D.A. 9-3-93 Orig + 7

IN THE SUPREME COURT OF FLORIDA

PALM POINT PROPERTY OWNERS' ASSOCIATION OF CHARLOTTE COUNTY, INC.,

Petitioner,

v.

ROBERT PISARSKI AND LILLIAN PISARSKI,

Respondents.

CASE NO. 80,840
DCA-2 NO. 91-03643

APPEAL FROM THE DISTRICT COURT OF APPEAL

OF THE SECOND DISTRICT,

STATE OF FLORIDA

- RESPONDENTS' AMENDED ANSWER BRIEF -

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STATEMENT OF FACTS

The Respondent homeowners generally adopt the "statement of case and facts" presented by the Petitioner corporation as to the chronology of pleadings before the Trial Court and District Court of Appeal resulting in the Second District Court of Appeals affirmation of the Trial Court's Order dated October 3, 1991 (R-207 - 208, A-1 - A-2). However, as noted by the Second District Court's opinion of November 13, 1992 (A-3 - A-8) there are a number of salient facts which have been omitted by the Petitioner's "statement" and require supplementation.

For the purpose of clarity the Petitioner, Palm Point Property Owners Association of Charlotte County, Inc. shall hereinafter be referred to as "Palm Point" and the Respondent property owners, Robert Pisarski and Lillian Pisarski shall hereinafter be referred to as "Homeowners".

The restrictions for Palm Point Subdivision were recorded in Charlotte County in 1958. Palm Point is a corporation which was created in 1981. Membership in Palm Point is voluntary and the organization claims for its membership only a portion of the lot owners within the subdivision. As pointed out by the District Court's opinion there is no dispute of fact that Palm Point is neither a direct successor to the interests of the developer nor an owner of any property within the subdivision. There are no common elements or common grounds owned or controlled by Palm Point. Furthermore, Palm Point is not identified in the Declaration of Restrictions as a party to be benefitted by such restrictions nor

was there an allegation by Palm Point in the Trial Court that it was intended to be benefitted by the property restrictions. The Homeowners expressly contest Palm Point's assertion that the constructed improvements are in any way contrary to the restrictive covenants of record and take exception as to the relevancy of Palm Point's assertion as to the content of its Corporate Charter or the issues previously disposed of in the three prior dismissals of complaint by the Trial Court for which no appeal has been taken dealing with class actions and appropriate class representations.

SUMMARY OF ARGUMENT

The facts of the instant case are not disputed. Palm Point is a Florida Corporation whose membership is voluntary and who represents only a portion of landowners within the Palm Point Subdivision. Palm Point is neither an owner of any lot nor common element, nor is it a successor in interest to the developer or common grantor of the subdivision. Palm Point has no expressed duties, powers or obligations pursuant to the Declaration and Restrictive Covenants of the subdivision. Therefore, both the Trial Court's dismissal of Palm Point's Complaint for lack of standing and the Second District Court of Appeal's affirmation of that decision was a correct application of the existing Florida law for the enforcement of restrictive covenants to land. While Florida courts have recognized standing of incorporated associations for the limited purpose of administrative actions under the APA and zoning issues where there has been shown to be a substantial interest or injury, there appears to be no case precedent within the State of Florida for extending the limited context of the APA and zoning decisions to allow a third party stranger to enforce a restrictive covenant to real property. To do so would be a violation of vested common law of this state. Palm Point in its Initial Brief before this Court has simply restated its belief that the law of standing in such matters should be liberalized. However, there is no indication by Palm Point that either the Trial Court nor the District Court of Appeal overlooked or misapplied any principle of law in this regard. The affirmation

by the Second District Court of Appeal of the Trial Court's decision should therefore be affirmed if this Court elects to take jurisdiction. However, it is the Homeowners' firm belief, as more particularly set forth in its Jurisdictional Motion to Dismiss, that the District Court of Appeal did not intend to create Supreme Court certiorari jurisdiction by its certified question, because it did not certify the question as being one of "great public interest". Rather, the District Court appears to be suggesting that this Court consider the promulgation of a procedural rule of standing not unlike ones previously established for condominium associations and mobile home owners' associations. The Homeowners do respectively disagree with the Second District Court's suggestion that such a rule would either be wise or needed for organizations such as Palm Point. The reason is that the mechanism for standing for either individual property owners or property associations who have received the delegated authority of the developer or common grantor is already part of our organic common law. Organizations such as Palm Point which have not been formed with delegated enforcement rights must represent an extreme minority of such organizations. The undersigned can find no cases dealing with similar associations within the state. It is also clear that a mechanism for giving such organizations enforcement authority already exists. That is, either the common grantor can assign the authority, declare the authority in the covenants or all of the current lot owners can jointly create such authority. The Homeowners, therefore, respectfully request that jurisdiction be

refused or, in the alternative, that if jurisdiction is accepted, the Second District Court of Appeal's opinion be affirmed.

ARGUMENT

ISSUE

ABSENT A SPECIFIC RULE OF PROCEDURE, DOES A PROPERTY OWNERS' ASSOCIATION THAT IS NOT A DIRECT SUCCESSOR TO THE INTERESTS OF THE DEVELOPER AND PROVISION FOR WHICH DOES NOT APPEAR IN THE GRANTORS ORIGINAL SUBDIVISION SCHEME HAVE STANDING TO MAINTAIN AN ACTION TO ENFORCE RESTRICTIVE COVENANTS?

The Homeowners would submit that the answer to the issue as posed by the Second District Court of Appeal, as certified in its opinion of November 13, 1992, should be answered in the negative. The question as paraphrased by the Appellate Court's opinion is more narrowly -- whether Palm Point has standing to sue? The answer is no! Because the Palm Point corporation is not an owner within Palm Point Subdivision of any lot or common element, nor is it a successor to the developer or common grantor, nor is it a party intended to be benefitted by the creation of the restrictive covenants sought to be enforced, it has no standing according to the recognized law of this state. The Homeowners do not qualify under the common law principle of privity of estate or privity of contract, nor under this Court's enunciated principle allowing equitable enforcement of a covenant by one, though not in expressed privity, for whose benefit the restriction was established. See Osius v. Barton, 147 So. 826 (Fla. 1933). Historically, the common law principle of standing for the enforcement of restrictive covenants to land grew out of the common law with respect to enforcement of contract rights and thus required privity. The

concept of a covenant running with the land and, therefore, allowing persons not in direct privity to sue lead to the evolution of the concept of "privity of estate" (51 ALR 3rd 556, 561). Florida has long recognized the concept of privity of contract and privity of estate in granting standing to persons for the enforcement of covenants. In 1933 this Court in the case of Osius v. Barton (Supra) recognized not only the existing strict common law principle for enforcement, but also enunciated the right of standing equitably to include one for whose benefit the restriction was established. There, this Court declared:

> "The theory adopted in this state is that the contract which embodies the restriction may be enforced against both the promisor and those who take from him with notice, thereby including amongst those who may enforce the obligation not only the promisee, but those who take from him and those in the neighborhood who may be considered as beneficiaries of the contract..."

This Court went on to reason:

> "The general theory behind the right to enforce restrictive covenants is that the covenants must have been made with or for the benefit of the one seeking to enforce them...
>
> The violation of the restrictive covenant creating a negative easement may be restrained at the suit of one for whose benefit the restriction was established, irrespective of whether there is privity of estate or of contract between the parties, or whether an action at law is maintainable... The rule is well established that where a covenant in a deed provides against certain uses of the property conveyed which may be noxious or offensive to the neighborhood, inhabitance, those suffering from a breach of such covenant, though not parties to the deed, may be afforded relief in equity upon a showing that the covenant was for their benefit as owners of neighboring properties." (emphasis supplied.)

While this Court expanded the circle of persons having a right to enforce restrictive covenants, clearly, the class of persons was not extended to include strangers such as Palm Point. Nothing in

the restrictions nor in matters brought to the attention of this Court by Palm Point's Brief indicates that it was in any way intended to be benefitted by the restrictions at the time they were created. The existing law is, therefore, clear that Palm Point has no standing to sue.

While this Court's decision in the Osius case appears to be the cornerstone decision upon which rests the law relative to standing to enforce covenants, subsequent decisions of this Court and the District Courts of Appeal have reinforced the consistent law of this State which narrowly limits those persons having standing to sue. In the case of Vetzel v. Brown, 86 So.2d 138 (Fla. 1956) suit was brought in equity by remote grantees of a common grantor for relief from restrictions resulting from an agreement placing restrictions on the use of their property by virtue of an agreement between the common grantor and an adjoining property owner. The agreement designated certain lots as "business" lots and restricted others to "residential" usage. This Court, citing the Osius case rejected the need for privity and upheld the enforcement of the restrictive covenant predicated upon the common development scheme by the common grantor. In the case of Batman v. Creighton, 101 So.2d 587 (Fla. 2d DCA 1958) a suit was brought to declare certain restrictive covenants inoperative because of a change of condition subsequent to restrictions being established. The Trial Court dismissed the Complaint and the Second DCA affirmed. There, the Plaintiffs contended that the restrictive covenants were not enforceable because, while they appear in other deeds within the

subdivision, they did not appear in their own. The case, therefore, turned not on technical rules of privity of contract or privity of estate, but rather upon whether the property of other owners was benefited by a common scheme for development. The Second DCA again citing the Osius case further explained the Florida Rule as to the extent of the interest required for standing as follows:

> "An action to restrain a breach may be maintained by the grantor in whose deed the covenant appears, so long as by ownership of some portion of the tract out of which he has made conveyance, or otherwise, he retains a substantial interest, rather than a merely nominal interest, in enforcement. A breach may be restrained by his grantee or other assigns of the land for whose benefit the restrictions were created, provided it is farily clear that the restrictions were imposed for their benefit as well as for that of the original covenantee." (emphasis supplied)
>
> "For instance, when it is apparent that restrictions were imposed as part of a general plan for a restricted residence district, each grantee of any part of the land involved in the plan is a beneficial owner of the right of enforcement... enforcement is by injunction, at the instance of the original grantors, or of parties to whom they have conveyed other property, for the benefit of which the restrictions were imposed...." (emphasis supplied)

In the case of Nelle v. Loch Haven Homeowners' Association, Inc., 413 So.2d 28 (Fla. 1982), Pinellas County subdivision lot owners sought an injunction against other lot owners for violation of subdivision restrictions. After an adverse decision the Plaintiffs appealed to the Second DCA which reversed. This Court, predicated upon a conflict of DCA decisions, took jurisdiction and affirmed the Second DCA decision thereby allowing the injunction. The question turned on when the developers reserved right to approve exceptions to the restrictive covenants prevented enforcement of

the remaining covenants by remote grantees. This Court affirmed its position in the Osius and Batman cases, ruling at Page 29 of the decision:

> "Ordinarily, restrictive covenants are unenforceable by one not a party to the conveyance unless the covenants were made by a common grantor for the benefit of all grantees." Osius v. Barton, 109 Fla. 556, 147 So. 862 (1933). One method of demonstrating this beneficial intent of the grantor is through a common, uniform, or scheme of restriction imposed on the property transferred out of the common grantor. id 147 So. at 866. Thus, a remote grantee may enforce restrictive covenants against another remote grantee when a common grantor intended to create a uniform building plan or scheme of restrictions. Batman v. Creighton, 101 So.2d 587 (Fla. 2d DCA 1958).

The key in the Nelle case was the intent of the grantor in creating the covenant for the benefit of the grantees. There, as in the instant case of Palm Point the owners individually have always had the right to bring an action against another owner alleging a violation of a restrictive covenant. But, a non-owner, not intended to be benefited by the creation of the original restriction by the common grantor, does not have standing. Again, in 1980, this Court in the case of Bessemer v. Gersten, 381 So.2d 1344 (Fla. 1980) upheld the right of successors in interest to the subdivision developer to bring a lien enforcement action against another subdivision lot owner. There this Court citing the Vetzel case restated its long held position that, "where appropriate, the right to enforce a covenant belongs to the holder of the benefited land". In the instant case of Palm Point, the Association is not the holder of the benefited land and therefore lacks the requisite standing. Finally, in the case of Rea v. Brandt, 467 So.2d 368 (Fla. 2d DCA 1985) the Second DCA summed up what appears to be the

Florida Rule for standing to enforce a covenant to land. Referencing this Court's Osius case the Second District Court of Appeal concluded at Page 369 of its decision:

> "Basically, the right to enforce a restrictive covenant requires proof that the covenant was made for the benefit of the party seeking to enforce it."

Certainly, there is no question that individual property owners in the Palm Point subdivision have a right to enforce restrictive covenants against other successor grantees to the common grantor. However, there is neither an assertion by Palm Point nor any evidence before this Court that the common grantor at the time of creating the covenants and restrictions for Palm Point in 1958, intended in any way to benefit Palm Point who is a corporate association created some twenty-three (23) years after the original covenants and restrictions. Even the amendments to the Restrictions in 1981 don't give Palm Point enforcement power and one must assume that the failure to do so was intentional. Even if that slim majority of property owners who amended the Restrictions in 1981 had attempted to give the Palm Point Association enforcement powers, it is doubtful as to whether such authority would be sustainable since to do so would have substantially altered the developer's original scheme without the joinder of all of the subdivision owners who have vested proprietary interest.

Just as it is clear that the courts have been consistent in determining who the narrowly defined group of parties are with standing to sue on a covenant, so to have the Florida courts been clear in determining who does not have standing to sue. In the

case of White v. Metropolitan Dade County, 563 So.2d 117 (Fla. 3d DCA 1990), the DCA considered a case where property was transferred from the grantor to Dade County including the express provisions that in the event the stated purpose of the grant was thwarted "the said (grantor), his heirs, grantee, or assigns were entitled to have the land reconveyed to them (Page 123). Heirs of the grantors and other county residents, brought an action to enjoin the county's construction of a tennis court center alleging the violation of the deed covenant that the land was "for public park purposes only". The county alleged lack of standing for both sets of plaintiffs. The Third DCA held, commencing at Page 122 of its decision, that the heirs had standing, but that the other residents of the county did not. The Court reasoned:

> "...in order to enforce a deed restriction, Plaintiffs must show that they sustained an injury that was greater in degree than that sustained by the general public (citation omitted) or that the restriction in the deed was intended for the Plaintiffs' benefit", Bessemer v. Gersten, 371 So.2d 1344 (Fla. 1980); Rea v. Brandt, 467 So.2d 368 (Fla. 2d DCA), review denied 476 So.2d 675 (Fla. 1985).
>
> "Two of the Appellants, Margaret Matheson Randolph and Malcom Matheson, Jr., are heirs of the original grantors. ...we conclude that the Appellants/Heirs have the requisite standing to enforce the deed restriction."
>
> "We rule, however, that there exists a lack of standing as to the other Appellants to raise the deed restriction issue. These other Appellants have not shown that they sustained an injury greater in degree from that sustained by the general public or that the deed restriction was intended for their benefit. ..."

As the county residents in the White case, Palm Point in the instant case has likewise made no showing that their harm was any greater than that of any other member of the public nor that the

restriction was in any way intended for their benefit.

Even where a party has a public interest in the enforcement of a covenant the strict rules of standing have denied such a party's participation in an enforcement action. In Mangrove Chapter of Izaak Walton League of America, Inc. v. Florida Game and Fresh Water Fish Commission, 592 So.2d 1162 (Fla. 1st DCA 1992), an appeal was taken from a Game and Fresh Water Fish Commission ("GFC") Final Order permitting the developer to destroy certain habitat during the development of a subdivision. The First DCA reversed the portion of the GFC Final Order dealing with the Commission's future enforcement of a pet control covenant which was to be binding upon subsequent subdivision property owners. The District Court noted that even though the GFC had statutory authority to prevent violations of GFC Orders,

> "The GFC itself would have no apparent standing to proceed against subdivision property owners after the permittees dispose of their ownership interest in the subdivision. Even though the GFC has condition the permit on conformance to its authority, we find no basis on which GFC may prosecute or otherwise enforce the subject permit with respect to subdivision pet control in its role as adjoining property owner having contiguous property outside the borders of the subdivision. Cf. Osius v. Barton, 109 Fla. 556, 147 So. 862 (Fla. 1933) 7 Fla.Jur2d, Building. Zoning, and Land Controls Section 48-9, at 443-7, 136-7 (pocket part) (1991). Further, the GFC would not appear to have privity of contract or estate with such subdivision owners. Accordingly, it would have not clear authority to require that the successors in title of the permittees (or their agents, etc.) to enforce pet control through a covenant to the subdivision. Nor apparently would the GFC, as a third party, have any other basis for standing to sue at future points in time, upon the facts before us in this record. ..."

In the Homeowners' Brief before the Second District Court the case of Beech Mountain Property Owners' Association v. Current, 240

S.E.2d 503 (N.C. APP. 1978) was cited. The case represents a succinct statement of established law in this area and apparently was given much weight in the Second District Court's opinion below. The case merits consideration not only because of its consistency with the established Florida law, but because the facts were nearly identical and the Court faced a similar argument for standing as that asserted by Palm Point. That is, even though the association owned no property and had received no assigned enforcement rights it, nevertheless, on the basis of asserted "representation" sought standing to enforce restrictive covenants. In denying the association's standing the Court reasoned:

> "Restrictive covenants are 'in derogation of the free and unfettered use of land (and) are to be strictly construed so as not to broaden the limitation of use.' This rule of strict construction also guides us in the determination of whether a party seeking to enforce the restriction has sufficient interest to do so." (emphasis supplied)

The Court then ruled:

> "Since the entity owns no property at Beech Mountain it cannot claim the benefit of the provision in the Declaration of Restrictions granting the right of enforcement of the restrictions to 'owners of lots...or any of them jointly or severally...' And we must assume that if the grantor had intended to authorize the plaintiff to enforce the provisions as an agent of the property owners, it would have expresed such intent." (emphasis supplied)

The North Carolina decision is perhaps not necessary to the understanding of Florida law, but in the undersigned's opinion represents the consistent common law encountered in all of the jurisdictions reviewed including Florida.

While Palm Point apparently does not contest the status of the existing Florida law as to its standing to enforce restrictive

covenants, nevertheless, the thrust of its Brief before this Court, as it was before the District Court, is to assert that other

jurisdictions have adopted more liberal rules of standing which Palm Point encourages this Court to similarly adopt. Palm Point has cited numerous cases which it believes support its suggestion that a new law of standing for the enforcement of restrictive covenants be adopted. Virtually none of the cases cited by the Appellant were found to be relevant to the issue of standing to enforce a real property covenant or restriction. In each instance the cases cited by Palm Point are distinguishable from the established Florida Law of standing eminating from the Osius decision.

In the Florida Homes Builders Association v. Department of Labor and Employment Security, 412 So.2d 351 (Fla. 1982), the U.S. Supreme Court granted standing to an Association where the challenge was as to the validity of a rule of the Bureau of Apprenticeship. The court was interpreting the substantial interest rule of Chapter 120 Florida Administrative Procedure Act, which is wholly inapplicable to this instant case. The Federal cases of Hunt v. Washington State Apple Advertising Commission 432 U.S. 333, 343 (1977) and Warth v. Seldin, 422 U.S. 490 (1975), similarly involve interpretation of the Federal APA in cases arising from North Carolina and New York, respectively. In Hunt, the Supreme Court allowed a Washington statutory agency to have standing on behalf of its constituents, not withstanding the

agency's lack of status as a traditional voluntary trade association. In Warth, the issue involved whether a New York zoning ordinance violated the Federal constitution regarding a civil rights statute and, ironically, the Supreme Court denied standing to the groups involved. However, neither case deals with enforcement of property restrictions by third parties. The Argonaut Insurance Company v. Commercial Standard Insurance Company, case 380 So.2d 1066 (Fla. 2d DCA 1980), of course, is a Florida case, but is clearly not a case for enforcement of restrictive covenants. There, this Court's concern was the language of a commercial bond and whether Argonaut as a successor to the obligee under a commercial bond had standing to make a claim. That case turned upon the actual language of the bond and it is not clear just what relevancy it has to the current case. The Merrionette Manor Homes Improvement Association v. Heda, 136 N.E. 2d 556 (Illinois 1d. 1956) case is an Illinois Appellate Court case. There, the plaintiff sought to enforce a restrictive covenant, but unlike the instant case, the property owners association was the assignee of the developer real estate corporation who specifically had the right to enforce the restrictions. In fact, the association was created by the developer solely for the purpose to act as assignee and enforcer of the covenants. Clearly, standing was granted as in all probability it would be in a Florida case. If anything, this case substantiates the position of the Homeowners that some actual proprietary or assignment right must exist in order to enforce a

restriction. Clearly, neither an ownership interest nor assignment is involved in the instant case and it is unclear what interest of Palm Point is advanced by the citation of this case. Similarly, the Wisniewski v. Kelly case, 437 N.W. 2d 25 (Mich. App. 1989), does little to advance the position of Palm Point. While the case generally deals with a Michigan property owners' association, the issue there was whether the Association, which was voluntary, had a right to improve lots reserved to the owners of the subdivision. The issue was not standing nor was it the enforceability of a restriction against a property owner. The Appellant cites Garden District Property Owners' Association v. City of New Orleans, 98 So.2d 922 (La. App. 1957), for its "important conclusion" about incorporated owners' associations. The conclusion is that in a zoning case an association may be granted standing to attack a variance. Once again, the Appellee submits that such cases are unimportant as to the rule of law for enforcement of restrictive covenants. Specifically, the Garden District Property Owners' Association case construed a Louisiana code provision as giving the association inherent authority to sue the city to prevent the issuance of a certificate of use. Zoning cases, particularly in a code state like Louisiana, should have very little influence on encouraging Florida courts to change the well established laws of required standing to bring an enforcement action on a restrictive covenant. Palm Point submitted the case of Save A Valuable Environment (SAVE) v. City of Bothell, 576n P.2d 401 (Wash. 1978), for the suggestion that by allowing an association to sue where it

otherwise does not meet standing requirements, it would offset the potential financial impact to an individual property owner suing in his own behalf. The Save A Valuable Environment case was a Washington State case where an incorporated environmental group was granted standing to challenge the City Zoning Ordinance by virtue of a specified Washington statute. The issue was whether the grant of the rezoning petition was arbitrary and capricious thereby constituting illegal spot zoning. While there may be some financial saving in an environmental group organizing for defense of a zoning petition where the members may be substantially diverse, the same is not true for an action to enforce a restrictive covenant. The burden and therefore the need for financial support or contribution is no greater for the party enforcing the covenant than for the owner defending. In the opinion of the undersigned, the financial burden on either side does not justify modifying Florida's rule of standing.

Relative to the Appellant's assertion that standing may also be "derivative" in nature, Palm Point cites the case of Neponsit Property Owners' Association, Inc. v. Emigrant Industrial, 15 N.E.2d 792 (N.Y 1938). There, the New York court considered the standing of an association to bring suit to enforce a restrictive covenant. This was apparently a first case of departure from the strict privity of estate rule in New York which had previously required that only an owner and his successor in interest could bring an action to enforce a covenant to pay money. The covenant involved cited on its face that it was enforceable by the

developer's assigns which was the association. The case turned on two issues not present in the instant case - Does a covenant to pay money run with the land?, and; Can an enforcement right be assigned to a successor corporation? These questions are wholly inapplicable to the present case since the covenant to pay money is clearly not involved, there is no question as to the covenant running with the land, and there has been no assignment of the developer's interest to the corporation seeking to enforce the covenant.

There are only three (3) cases which have been cited in Palm Point's Brief which were not cited and considered below. Aldridge v. Georgia Hospitality & Travel Association, 304 So.2d 708 (Ga. 1983); Douglaston Civic Association, Inc. v. Galvin, 324 N.E.2d 317 (N.Y. 1974); and Snyder v. Callaghan, 284 S.E.2d 241 (W.Va. 1981). With the exception of the Aldridge case, which apparently was improperly cited, and therefore could not be found, the two (2) new cases, as well as all of the cases cited by them above, fall into one of only three (3) categories:

1. Environmental enforcement cases under the pertinent Federal or State APA;
2. Variance or zoning cases, and;
3. Foreign state court cases in opposition to Florida's Rule of Standing for Enforcement of Covenants.

The Douglaston case is again a variance case where standing was predicated upon the court's finding that the association was an "aggrieved person". Aside from the fact that the homeowners

believe that variance cases are not precedent for standing to enforce covenants to real property, there has also been no showing in the instant case that the association is "an aggrieved person". This is true particularly in light of the fact that property owners within Palm Point clearly do have a right to enforce restrictive covenants outside of the association. The Snyder case is a West Virginia case against the State's Director of the Department of Natural Resources concerning an environmental problem. Such APA, zoning or environmental cases involving issues of substantial interest are simply not analogous to the issue of standing for the purpose of enforcing restrictive covenants. Each state's APA is at variance and most specifically identify criterion for standing rather than relying upon common law principles upon which the decision turns in the instant case. The "Representative Theory" and the "Derivative Theory" offered by Palm Point and as evidenced by the cases cited, deal only with administrative or zoning issues within the jurisdictions involved. In such administrative or zoning cases such "representative" or "derivative" standing of a loosely knit association organized for the purpose of consolidating opposition to a zoning or environmental issue may well serve a valid purpose. It is not unusual for a voluntary environmental group to be granted party status for the purpose of intervention in a DRI appeal or for the purpose of contesting an administrative rule pursuant to the APA. It is also not unusual for a buyer or developer of real estate to be granted standing before a zoning tribunal where zoning is a prerequisite for the purchase or

development of the property. However, granting standing to a stranger to enforce a restrictive covenant is a violation of organic common law, not only in this state, but across the country. Florida courts have vigorously limited standing to those persons who have a vested proprietary, contractual or beneficial interests. The fact remains, that Florida law of standing to enforce covenants to real property is established and the citation of the foreign jurisdiction cases or cases in administrative and zoning law will not change the status of Florida law in this respect and are, therefore, not beneficial to the analysis of existing law. The only possible benefit is as to whether such cases serve as an enticement to this Court to modify the law through the adoption of a new rule of civil procedure. To this end it should be noted that Florida courts on many occasions involving administrative zoning and environmental issues have denied standing to organizations attempting to represent their members for lack of sufficient or substantial interest or of injury. Even in the environmental or zoning realm standing is not an unquestioned right but one within the discretion of the board, hearing officer or court predicated upon the gradation of interest represented or injury incurred. 8 ALR 4th 1087, "Standing of Civic or Property Owners' Association to Challenge Zoning Board's Decision (as Aggrieved Party)". As illustrative of this point the undersigned would cite two of the numerous such cases reported throughout the State. In the case of Hemisphere Equity Realty Company, Inc. a/k/a/ Hemisphere Equity Company, and Dade County, Florida v. Key Biscayne Property

Taxpayers Association, 369 So.2d 996 (Fla. 3rd DCA 1979), individuals owning land in the vicinity of property being rezoned, as well as general taxpayers of Dade County, brought a petition for certiorari to challenge the rezoning of the subject property. The District Court in its opinion found that individual petitioners had standing to maintain the action, because of the proximity of their property to the subject property, but denied the standing of the taxpayers' represented by the Key Biscayne Property Tax Payers' Association, Inc. Unlike the association, the property owners showed that they stood to suffer special damages from the effect of the zoning of the subject property. In the case of Chabau v. Dade County and Key Biscayne Property Taxpayer's Association, Inc., 385 So.2d 192 (Fla. 3rd DCA 1980), the Key Biscayne Property Taxpayer's Association along with Dade County sought to represent individual property owners in their opposition to a developer's request for zoning variances. There the District Court ruled at Page 130 of its decision:

> It is clear that a representative association, such as Appellee, could not sue in State court; it would have no standing, unless it, rather than its members, had suffered some special injury. United States Steel Corporation v. Save Sand Key, Inc., 303 So.2d 9 (Fla. 1974), Hemisphere Equity Realty Company, Inc. a/k/a Hemisphere Equity Company, and Dade County, Florida v. Key Biscayne Property Taxpayers' Association, 369 So.2d 996 (Fla. 3rd DCA 1979).

It is interesting to note that the Third District Court of Appeals rejected the position of foreign decisions including the Douglaston case cited by Palm Point by holding:

> Although the Appellees have referred us to two foreign decisions in which the requirement of aggrievement was lowered to facilitate administrative appeal by representative groups,

> we are not disposed to embrace their holdings. Contra our decision Douglaston Civic Association, Inc. v. Galvin, 36 N.Y. 2d 1, 324 N.E.2d 317, 364 N.Y.S.2d 830 (1974); East Camel Back Homeowners' Association v. Arizona Foundation for Neurology and Psychiatry, 19 Az.AP. 118, 505P 2d 286 (1973). If Dade County wishes to liberalize access to its local tribunals, it may undertake to do so.

Among all of the cases cited by Palm Point, only Palm Point's case of Conestoga Pines Homeowners' Association, Inc. v. Black, 689 P.2d 1176 (Colo. APP 1984) falls into the third category of cases cited above and, therefore, in any way suggests that a stranger may have standing to enforce a restrictive covenant. The Homeowners submit that the Conestoga Pines case is an isolated case which is poorly reasoned and, therefore, should not be considered as precedent for changing Florida law. The Colorado court in the Conestoga case cites no prior precedent for its ruling. Rather the Court rests its decision upon the same mistaken point of law which is urged by Palm Point in this case. That is, the Colorado court cites the Federal cases of Warth v. Seldin, 422 U.S. 490 (1975) and Hunt V. Washington State Apple Advertising Commission, 432 U.S. 333 (1977). Neither of the cited cases deal with enforcement of restrictive covenants, but, in fact, deal with standing in environmental cases. Hunt, for instance, involved the interpretation of the Federal APA in cases arising from North Carolina and New York respectively. In Hunt the Supreme Court allowed a Washington statutory agency to have standing on behalf of its constituents not withstanding the agency's lack of status as a traditional voluntary trade association. In Warth the issue involved whether a New York zoning ordinance violated the Federal

Constitution regarding a civil rights statute. In that case the Supreme Court denied the standing to the groups involved. The Homeowners submit that the Colorado court in relying upon the Hunt and Warth cases for its authority to grant standing to enforce a restrictive covenant simply overlooked the organic common law within its own state. The Homeowners, therefore, suggest that the Conestoga case is neither reliable authority for the expansion of the common law principle of standing, nor for a modification of the long held Florida position. In summary, there are no cases cited by Palm Point which authoritatively suggest that Florida or any other jurisdiction within the country has been persuaded to consider a modification of the common law of standing for the enforcement of a restrictive covenants.

A substantial portion of the remainder of Palm Point's Brief appears to be misdirected to matters not before the Court. Palm Point contends that it was denied the right to bring a class action in the Circuit Court being named as the class representative (please see page 23 through 32 of Petitioners' Brief). Palm Point also contends that individual property owners should have been permitted to join as plaintiffs to bring suit to enforce the subdivision restrictions (please see page 32 through page 35 of the Petitioners' Brief). The Homeowners disagree and would submit that both of these issues were attempted to be placed before the District Court of Appeal and were properly disregarded in the District Court's opinion. The Homeowners would submit that this Court lacks subject matter jurisdiction of either issue in that the

Trial Court's Order of October 3, 1991, (R 207 & R 208), from which the Appeal to the Second District Court arose, did not involve a class action and was therefore not subject matter of the Appeal. The Homeowners would also point out that the individual property owners dismissed by the Trial Court's Order of October 3, 1991, were dismissed without prejudice with the right to refile principally because the allegations of the Complaint were not personal to them, but rather allegations in support of the Association's position. While the issue of the bringing of a class action and the naming of the Association as class representative was dismissed by Trial Court's Dual Orders of May 13, 1991,(R 176 & R 177), thereafter the Association's Amended Complaint failed to renew any action by the Association or others as a class action. Consideration of such issue is therefore barred as a matter of law. Please see Cordell v. World Insurance Company, 352 So.2d 108 (Fla. 1d DCA 1977), Smith v. Atlantic Boat Builder Company, 356 So.2d 359 (Fla. 1d DCA 1978), and Raymond, James & Associates v. Zumstorchen Investment, Ltd., 488 So.2d 843 (Fla 2d DCA 1986). As to the propriety of bringing a class action, even if the issue were properly made part of this appeal the case of Port Royal, Inc. v. Conboy, 154 So.2d 734 (Fla. 2d DCA 1963), and the case of Lantana Cascade of Palm Beach, Ltd. v. Lanca Homeowners, Inc., 516 So.2d 1075 (Fla. 4th DCA 1987), are definitive for the proposition that a person without standing in his own right has no standing to bring a class action nor act as a class representative. In the Port Royal case the Second District Court of Appeal set down the

following guidelines for acting as a class representative:

> "It is fundamental that an action is not a class suit merely because the plaintiff designates it as such in the complaint and uses the language of the rule. Whether it is or is not a class suit depends upon the circumstances surrounding the case. However, the complaint should allege facts showing the necessity for bringing the action as a class suit and the plaintiff's right to represent the class. The plaintiff should allege that he brings the suit on behalf of himself and others similarly situtated... Generally the intrest of the plaintiff must be co-extensive with the interest of the other members of the class. A class suit is maintainable where...all members of the class have a similar interest in obtaining the relief sought... There must be a common right of recovery based on the sasme essential facts." (emphasis supplied)

The case of Lantana Cascade followed the guideline initiated by the Second District Court in the Port Royal case. There, the District Court of Appeal found that the association was not an appropriate class representative to represent mobile home owners in a civil action where the Court found:

> "We find that the trial court erred when it found the Lanca was an appropriate class representative for the mobile home residents. Lanca is not a member of the class, and therefore, does not meet the requirements of Florida Rule of Civil Procedure 1.220(a)."

Therefore, since standing is a clear prerequisite for Palm Point to be a class representative, it seems wholly unnecessary to delve into the issues submitted by Palm Point as to "numerosity principal", "commonality of interests principal", "typicality principal", "adequate representation principal" or the "maintainable claim principal". The issue was well summarized by the Trial Court at the conclusion of the Motion to Dismiss the Prior Count when Judge Pellecchia stated, "the court does not find any necessity for the maintenance of the suit in this fashion", (R

25).

With regard to the Association's Brief dealing with the right of the sixteen (16) property owners previously dismissed without prejudice by the Trial Court's Order of October 3, 1991, the Homeowners would submit that such parties simply were not parties appellant before the Second District Court of Appeal. Therefore, this Court lacks personal jurisdiction.

The singular issue before the Trial Court, District Court of Appeal and as presented to this Court for certiorari jurisdiction by certified question is whether Palm Point has standing to sue to enforce a covenant. Palm Point's arguments regarding questions of whether covenants may be enforced as a class action or whether the Association is a proper class party or whether the right to sue on a covenant may be assigned to a third party as a chose of action, are simply not relevant to this action nor are they jurisdictionally part of the Appeal. It is apparent that the District Court of Appeal below disregarded the attempt to expand the issues on appeal beyond the standing issue as raised by the Trial Court's decision.

Finally, even though the question certified by the Second District Court of Appeal in this case expresses a query only as to the status of existing law, within the body of the Court's opinion the Court expresses a perceived need for the promulgation of a procedural rule of standing, contrary to common law, for associations like Palm Point. The Homeowners respectfully disagree. Though perhaps not relevant to the decision in the

instant case, unless such a rule of standing were to be promulgated with retroactive effect, nevertheless, because the Palm Point Brief has dealt extensively with the perceived need for such a rule of standing, the Homeowners feel compelled to address the policy against such a rule's adoption. Such a rule of standing, if adopted, being contrary to existing common law, should have a perspective application only. Even though such a rule would, therefore, not affect this case, the Homeowners do urge the Supreme Court not to consider such a rule because: (1) It would unnecessarily disrupt existing common law; (2) it would be inconsistent with the purposes for which other similar rules of standing have been adopted for mobile home parks and condominium associations; and (3) it would be counterproductive as a matter of public policy.

The Osius case represents the current common law. There is no identified enhancement of Florida law by allowing a stranger such as Palm Point to have standing to enforce a covenant to real property. The Second District Court's opinion suggests that an analogy exists between associations like Palm Point who lack standing and condominium or mobile home park associations for whom rules of procedure were promulgated by this Court in the cases of Avila South Condominium Association, Inc. v. Kappa Corporation, 347 So.2d 599 (Fla. 1976) and Lanca Homeowners, Inc. v. Lantana Cascade, 541 So.2d 1121 (Fla. 1988). The undersigned disagrees. This Court in the Avila and Lanca cases was asked to rule upon the constitutionality of an existing statute which attempted to give

standing to such associations which represented all of the respective property owners within the condominium or mobile home park as to matters of common interest. In each case this Court found that the statute as adopted was a violation of the Supreme Court's vested constitutional authority for promulgating rules of procedure. Because there was an existing statute and a perceived need to grant such organizations standing, this Court adopted, on an emergency basis, Rules 1.221 and 1.222 Florida Rules of Civil Procedure. In the instant case there is no existing statutory authority for Palm Point or organizations similarly situated. Unlike condominiums or mobile home parks there is no similar need for such a statute. Within our existing common law an association by grant of the developer's right or by common action of the homeowner can be authorized to enforce restrictive covenants. The remedy is complete as it exists. The Palm Point situation is truly a legal aberration. Palm Point was simply not given the power that it seeks to enforce, whether intentionally or unintentionally. To grant an association like Palm Point standing by way of rule would unnecessarily violate the vested contractual and proprietary interests of each property owner. Furthermore, it is clear from the facts of this case that Palm Point is not a representative of all of the lot owners in that its membership is not mandatory and it is, therefore, not a proper party to enforce restrictions. Inherent in both of the rules of procedure adopted by this Court for condominium associations and mobile home parks is the mandate that such an association represent "all unit owners" or "all

homeowners". This is simply not consistent with the Palm Point facts.

While the undersigned certainly endorses the need which existed and which was filled by this Court's adoption of Rules 1.221 and 1.222, Florida Rules of Civil Procedure for Condominiums and Mobile Home Parks, the position of those organizations and the apparent intent of the rules was quite different than what is suggested in this case. First, condominiums and mobile home parks are creatures of statute, they do not exist at common law. Unlike homeowner associations which have been delegated the developer's enforcement right, associations representing condominiums and mobile home parks are not recognized as representatives of their members. But for the duties and privileges accorded by statute, such entities do not have existence. For instance, Chapter 718.111 entitled, The Association states that, "The operation of the condominium shall be by the association, which must be a corporation for profit or a corporation not for profit... The owners of units shall be shareholders or members of the association. The officers and directors of the association have a fiduciary relationship to the unit owners..." Subparagraph 2 of that statute sets out the powers and duties as prescribed in Chapter 607 and 617 of the applicable corporate law and in paragraph 3 grants to the association the capacity to "contract, sue or be sued with respect to the exercise or non-exercise of its powers." Subparagraph 4 deals with the association's duty to manage the common elements. By contrast, in dealing with a

subdivision, the developer doesn't require a statute in order to authorize an association to act on behalf of its members. Rather, the developer by proper drafting of the subdivision restrictions empower the association to enforce restrictive covenants. Because such associations are recognized to have standing at common law no procedural rule, such as that promulgated for condominium associations and mobile home park associations, is necessary for such an association to act on behalf of the lot owners. Therefore, while promulgation of a rule of procedure for mobile home associations and condominium associations may be reasonable the parallel mechanism to create a subdivision association already exists at common law. In addition, the owners of lots independently have the ability to obtain complete relief by an independent action to enforce a restrictive covenant whereas individual condominium unit owners or mobile home park owners may not be able to obtain complete relief because of the dependence of their ownership upon the community itself and upon the existence of common elements. Because condominiums and mobile home park associations do have statutory duties and ownership, it is reasonable that this Court has promulgated a rule by which they will have standing to represent "all unit or homeowner concerning matters of common interest". For condominium associations, the rule of standing includes disputes concerning common elements, roofs, structural components, etc. In the case of mobile home parks such standing includes disputes concerning "common property; structural components of the building or other improvements. It

is, therefore, reasonable by the promulgation of a rule of civil procedure to give owners of condominiums or owners of mobile homes a common voice through its legislatively created association to sue and be sued. By contrast, the ownership of land and the ability of owners and developers of land to by deed or common declaration of restrictions affect the subsequent use of the land is vested in common law and well recognized. The owners themselves have the ability to obtain complete relief by an independent action and enforce restrictive covenants or, the association, if duly constituted and authorized by the common developer, has the ability to enforce covenants and restrictions. The association which has received the assignment of the developer or common grantor's enforcement right has the current ability to sue or be sued in the Courts of this State without further rule or legislative provision. We don't know whether the failure of the developer to create an association and grant it the authority to enforce restrictions in Palm Point Subdivision was intentional or unintentional, but if the right existed at the time the restrictions were created and the developer did not grant such right to an association, then that was the developer's prerogative and that right should likewise be protected by the Courts of this state. If subsequent owners wish to have rules that are enforceable by an association, then they may collectively, by gaining the approval of all lot owners, place themselves in that position. Once again, that right is protected by our common law. There are hundreds, if not thousands, of homeowner associations throughout this State which have been

properly formed and have received the transfer or assignment of the developer's rights and for whom there is no question as to their standing to sue, be sued or enforce restrictions. By contrast, Palm Point is one of what must be a very small number of associations, which have not been properly formed and who do lack standing. As noted above Palm Point association is not representative of all lot owners and should not have such power.

It is clear from the text of Rules 1.221 and 1.222, Florida Rules of Civil Procedure, that the type of standing granted to the association was intended to be limited to actions on behalf of "all" of the owners concerning, primarily, matters of "common interest", and in particular, actions concerning "common elements" or "common property". It is also expressed by way of illustration within the rule that such standing was intended for actions against third parties such as the developer. There is certainly no indication that standing under the rules of procedure was intended or would be granted in an action, such as the instant action, against one of its own association members. Inherently such an action would be non-representative of at least one member and would not be concerning "common property". Under condominium law, Chapter 718 Florida Statues, authorizes the association to take independent actions against a unit owner for such things as breach of covenants or failure to pay assessments. Such right is contractual since it is part of the declaration of condominium. Rule 1.221 and 1.222, Florida Rules of Civil Procedure seem to grant standing in the nature of a class action only against third

parties only rather than for actions among its members.

There would certainly be no judicial economy as a result of implementing a rule of procedure for homeowner associations. As pointed out above, historically, such rules of procedure have been directed to the litigation by the homeowners collectively, represented by an association, against some third party. If the rule were expanded to include standing for covenant enforcement actions, as has been suggested, it would appear to add, rather than limit, the parties who may bring a suit. Presumably, such a rule of procedure would not detract from individual property owners continuance to have the right to enforce a restrictive covenant and, therefore, the addition of one additional corporate party with such standing would only lead to potential multiplicity of suits and the confusion as to when the action brought by the association became binding and determinative of individual property owner's rights of enforcement. On an associated issue, often the injury being redressed in a covenant enforcement action is personal to the individual property owner. That is, the violation by one homeowner may have a particularly adverse effect on an adjoining lot owner where a setback is violated or some nuisance created. Similarly, the owner bringing the action may be subject to individual defenses or liabilities not representative of the community. For instance, if the landowner bringing an action has himself breached the same or similar restriction it would form a defense for the homeowner he is suing. Granting standing to the association generally may have the effect of sanitizing litigation by removing individuals from

the action and eliminating defenses that a homeowner might otherwise have.

Finally, it is the undersigned's belief that Rules 1.221 and 1.222, Florida Rules of Civil Procedure, were enacted to give homeowners a collective voice in the Courts where none existed previously. If a parallel rule were to be adopted for homeowner associations such as Palm Point, and expanded to cover such matters as enforcement of covenants against its members, then the undersigned submits that such a rule would have the effect of augmenting or shifting the balance of litigation strength in disputes among owners. Currently covenants must be enforced by lot owner unless a developer chooses to create the declaration of restrictions and clothe the association with enforcement rights. Since Declarations are of public record, the owner of property at the time of his purchase knows whether such an enforcement right rests with the association or not. In the instant case enforcement must be by individual property owners. If a parallel rule of civil procedure were adopted for associations such as Palm Point, the effect would certainly be to create a litigation imbalance where the original grantor apparently intended none. That is, where the developer originally intended that only itself and individual property owners have the right of covenant enforcement, a rule of standing as suggested by the Second District Court of Appeal would clothe the enforcement entity with the financial strength well beyond that of an individual owner. This issue is very real and is of substantial concern to the landowner. In the instant case the

landowner has endured three (3) years of litigation expense, four (4) dismissals of complaints at the trial level, a full appeal with the Second District Court of Appeal, and now the instant action before this Court. The Homeowners are facing immense legal costs versus the financial strength of a confederation of at least sixteen (16) lot owners. Against such financial imbalance many, if not most private homeowners, would have to give up regardless of the propriety of their legal position.

Therefore, since there can be little question that the common law as expressed by this Court in the Osius case is the law of standing in this state with respect to the enforcement of covenants, the only question remaining is the propriety of following the Second District Court's suggestion for the adoption of a new rule of standing. Even if such a rule consistent with Rules 1.221 and 1.222, Florida Rules of Civil Procedure, were adopted as suggested by Palm Point such rule would be of no application to the instant case. This is not a class action, does not involve all of the lot owners, and it does not relate to common elements, common property or common interests. However, as a matter of public policy, the undersigned urges that this Court not adopt such a rule of procedure, because, for the reasons noted above, such a rule would disrupt the existing common law, be inconsistent with the reasons that this Court adopted such rules for mobile home parks and condominium associations, and would be counterproductive as a matter of public policy.

CONCLUSION

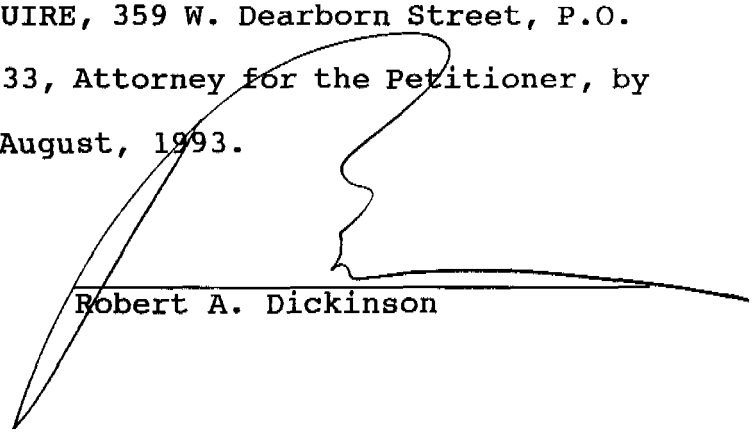
The established common law of this State does not grant standing to enforce a restrictive covenant to real property to a stranger such as Palm Point's association where the person is not an owner within the subdivision, is not the assignee of the developer's or common grantor's right of enforcement, and where the covenant neither names the person as having enforcement rights nor designates it as a party to be benefitted thereby. Therefore, the Order of the Trial Court dismissing the Petitioner's Complaint and the Order of the Second District Court of Appeal affirming the dismissal was proper. There has been no demonstrated need for this Court to promulgate a similar rule of standing as has been done for condominium and mobile home owners associations. The lot owners currently enjoy the right to enforce covenants individually and obtain complete relief. Because no common property issues are involved in the instant case, it is doubtful that such a rule of procedure could have an effect upon the parties to this action. It is, therefore, respectfully submitted that this Court should either decline the certiorari jurisdiction or accept jurisdiction and affirm the lower Courts' Orders.

Respectfully submitted,

Robert A. Dickinson
A Chartered Professional Assoc.
460 South Indiana Avenue
Englewood, Florida 34223
(813) 474-7600
Florida Bar #161468

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished to R. EARL WARREN, ESQUIRE, 359 W. Dearborn Street, P.O. Box 1207, Englewood, Florida 33533, Attorney for the Petitioner, by hand delivery this 25th day of August, 1993.



Robert A. Dickinson

IN THE CIRCUIT COURT IN AND FOR CHARLOTTE COUNTY, FLORIDA

PALM POINT PROPERTY OWNERS' ASSOCIATION, INC. Plaintiffs,	
v.	CASE NO. 90-1183-CA-DP
ROBERT PISARSKI and LILLIAN PISARSKI Defendants.	

ORDER

THIS MATTER having come on before the Court on Defendant's Motion to Dismiss Plaintiff's Third Amended Complaint for Injunction and upon the Court having considered the arguments of counsel and being otherwise fully advised in the premises, it is therefore

ORDERED AND ADJUDGED:

1. That this action as to the Plaintiff, PALM POINT PROPERTY OWNERS' ASSOCIATION, INC., is hereby dismissed with prejudice on a finding that said Plaintiff lacks standing to pursue this matter.

2. That this Court reserves jurisdiction to consider the issue of whether the Defendants are entitled to an award of attorney's fees and costs.

3. That as to Plaintiffs, STANLEY and DEBORAH COPERHAVER, GEORGE and BLANCHE DIPPEL, WILLIAM H. and JUDITH A. DOODY, GEORGE and CLARICE KUHLMAN, WILLIAM J. and VIRGINIA S. LINSBERG, PAUL L. and JOAN B. LITCHFIELD, THOMAS M. and DOLORES M. McNEAL, AUGUST and EILEEN RUND, this action is dismissed without prejudice, but with direction that further action, if any, shall be permitted upon the filing of a new and independent action.

DONE AND ORDERED in Chambers in Punta Gorda, Florida, this 3 day of October, 1991.

CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing document has been furnished to RICHARD BARTON RAY, ESQUIRE, R. Earl Warren, P. A., P. O. Box 1207, Englewood, Florida 34295-1207, Attorney for Plaintiffs and ROBERT A. DICKINSON, ESQUIRE, 460 S. Indiana Avenue, Englewood, Florida 34223, Attorney for Defendants, by mail, this 8 day of ~~September~~ October, 1991.

Judicial Assistant

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

PALM POINT PROPERTY OWNERS' ASSOCIATION OF CHARLOTTE COUNTY, INC.,	
Appellant,	
v.	Case No. 91-03643
ROBERT PISARSKI, and LILLIAN PISARSKI,	
Appellees.	

Opinion filed November 13, 1992.

Appeal from the Circuit Court
for Charlotte County;
Donald E. Pellecchia, Judge.

Mira Staggers White of
R. Earl Warren, P.A.,
Englewood,
for Appellant.

Robert A. Dickinson of
Dickinson & Nipper,
Englewood,
for Appellees.

BUCKLEW, SUSAN C., Associate Judge.

Palm Point Property Owners Association sued Robert and Lillian Pisarski, seeking to enjoin the Pisarskis from violating

EXHIBIT A

certain deed restrictions in their construction of a swimming pool, stem wall, and dock on their lot in the Palm Point subdivision. The Pisarskis maintained that the plaintiff, which is an incorporated homeowners' association that is neither a direct successor to the interests of the developer nor an owner of any property within the subdivision, lacked standing to pursue this action. After according the plaintiff several opportunities to amend the complaint, the court dismissed the suit with prejudice. We affirm.

Palm Point Property Owners' Association is comprised entirely of property owners, any one of whom could sue to enforce the restrictions at issue in this case. See Osius v. Barton, 147 So. 2d 862 (Fla. 1933). However, Palm Point is not, as we have stated, a direct successor to the interests of the developer, nor does provision for such an association appear in the grantor's original subdivision scheme. The narrow question with which we are concerned, then, is whether Palm Point has standing to sue.

This is a question that is easier to answer when the homeowners' association is either a direct successor to the developer or was contemplated by the original subdivision documents. For instance, in Neponsit Property Owners' Ass'n, Inc. v. Emigrant Industrial Sav. Bank, 278 N.Y. 248, 254, 15 N.E. 2d 793, 795 (N.Y. Ct. App. 1938), the court stated, "There can be no doubt that Neponsit Realty Company intended that the covenant should run with the land and should be enforceable by a property owners association against every owner of property in the

residential tract which the realty company was then developing." Similarly, in Merrionette Manor Homes Improvement Ass'n v. Heda, 11 Ill. App. 2d 186, 187, 136 N.E.2d 556, 557 (Ill. App. 1956), the court noted that the "association has no legal title to any property in the area, but the prospect of the formation of such an association for the purpose of requiring conformance was set out in the declaration establishing the restrictive covenants." See also Wisniewski v. Kelly, 175 Mich. App. 175, ___, 437 N. W. 2d 25, 27 (Mich. App. 1989) (grantor anticipated need for association to manage areas outside authority and jurisdiction of individual lot owners). In those cases the courts allowed the property owners' associations to maintain suits to enforce covenants.

In this case, however, although the original subdivision declaration is silent on the need for an owners' association, the owners of a majority of the lots formed one in 1981. The stated purpose of the association was "promotion of the best interests of the property owners of Palm Point subdivision." In its articles of incorporation the association did not state that it was being formed to maintain lawsuits to enforce the subdivision restrictions, but the modified restrictions do require submission of plans for approval of specifications and also provide for assessment of court costs and legal expenses against those who violate the restrictions. At least the implied intent of the organization was that it be able to enforce the standards of which it was to be the arbiter and to insure that restrictions were followed without the necessity for any individual lot owner to incur the burdens of litigation.

Although assumption of the litigator's mantle may have been a purpose of the organization, we can find no Florida cases specifically supporting that role. The parties have urged us to consider cases from other jurisdictions, particularly Conestoga Pines Homeowners' Ass'n, Inc. v. Black, 689 P. 2d 1176 (Colo. App. 1984), and Beech Mountain Property Owners Ass'n v. Current, 240 S.E.2d 503 (N.C. App. 1978). In Conestoga Pines the Colorado court permitted a voluntary homeowners' association to represent its members in a suit to enforce a restrictive covenant against the keeping of goats on subdivision property. Using the test outlined in Hunt v. Washington State Apple Advertising Commission, 432 U. S. 333, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977), the court found that the association's members would otherwise have standing to sue in their own right, that the interests the association sought to protect were germane to its purpose, and that neither the claim nor the relief required participation of individual members in the lawsuit. In Beech Mountain, however, the North Carolina court took a conservative view. Because the homeowners' association owned no property at Beech Mountain, it could not claim the benefit of the provision in the declaration of restrictions that granted enforcement rights to any of the owners of the lots. Furthermore, the court assumed, had the grantor intended an association to enforce the provisions as an agent of the property owners, it would have expressed that intent in the original documents. Accordingly, the North Carolina court held that the property owners' association lacked standing.

We have also looked to analogous situations in Florida to resolve this issue. Our supreme court has recognized that the peculiar features of condominium associations and mobile homeowners' associations underscored the need for procedures to settle disputes affecting unit owners concerning matters of common interest. In Avila South Condominium Ass'n, Inc. v. Kappa Corp., 347 So. 2d 599 (Fla. 1976), the supreme court promulgated Rule 1.221 of the Florida Rules of Civil Procedure, bestowing upon condominium associations the capacity to sue. Similarly, in Lanca Homeowners v. Lantana Cascade, 541 So. 2d 1121 (Fla. 1988), the supreme court addressed the needs of mobile homeowners' associations and promulgated Rule 1.222. Both of those cases dealt with unconstitutional incursions into the supreme court's rule-making authority by the legislature, which had attempted to confer standing on such associations by statute. The promulgation of these rules endowed these associations with the authority to pursue resolution of problems of mutual concern and common interest. The same procedural vehicle should be available to a property owners' association of the type involved in this case. Without promulgation of such a rule by the supreme court, however, we hold that Palm Point lacked capacity to maintain this action.

Accordingly, we affirm the order of dismissal but certify the following question to the Florida Supreme Court:

> ABSENT A SPECIFIC RULE OF PROCEDURE, DOES A PROPERTY OWNERS' ASSOCIATION THAT IS NOT A DIRECT SUCCESSOR TO THE INTERESTS OF THE DEVELOPER AND PROVISION FOR WHICH DOES NOT APPEAR IN THE GRANTOR'S ORIGINAL SUBDIVISION SCHEME HAVE STANDING TO MAINTAIN AN ACTION TO ENFORCE RESTRICTIVE COVENANTS?

RYDER, A.C.J., and PATTERSON, J., Concur.