IN THE
SUPREME COURT OF FLORIDA

CASE NO. 79,981

CASE NO. 91-2203

CIRCUIT COURT CASE NO. 91-12671-CA-28

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

Petitioner/Appellant,

vs.

LOUIS CARUANA, et al.,

Respondents/Appellees.

PETITIONER'S REPLY BRIEF

John K. Shubin, Esq.
Stearns, Weaver Miller Weissler
Alhadeff & Sitterson, P.A.
Attorneys for Appellant
Suite 2200, Museum Tower
150 West Flagler Street
Miami, Florida 33130
(305) 789-3200

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STEARNS WEAVER MILLER WEISSLER ALHADEFF & SITTERSON, P.A.

MUSEUM TOWER, 150 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 789-3200

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SUMMARY OF ARGUMENT

The respondents, Louis Caruana ("Caruana") and Townsend Construction Corporation ("Townsend") (collectively "respondents"), correctly recognize that any use restriction which does not fall within the exceptions to the Marketable Record Title Act contained in Fla. Stat. §712.03 is extinguished as a matter of law. The respondents fail to recognize, however, that §712.03 requires that the plat restrictions at issue in this case be enforced as a matter of law. Furthermore, the respondents' brief (hereafter "R. Br.") fails to cite any legal authority which directly supports their position that the Act extinguishes the subject plat restrictions. To the contrary, the purported authorities contained in the respondents' brief either fail to address the specific legal issues before this Court or support the enforceability of the plat restrictions.

The respondents' analysis of the legislative history of the Act and its source, the Model Marketable Record Title Act, is also inconsistent with the recorded commentary regarding the Act and Model Act's purposes. Nothing in the legislative history of the Act or the Model Act requires that this Court uphold the trial court and the district court's extinguishment of the plat restrictions at issue. Reliance on the analysis of the Model Act's drafters, when coupled with adherence to the plain language of the Act and Model Act, demand an opposite result -- the enforcement of the plat restrictions. These plat restrictions, rather than being

obsolete and antiquated relics of the past, are precisely those types of restrictions which the Model Act's drafters thought should be enforced.

ARGUMENT

A. THE RESPONDENTS' BRIEF FAILS TO OFFER ANY DIRECT AUTHORITY TO SUPPORT THEIR CONCLUSION THAT THE FLORIDA MARKETABLE RECORD TITLE ACT EXTINGUISHES THE PLAT RESTRICTIONS AS TO THE SUBJECT PROPERTY.

The respondents' central argument -- that "[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" -- is totally unsupported by the plain language of Fla. Stat. §712.03(1). (R. Br. 12). Even more incredulous is the respondents' citation to §712.03(1) in support of this conclusion. Id. As any reader of the statutory language must recognize, even general references to use restrictions do preserve the use restrictions if

> 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.

Fla. Stat. §712.03(1) (1991).

As the statutory reader must also recognize, the above language arguably applies only to a "general reference" to use restrictions contained "in any of such muniments." Alternatively,

where the restrictions are either specifically "disclosed by" or "inherent in the muniments of title on which said estate is based beginning with the root of title," the focus on general references becomes less relevant and the restrictions clearly are not extinguished under the Act. Id.

Under either reading of 712.03, however, the respondents' argument is legally deficient. If one assumes, as one should, that the specific plat references contained in each title transaction from the root of title onward are "disclosed by" the "muniments of title" (i.e., the deeds), it must be concluded that the plat restrictions contained therein are specifically "disclosed" by the appropriate plat references. This conclusion, as noted in the petitioner's initial brief, is supported by the opinion of Florida courts which hold that references in a deed to a plat specifically incorporate the terms of the plat onto the deed as a matter of law. See Crenshaw v. Holzberg, 503 So.2d 1275 (Fla. 2d DCA), rev. denied, 511 So.2d 998 (1987); Lawyers Title Guaranty Fund v. Milgo Electronics, 318 So.2d 416 (Fla. 3d DCA 1975), cert. denied, 336 So.2d 602 (1976).

Thus, even if one were to assume that the plat restrictions "disclosed by" the muniments of title still must meet the "specific reference" standard, it must still be concluded under this case's facts that the plat and its restrictions are excepted from the Act in that they have been identified by references in each deed to both "the name of the recorded plat" and its "book and

page of record." This conclusion is also mandated by the plain language of Fla. Stat. §712.03(1).

The respondents, in essence, wish this Court to interpret the Act to require specific references to the name of the plat or the specific plat restrictions in the recitals of a deed where no such requirement is required by the Act or by any Florida case interpreting the Act. They also urge this Court to disregard pre-Act caselaw which clarifies rather than conflicts with the Act, as well as to adhere to Florida Title Standards which do not specifically address the preservation of plat restrictions under the Act while ignoring Title Notes which do. For these reasons alone, the respondents' brief fails to sufficiently address and rebut the arguments put forth by the appellant.

B.

THE LEGISLATIVE HISTORY OF THE FLORIDA MARKETABLE RECORD TITLE ACT DOES NOT SUPPORT THE Respondents' CONTENTION THAT THE PLAT RESTRICTIONS AT ISSUE ARE ELIMINATED BY THE ACT.

The weakness of the respondents' response is brought into closer focus when one scrutinizes their analysis of the Act's legislative history. Not only is the respondents' analysis analytically deficient, but it also poorly represents to this Court the analysis of commentators and other secondary sources.

For example, the respondents' page citation to Boyer and Shapo's law review article on the Act[1/] does not state, as the respondents claim, "that plat restrictions are wiped out by the broad sweep of interests obliterated by the Act." (R. Br. 15). Petitioner's counsel could not find one reference within pages 113 through 115 to "plat restrictions" and challenges this Court to do the same. Mention is made to "easements and servitudes" as well as to the issue of subdivisions. Nowhere, however, is it explicitly stated that plat restrictions are "wiped out" by the Act or subject to any analysis other than that which is clearly required by the Act itself.

The respondents' dismissal of Prof. Barnett's analysis of the survival of plat restrictions under the Act[2/] further evidences the hyperbolic tendencies of the respondents' brief. Rather than acknowledging, as the respondents assert, that his interpretation of the Model Act "is contrary to the interpretations placed upon the Act by its author Professor Simes," (R. Br. 16), Barnett makes the following comment regarding the views of the Model Act's authors:

> Simes and Taylor appear to take the position that such rights usually lose their social utility after the subdivision is forty years old, and since the Model Act could not cut them out before that time, there is little

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[1/] See Boyer & Shapo, Florida's Marketable Record Title Act: Prospects and Problems, 18 U. Miami L. Rev. 103 (1963).

[2/] See Barnett, Marketable Title Acts - Panacea or Pandemonium, 53 Cornell Law Rev. 45 (1967).

> danger that they will be extinguished before they have outlined their usefulness.

Although Barnett then notes that the Florida Act fails to except restrictive covenants from its reach, he still concludes that restrictive covenants contained on the face of a plat, i.e., plat restrictions, would not be extinguished under the Act. Barnett's comment that "justice demands the same treatment" of both plat restrictions and deed restrictions hardly implies, as the respondents also boldly suggest, that his conclusion as to the enforceability of plat restrictions is thus unjust.

Closer inspection of Simes and Taylor's seminal analysis, The Improvement of Conveyancing By Legislation, will also call into question the respondents' restatement of the purported intent of the Model Act. In Title 20 of their treatise, Simes and Taylor specifically address the Model Marketable Record Title Act as it applies to "easements and equitable servitudes" and, as to equitable servitudes, they conclude that they are within the Model Act's scope. The extinguishment of these servitudes, Simes and Taylor note, is justified in light of their limited social utility. L. Simes & C. Taylor, The Improvement of Conveyancing by Legislation 225 (1960). This analysis is echoed by the respondents in their brief (Br. 14), but is misleading as to the specific issue on appeal.

Simes and Taylor simply do not address the specific issue before this court -- the survival of use restrictions contained on the face of a plat and then referenced in every subsequent title

transfer through specific reference to the plat in the deed's legal description and the recital that the property is "subject to restrictions of record." Instead, Simes and Taylor address equitable servitudes, i.e., use restrictions which are created by restrictive covenants contained within deeds conveyed by the common transferor of subdivided property. It is this second type of restriction to which Professor Barnett refers when offering his analysis of Simes and Taylor's position and when comparing the legal effect of the restrictions being created through a plat or through a deed.

Simes and Taylor's commentary on general references, such as "subject to restrictions of record," is also instructive. As they defined the problem,

> Essentially the problem is one of indefinite references. Sometimes the indefiniteness is due to the vague language used in describing an interest to which the conveyance is subject. Sometimes it is due to the failure to identify another recorded instrument. But the reference is still believed to be indefinite for purposes of the title searcher if it does not refer to the place in the record through which another instrument creating the interest in question may be found...

Simes & Taylor, supra at 102.

It is apparent from this passage that the problem of indefinite references relates exclusively to the ease with which a restriction can be identified. In the case of a plat restriction where the plat is specifically referenced by every deed in the chain of title, there is no secret as to where a title searcher

must look for guidance as to "restrictions of record." Furthermore, Simes and Taylor's "Model Act Concerning Indefinite References" defines an "indefinite reference" as existing where

> (A) there is a recital, implication, or indication in the instrument that the title is subject to another instrument, or to a restriction, easement, mortgage, encumbrance or other interest, or that the title may be subject to another instrument, or to a restriction, easement, mortgage, encumbrance, or other interest; and
>
> (B) the instrument containing the reference does not include any provision from which can be determined, directly or through a reference to other specified, public records, the place in the public records where the instrument referred to may be found, or where the instrument by which the restriction, easement, mortgage, encumbrance, or other interest, is, or may be, created.

Simes & Taylor, supra, at 103 (emphasis supplied).

Contrary to the respondents' assertions, an indefinite reference is not defined solely by the language contained in a deed recital. If the instrument containing the reference, i.e., the deed, includes any provision from which the restrictions may be formed, there is no indefinite reference. In other words, if the deed containing the recital also contains a specific reference, as in this case, to the instrument - the plat - by which the restriction "is, or may be created," there can not be an indefinite reference as contemplated by either the Model Marketable Record Title Act or the Florida Marketable Record Title Act.

The respondents also make an inappropriate reference to Simes when they put forth the argument that the extinguishment of the plat restrictions at issue (i.e. setback restrictions) would further the purpose of the Act, the purportedly "meritorious service" of eliminating "obsolete restrictions which diminish the value of land." (R. Br. 16). The respondents argue that the void created by the elimination of any plat restrictions by the Act is "filled by the application of current codes and ordinances which reflect today's standards." Id.

Although some of the restrictions contained on the face of the plat may be illegal or may be obsolete, there can be little doubt that the specific setback restriction which the petitioner is attempting to enforce is not obsolete or illegal. The setback restrictions in the Sunshine Vistas subdivision are precisely those types of restrictions by which, as Simes and Taylor noted, "the economic value of all the lots is improved." Simes & Taylor, supra at 223. Furthermore, "[f]ar from being an encumbrance which makes the title unmarketable, the presence of the restrictive scheme tends to make the property more marketable." Id.[3/]

If contemporary standards, as reflected in current zoning codes and ordinances, are the only standards that are capable of enforcement as a matter of law, then all plat restrictions which deviate from zoning ordinances must be disregarded, regardless of

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[3/]This passage clearly calls into question the respondents' contention that the plat restrictions at issue are "no longer useful." (R. Br. 15).

their compliance with the Act. This type of logic is fundamentally at odds with recent pronouncements from Florida courts regarding plat restrictions, and with the plain language of the Act, which would allow the enforceability of use restrictions of any age which fall within the exceptions contained in §712.03. See generally Dade County v. Timinsky, 579 So.2d 356 (Fla. 3d DCA 1991) (allowing enforcement of plat restrictions by municipal government).

The respondents also fail to directly acknowledge that the obsolescence of the use restrictions is not at issue on appeal. Although the Answer filed below by the respondents asserts "changes in character of the Sunshine Vistas neighborhood" as an affirmative defense to the appellant's action, (R.37), a defense which Simes and Taylor acknowledge as a "doctrine by which the equitable servitude may be terminated," Simes & Taylor, supra at 221, this defense is independent from the defense that the Act extinguishes the plat restriction. As noted, the Act itself might still allow for the enforcement of an antiquated use restriction in spite of a significant change in the character of the subject neighborhood.

CONCLUSION

For the reasons set forth above, petitioner Sunshine Vistas Homeowners' Association requests that this Court accept jurisdiction of this action, answer the certified question in the

negative, reverse the decision of the district court, and remand this action for further proceedings consistent with its judgment.

Respectfully submitted,

STEARNS WEAVER MILLER WEISSLER
ALHADEFF & SITTERSON, P.A.
Suite 2200, Museum Tower
150 West Flagler Street
Miami, Florida 33130
(305) 789-3200

By: _____
JOHN K. SHUBIN
Florida Bar No. 771899

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by hand and U.S. mail upon David Rogero, Esq., and Angela Flowers, Esq., Blackwell & Walker, P.A., 2400 AmeriFirst Building, One Southeast Third Avenue, Miami, FL 33131, this 11th day of September, 1992.

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JOHN K. SHUBIN

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