to be narrowly construed, recognizing the legislative intent to depart from pre-existing law.

Accordingly, Wahrendorff v. Moore, 93 So. 2d 720 (Fla. 1957), cited by Sunshine Vistas as authority, is no longer controlling on this issue.[11] Instead, as discussed supra, Wahrendorff illustrates

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[11] Florida's Marketable Record Title Act was enacted in 1963. See Ch. 63-133, Laws of Fla.

one of the very reasons the Act was adopted, to eliminate outdated and useless restrictive covenants contained in plats. Sunshine Vistas has failed to cite to any post-Act Florida authority to support the proposition that reference to a plat in the property description in a deed incorporates the plat into the deed or satisfies the Act's requirements. The only post-Act cases cited by Sunshine Vistas or the Fund involve boundary disputes and address the issue of notice of the platted dimensions of property, Crenshaw v. Holzberg, 503 So. 2d 1275 (Fla. 2d DCA), rev. denied, 511 So. 2d 998 (Fla. 1987), and Lawyers Title Guaranty Fund v. Milgo Electronics, 318 So. 2d 416 (Fla. 3d DCA 1975), cert. denied, 336 So. 2d 602 (Fla. 1976);[12] they do not involve any questions concerning the Act. Thus, these cases are also inapposite. Likewise, the Uniform Title Standard cited by Sunshine Vistas and the Fund, P.B. at 14, A.B. at 6, is not intended, nor does it discuss, application of the Act to plats. Section 11.6, Uniform Title Standard, supra, is specifically contained in the chapter on plats generally, not the chapter discussing the Act. Cf. Chapter 17, Uniform Title Standards.

Nor are the use restrictions inherent in the deed by virtue of the property description. Contrary to Sunshine Vistas' assertion,

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[12] See also Andreu v. Watkins, 26 Fla. 390, 7 So. 876 (1890) (boundary line dispute); Khan v. Delaware Securities Corp., 114 Fla. 32, 153 So. 308 (1934) (same); Mexico Beach Corp. v. St. Joe Paper Co., 97 So. 2d 708 (Fla. 1st DCA 1957) (same); Spencer v. Wiegart, 117 So. 2d 221 (Fla. 2d DCA 1959), cert. denied, 122 So. 2d 406 (Fla. 1960) (easement shown on plat); Zwakhals v. Senft, 206 So. 2d 62 (Fla. 4th DCA 1968) (boundary dispute), cited by the Fund. A.B. at 2-3.

section 712.03 does not provide that use restrictions which are "inherent" in the muniments of title are not extinguished. While the Act provides that "defects inherent in the muniments" are not extinguished, use restrictions are treated differently. § 712.03(1).[13] Use restrictions must be "disclosed by" the muniments of title (i.e., specifically set forth) or mentioned generally in combination with specific identification of their source by reference to a recorded title transaction, (i.e., the name of a recorded plat). Id.

Alternatively, Sunshine Vistas erroneously asserts that the property description contained in the Heuer/Pasco deed coupled with the later statement that the deed is "subject to covenants and restrictions of record" equals a specific reference which saves the plat restrictions from being extinguished. Professor Simes, in commenting upon the prohibition against general references states that the proviso is designed to "eliminate the uncertainties caused by general references." Simes, supra at 12. If, when faced with a general reference in a muniment that the land is "subject to restrictions of record," interested parties are expected to search the face of the document for any possible hint as to where these restrictions may be located the system will be rendered inherently uncertain. This Court must apply the limited exceptions to marketability so as to effect the legislative purpose behind the

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[13] Section 712.03's reference to "defects inherent in the muniments of title" has been narrowly interpreted to refer only to defects in the make up or constitution of the deed. ITT Rayonier, Inc. v. Wadsworth, 346 So. 2d 1004, 1011 (Fla. 1977).

Act. The only way to give full meaning to section 712.03, Fla. Stat., is to require that where title to property is conveyed by a deed subject to a general reference to restrictions, a specific reference to matters shown on the plat must be included.

Finally, while neither party has been able to find any case law precisely on point, there is one Ohio case that deserves attention.[14] In Toth v. Berks Title Ins. Co., 453 N.E.2d 639 (Ohio 1983), the court sought to determine marketability of property transferred in 1974. The root of title was a 1928 deed. The deed made no reference to use restrictions contained in a 1926 plat. However, a 1966 deed contained a specific note that: "The above plat shows a building line of 100 feet parallel and with the westerly line of Beck Road a building line of 60 feet parallel and with the northerly line of West Market Street for caption." Id. at 643 n.8. Accordingly, the court held that the specific reference to the restriction satisfied the requirement that it be disclosed by a muniment of title. Id. at 642.

Notably, in Toth, the plat was also referred to in an earlier portion of the deed. Id. at 643 n.8. Nonetheless, this earlier reference was not treated with any significance. This is precisely how this Court should treat the mention of the Sunshine Vistas plat in the property description -- as having no significance to the question of whether plat restrictions which are not mentioned by a specific reference to the plat are extinguished.

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[14] Ohio, like Florida, relied upon the Model Act in drafting its Marketable Title legislation. Sickler, supra at 4.

C. Enforcement Of The Plat Restrictions Contravenes The Plain Language And Purpose Of The Florida Marketable Record Title Act.

As discussed supra at 13-15, the history of the Act reveals that it is intended to eliminate plat restrictions not preserved by one of the statutory exceptions to marketability. The purpose of the Act is not simply to limit title searches, as petitioner suggests, but to increase the marketability of real property by freeing it of title restrictions. Professor Simes lamented the difficulty of clearing land of use restrictions by common law means and applauded the effectiveness of the Model Act in clearing title of obsolete restrictions. Simes, supra at 221. While Sunshine Vistas attempts to glorify the plat restrictions, they are no longer useful. They served their purpose for thirty years. As the legislature has determined, thirty years is enough unless appropriate steps are taken to continue their validity.

D. Application Of Florida's Marketable Record Title Act To Extinguish All Use Restrictions Not Properly Preserved Does Not Interfere With The Legal Effect Of Plats.

Despite Sunshine Vistas' protestations, the elimination of use restrictions in plats does not encroach upon the platting statute. The purpose of sections 177.011 to 177.151 is to control the platting of lands. § 177.011, Fla. Stat. (1989). Properly recorded plats are afforded the legal effect of establishing the identity of lands and allowing for conveyance by reference to the plat. § 177.021. There is no intent in the statute that plats function as a public source of use restrictions.

The Third District's decision in Metropolitan Dade County v. Timinsky, 579 So. 2d 356 (Fla. 3d DCA 1991), is not to the contrary. See also Metropolitan Dade County v. Timinsky, 598 So. 2d 266 (Fla. 3d DCA 1992). Neither Timinsky I nor II address the question of the continued validity of the plat restrictions under the Act. Rather, these cases concern a county's control over the subdivision of property. There is nothing in Timinsky I or II to indicate that the Act should not be applied to extinguish plat restrictions not properly referenced in a muniment within the applicable chain of title.

The loss to the public of use restrictions contained in plats is no greater than the elimination of deed restrictions. Land matters which necessarily must be regulated for the public good are addressed by governmental codes, ordinances and statutes. Platted subdivisions which contain use restrictions are well established within thirty years. To the extent some variation may occur in later developed lots, the benefit of simplifying and facilitating land title transactions far outweighs the value of the extinguished use restriction.

CONCLUSION

Based upon the foregoing facts and legal authorities Respondents Louis Caruana and Townsend Construction Corporation respectfully request that this Court affirm the Third District's decision in all respects.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 17th day of August, 1992, to John K. Shubin, Esq., STEARNS WEAVER MILLER WEISSLER ALHADEFF & SITTERSON, P.A., Attorneys for Petitioner, Suite 2200, Museum Tower, 150 West Flagler Street, Miami, Florida 33130 and R. Norwood Gay, III, Esq., Attorneys' Title Insurance Fund, Inc., Attorney for Amicus Curiae, P.O. Box 628600, Orlando, Florida 32862-8600.

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