IN THE SUPREME COURT OF FLORIDA

PALM POINT PROPERTY OWNERS' ASSOCIATION OF CHARLOTTE COUNTY, INC.,	
Petitioner,	CASE NO. 80,840 DCA-2 NO. 91-03643
v.	
ROBERT AND LILLIAN PISARSKI,	
Respondents.	

PETITION FOR RULE 9.120 REVIEW

OF DECISION ISSUED BY THE

SECOND DISTRICT COURT OF APPEAL

-BRIEF OF PETITIONER-

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STATEMENT OF CASE AND FACTS

This Rule 9.120 proceeding arose out of a dismissal by the Circuit Court of the 20th Judicial Circuit of the State of Florida entered on October 3, 1992. (R. 207-208).[1] Upon appeal the Second District Court of Appeal affirmed the trial court's order of dismissal by its opinion entered on November 13, 1992 and certified the following question:

> "ABSENT A SPECIFIC RULE OF PROCEDURE, DOES A PROPERTY OWNERS' ASSOCIATION THAT IS NOT A DIRECT SUCCESSOR TO THE INTEREST 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?" (A. 18).[2]

Palm Point is a small subdivision for single family residential housing located in the growing Southwest Florida setting of Englewood, an unincorporated community. The initial subdivision restrictions were recorded on May 26, 1958 by the individual developer. (A.1). The subdivision restrictions contained several covenants, as well as a provision outlining the necessary procedure for modifying these covenants. (A. 1). The covenants could be modified by a majority of the property owners. (A. 1). Since the recording of these subdivision restrictions, they have been duly modified by the majority of property owners on four occasions. (R. 44).

On June 12, 1981, the then subdivision property owners organized as the Palm Point Property Owners Association. (R. 4). On that same day, the Association was incorporated as Palm Point

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1. R.-used to denote page number in record on which referenced material is found.
2. A.-used to denote page number of appendix on which referenced material is found.

Property Owners Association of Charlotte County, Inc., hereafter referred to as "PPA". (R. 4) and (A. 3-7). In its organic corporate papers, PPA is charged with the responsibility of enforcing the subdivision restrictions on behalf of all the property owners in this subdivision. Also, PPA was named as the entity to review and approve construction plans and specifications and other such matters in the 1983 recorded modifications of these restrictive covenants.

The Respondents, Robert and Lillian Pisarski, purchased a lot in the Palm Point Subdivision in August, 1988. (R. 37). Subsequently, Respondents decided to construct a house, swimming pool and dock on their property. (R. 38 & 41). Respondents submitted the building proposals to PPA, ostensibly complying with the subdivision restrictions. (R. 38 & 41). However, Respondents then constructed a swimming pool, stem wall and dock in violation of the restrictive covenants. (R. 37-42). PPA filed suit in Circuit Court, seeking to enjoin Respondents from violating the subdivision restrictions. (R. 36-74). An order of dismissal without prejudice was entered on October 16, 1990. (R. 110). The basis for this dismissal was a lack of standing by PPA. (R. 75 & 110).

PPA amended the complaint by alleging a class action pursuant to Fla. R. Civ. P. 1.220. (R. 111-150). The amended complaint was superseded with court approval by a second amended complaint.

The Second Amended Complaint was also filed as a class action. (R. 155-164). The facts surrounding this complaint

differed from those of the First Amended Complaint. Prior to filing the Second Amended Complaint, fourteen Palm Point Subdivision property owners assigned to PPA their chose in action against Respondents. (R. 121 & 156). The motion to certify PPA as the class representative and to allow the class action to proceed was denied. (R. 176). Additionally, the action was dismissed without prejudice on May 13, 1991. (R. 177).

The Third Amended Complaint was filed on June 11, 1991. (R. 178-202). In that complaint, PPA joined as plaintiffs sixteen Palm Point Subdivision property owners. (R. 178-202). Again, Respondents filed a Motion for Dismissal based on a lack of standing. (R. 203-205). The Court entered an order on October 3, 1991 dismissing PPA with prejudice and dismissing the sixteen property owners without prejudice. (R. 207-208).

PPA noticed its appeal to the Second District Court of Appeal on October 31, 1991. (R. 209). That appeal concluded with the affirmance of the trial court and the certified question which is the subject of these proceedings.

III. SUMMARY OF ARGUMENT

In the trial court and in the court below, PPA has argued that it did have standing to enforce the subdivision restrictions and in support thereof cited pertinent case authority. In this Court, PPA continues to urge that it has standing (and also arguing alternatively, that it should have standing) and that this action to enforce subdivision restrictions should be allowed to proceed.

In the first action, PPA brought suit on behalf of the

property owners of Palm Point Subdivision. PPA felt it had standing to bring suit to enforce the restrictive covenants of Palm Point Subdivision.

Under the representation theory, an association has standing to sue on behalf of its members when:

a.) its members individually have standing to sue;

b.) the interests which the association seeks to protect are germane to its purpose; and,

c.) participation of the individual members in the lawsuit is not necessary.

These criteria are satisfied in this case. Although the Florida courts have not used the representation theory to find association standing in the context of this case, they have used the theory to find standing for associations to challenge zoning decisions. Furthermore, courts in other jurisdictions have applied the representation theory in a variety of situations. One court has used this theory to uphold association standing to enforce real covenants. There is ample authority to justify this Court's ruling that PPA has standing under the representation theory to enforce this subdivision's duly recorded restrictions.

PPA also maintains it has standing under the derivative theory. This theory requires an association to derive its power to sue from the grantor or one in privity with the grantor. Thus, PPA obtained the power to sue from an <u>implicit</u> assignment by the property owners of Palm Point Subdivision.

Furthermore, public policy reasons demand that this Court find that PPA has standing. The distinctive features of property

ownership and residence in a subdivision demand an effective procedural format to resolve disputed matters of common interest. A decision otherwise would be detrimental not only to Palm Point Subdivision, but to all similarly situated communities. Additionally, a denial of standing would effectively terminate PPA's operations.

For the foregoing reasons, PPA should not be dismissed for a lack of standing, and the trial court should be directed to allow this action to go forward.

The second action was brought as a class action with PPA serving as the representative. A class action is an appropriate method to seek enforcement of subdivision restrictions. In general, a class action can be maintained when joinder of its members is impracticable; the claim raises common questions of law and fact; the representative's claim is typical of the claims held by the class members; the representative can adequately represent the class members' interests; and, the claim is maintainable as a class action.

In this action all of the prerequisites to a class action are established. The class consists of seventy-two property owners, making joinder impracticable. Common questions of fact and law exists because the Respondents' action affected each member similarly and the resulting harm can be rectified with an injunction. The only arguable position regarding the appropriateness of the class suit is whether PPA's claim is typical of the other members. PPA received from fourteen subdivision property owners valid assignments of their individual

choses in action against the Respondents. The rights derived from these assignments are identical to the rights held by the property owners who comprise the class. As such, PPA's claim is typical of those of the class members. PPA can adequately serve as representative, since it is a composite of the property owners and it has a willingness to prosecute this action. Finally, the remedy sought, an injunction, makes the nature of the claim maintainable as a class action.

The appropriateness of a class action with PPA serving as representative is evident. The class should have been certified and the action permitted to proceed as a class suit. Again, the trial court erred in entering an order of dismissal.

PPA joined as plaintiff with sixteen property owners to bring the third action. A proper party is one who has an interest in the subject matter of the action. PPA is a proper party. PPA has an interest in the subject matter of the action based on two grounds. First, PPA feels it has standing to bring suit to enforce the subdivision's restrictions. Second, PPA will be directly affected by an adverse decision of this case on its merits. Since PPA is a proper party, its claim should not have been dismissed.

Furthermore, the dismissal of the property owners' claim was erroneous. Inherent in the ownership interest of the property is the right to enforce the subdivision's restrictive covenants. This enforcement right gives the owners standing to bring suit.

IV. ARGUMENT

A. RIGHT OF PPA TO BRING SUIT TO ENFORCE THE SUBDIVISION'S RESTRICTIONS

1. Introduction

PPA began this injunctive action against the Respondents to enforce the subdivision's restrictive covenants by filing its Complaint in two Counts, the first challenging the pool and stem wall and the second the dock. (R. 36-74). The trial court ultimately dismissed this suit, finding that PPA did not have standing. (R. 207).

Standing requires a party to have sufficient interest in the outcome of the litigation to warrant the court's consideration of its position. Argonaut Ins. Co. v. Commercial Standard Ins. Co., 380 So.2d 1066, 1067 (Fla. 2d DCA 1980), cert. denied, 380 So. 2d 1108 (Fla. 1980). A homeowners' association ordinarily gains standing in one of two ways: 1.) by seeking to vindicate rights of its members (representative capacity); or, 2.) by seeking relief for injuries to its own rights (derivative capacity). Conestoga Pines Homeowners' Ass'n, Inc. v. Black, 689 P.2d 1176, 1177 (Colo. App. 1984).

2. Representative Standing of PPA

An association has standing to bring suit on behalf of [and as a representative of] its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the

lawsuit. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977).

Courts in this country have applied the "representation theory" of standing to find standing for unincorporated or incorporated non-profit associations. See, Warth v. Seldin, 422 U.S. 490 (1975); Save a Valuable Environment v. City of Bothell, 576 P.2d 401 (Wash. 1978); and Aldridge v. Georgia Hospitality & Travel Ass'n, 304 S.E.2d 708 (Ga. 1983).

In Florida, the Courts have not frequently addressed the issue of association standing based on the representation theory. However, in Florida Home Builders Ass'n v. Dept. of Labor, 412 So.2d 351 (Fla. 1982), this Court approved the Hunt test as it applied to a home builders' association in its challenge of an administrative ruling. Id. at 353. Furthermore, in his dissenting opinion for U.S. Steel Corp. v. Save Sand Key, Inc., 303 So.2d 9 (Fla. 1974) (public nuisance action dismissed for failure to show special injury), Justice Ervin endorsed the concept of association standing by noting that "a bona fide non-profit organization may sue for and on behalf of some or all of its members who have been or will be directly and personally aggrieved in some manner relating to and within the scope of the interests represented and advanced by such organization." Id. at 14.

The representation theory has been applied by courts in other jurisdictions to situations relevant to this appeal. Most notably, the Colorado Court of Appeals used the representation theory to allow the Conestoga Pines Property Owners' Association

to enforce real covenants. Conestoga at 1178. The Conestoga Pines property owners were bound by an express covenant in their property deeds that prohibited the keeping of goats within the subdivision. The covenants also provided that each landowner has the right to enforce them. A property owners' association was formed, as indicated in its bylaws, to "enforce the covenants and to take such actions as are necessary to protect the value and desirability of its members' property." Id. at 1177. Participation in the association was voluntary. Following a breach of the covenants, the association brought suit to enjoin the violation. In resolving the question of the association's standing, the court stated:

> The Association sought relief in a representative capacity. Therefore, we do not have to concern ourselves with whether there was an assignment from the developers enabling the Association to enforce the covenants on its own behalf.
>
> Because this action was representative, no formal assignment of rights to the Association from its members was necessary. All that is required is some showing that the Association's actions properly represent its members' interests and that the test set out in Hunt . . . is met.

Id. at 1178 [emphasis added].

The requirements for association standing, as set out in Conestoga, can be established by PPA. All of PPA's members are property owners within Palm Point Subdivision, thus ensuring that PPA reflects the interests of the property owners and acts in a manner beneficial to them.

The Hunt test can also be satisfied. Each member of PPA is a property owner in the Palm Point Subdivision, and is subject to

the harmful effect caused by the Respondents' violation of the subdivision restrictions. The right of each member individually to bring suit to enforce such covenants is well grounded in real property law. This Court noted in Osius v. Barton, 147 So. 862, 865 (Fla. 1933):

> 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, inhabitants, those suffering from a breach of such covenants, though not parties to the deed, may be afforded relief in equity upon showing that the covenant was for their benefit as owners of neighboring properties.

Additionally, Respondents readily acknowledge that the individual property owners do have legal standing to enjoin a violation of the covenants. (R. 18 & 30).

Next, the Articles of Incorporation of PPA indicate that "[t]he general purposes for which this corporation is organized include the promotion of the best interests of the property owners of Palm Point Subdivision . . . and the transaction of any and all lawful business for which corporations not for profit may be incorporated under the provisions of Chapter 617, Florida Statutes, as the same now exists or as it may hereafter be amended." (A. 4). Florida Statutes 617.0302 (2) and its predecessors expressly provided for such a corporation to sue and appear in all actions and proceedings in its corporate name to the same extent as a natural person. Furthermore, the restrictions for Palm Point Subdivision, as modified on May 12, 1983, indicate that the property owners organized as PPA and granted PPA the powers of reviewing, regulating and approving all building proposals. (R. 69-72) and (A. 10-13). Clearly, the purpose of

PPA is to protect and enforce the quality of life within the subdivision by ensuring architectural uniformity and integrity within the community among other reasons. This action is necessary to preserve the character of the community, and thus, is germane to the purpose of PPA.

Finally, neither the claim asserted nor the remedy sought requires the individual members of PPA to participate in this action. Individual member participation is not necessary when the injury is common to all members, no individualized proof of damage is required, and the benefit from the remedy sought will inure to all members. Warth at 515. The claim brought by PPA does not require individualized proof because the Respondents' deliberate violation harmed each PPA member in the same fashion. Additionally, the remedy PPA sought, an injunction, will stop the Respondents from prospectively violating the subdivision restrictions. Each PPA member will share in that benefit equally.

PPA also fulfills the requirements in Conestoga for representation standing. By seeking to vindicate and champion its members rights through enforcement of these subdivision restrictions, PPA's action unquestionably represents its members' interest and it satisfies the three requirements of Hunt. As such, this Court has sufficient basis for holding that PPA has standing to enforce the real covenants of this subdivision.

Further support for this position can be found in zoning case law. Several courts have used the representation theory to find standing for homeowners' associations to challenge zoning decisions. Annotation, Standing of Civic or Property Owners'

Ass'n to Challenge Zoning Board Decision (as Aggrieved Party), 8 A.L.R. 4th 1087 (1981). The relevancy of these rulings to this case is obvious. Zoning regulations, like real covenants, often restrict an owner's use of land. Zoning regulations originate with a governmental entity and are enforced against the public at large, whereas, real covenants generally originate with a private citizen and are enforced against another private citizen. Although the form of zoning regulations and real covenants differ, in substance their purposes are substantially the same. Therefore, use of the representation theory to establish standing of associations to challenge zoning decisions directly supports a finding of association standing for PPA to enforce the real covenants of Palm Point Subdivision.

One case involving the standing of homeowners' associations in zoning cases is particularly noteworthy. In Garden District Property Owners Ass'n, Inc. v. City of New Orleans, 98 So.2d 922 (La. App. 1957), the court draws an important conclusion about incorporated homeowners' associations, which has direct bearing on this proceeding. The Garden District Property Owners' Association was a non-profit corporation formed to promote the interests of the property owners through enforcing zoning regulations. In fulfilling its purpose, the association brought suit to prevent the City of New Orleans from issuing a variance which would permit the construction of an apartment house in its members' two family home district. The court found that the association had standing to sue on behalf of its members. Garden District at 924. In reaching its decision, the court focused on the corporate form of

the association, and stated that:

> We wonder, however, how it can be said that a corporation, which is organized for the very purpose of bringing such suits as this, has no real and actual interest in such a matter . . .
>
> If a corporation organized to accomplish just such a purpose and which is authorized to do any act necessary to accomplish that purpose, surely it is authorized to bring such suits as may be required.

Id. at 924.

The Louisiana court thus acknowledges that part of the rationale for homeowners to incorporate as an association is to empower that entity to represent their interests. That rationale applies to the case at bar. PPA was formed to promote "the best interests of the property owners of Palm Point Subdivision" and to do any lawful act which non-profit corporations may do. (A. 4). Implicit in this grant of power is the authority of PPA to prosecute legal actions necessary to further its purpose. Since the homeowners at Palm Point have elected to incorporate and by reference to statutory law granted PPA the power to enforce the covenants, the rationale of Garden District supports PPA's standing as a corporate representative of the property owners.

In summary, under the representation theory PPA has standing to bring suit on behalf of its members. As pointed out in Conestoga, whether the homeowners' association has privity is not the determining factor. Conestoga at 1178. What is critical to the case at the bar is the recognition by this Court of the representation theory of standing for PPA.

> Clearly [the representation theory of standing for associations] . . . is consistent with the underlying justifications of the traditional standing rule. The requirement that the organization meet . . . [the

> Hunt] criteria insures that the case will present a justiciable controversy and that the organization will fairly and adequately represent the interests of its members.

Synder v. Callaghan, 284 S.E.2d 241, 251 (W.Va. 1981).

In addition to the constitutional reasons for standing, practical considerations support this Court applying the representation theory and finding that PPA has standing. Permitting an association to sue on behalf of its members helps to ensure that harm to an individual does not go without redress. "An individual who is harmed by an action may be unable to afford the costs of challenging the action himself." Save a Valuable Environment at 404. Although a class action would similarly allow an individual to avoid some of the expense of litigation, "a class suit may be too cumbersome" with its administrative requirements. Id. Finally, use of the representation theory helps to alleviate the administrative pressure on the civil court system. "To protect the common interests of its members avoids multiplicity of suits by similarly situated plaintiffs involving the same or similar causes of action and provides an efficient and expeditious method of adjudicating disputes." Synder at 252.

3. Derivative Standing of PPA

A homeowners' association can have standing to act on behalf of its owns interests and to seek relief for its own injuries. Conestoga at 1177. Typically, a homeowners' association will obtain its interest derivatively as a successor or assignee of the grantor's interests. This derivative interest does not necessarily have to be an ownership interest in real

property of the subdivision. Neponsit Property Owners' Ass'n v. Emigrant Industrial Saving Bank, 15 N.E.2d 793 (N.Y. 1938) at 798; and, Merrionette Manor Homes Improvement Ass'n, Inc. v. Heda, 136 N.E.2d 556 (Ill. App 1956) at 558 & 559. The New York Court of Appeals, in Neponsit, reflects the modern view of not requiring property ownership in order to enforce covenants when it states that:

> Only blind adherence to an ancient formula devised to meet entirely different conditions could constrain the court to hold that a corporation formed as a medium for the enjoyment of common rights of property owners owns no property which would benefit by enforcement of common rights and has no cause of action in equity to enforce the covenant upon which such common rights depend.

Neponsit at 798. Furthermore, an association can gain a derivative interest without an express assignment from the grantor. Wisniewski v. Kelly, 437 N.W.2d 25 (Mich. App 1989).

In Kelly, the grantor developed six subdivisions. The deeds of each subdivision contained covenants that allowed all owners and occupants of the subdivision lots to have common use of two lots for recreational purposes. The grantor also reserved the power to make necessary and reasonable rules for the subdivisions and to "exercise such police power over said subdivision[s] as a municipal corporation might do . . . and said police powers may be by said owner granted to and exercised by any association of individual lot owners . . ." Id. at 27. The grantor did not assign the powers he retained to any association.

The residents of the subdivision then formed a non-profit homeowners' association. Subsequently, the association sought to improve one of the recreational lots, but two individual property

owners physically prevented the making of improvements. The association brought suit to enjoin these individuals from interfering with construction of the improvements. Among the defendants' claims was a contention that the association lacked the power to make improvement decisions because the grantor had not empowered the association. In allowing the association to act without an express assignment of power from the grantor, the court commented "[t]hat the grantor failed to grant these powers to an association during his lifetime is not fatal to a finding that the residents could act to sustain and improve the lots . . . in concert through an association of the individual lot owners." Id. at 27. The court reached this determination by finding that the original grantor intended to allow the association to act. Id.

In the original subdivision's restrictions of Palm Point Subdivision, the grantor provided that the restrictions, covenants and reservations upon the various lots included in the subdivision shall run with the land and be binding upon the subsequent owners, their heirs, legal representatives, successors and assigns until December 31, 2000. (A. 1). The grantor also provided:

> . . . that the owners of a majority of the lots in said Subdivision may modify or rescind in whole or in part such restrictions, covenants, conditions and reservations . . . Should any person violate these restrictions and refuse to comply therewith upon ten days written notice, then such person shall be responsible for all court costs and legal expenses connected with court proceedings requiring compliance therewith.

(A.1-2).

These restrictions clearly indicate an intent by the grantor to bestow upon the property owners the power to enforce

the restrictions and to modify the restrictions as the property owners see fit. The property owners duly modified these restrictions on May 12, 1983. (R. 44-72). The modified restrictions provided, in part, that:

> 1. . . . The lot owners organized as the Palm Point Property Owners Association on June 12, 1981 and declare the following as restrictions, covenants, and reservations . . . which . . . shall run with the land and be binding upon the subsequent owners of said lots . . .
>
> 2. . . . No business . . . shall be maintained or carried on except . . . [with] written approval for which shall first be obtained from the Board of Directors of Palm Point Property Owners Association . . .
>
> 4. Plans and specifications for all dwelling houses, and their appurtenant buildings, shall be submitted to and approved by the Palm Point Owners Association . . . before any building is erected . . .
>
> 8. . . .Plans for any such landing must be approved by the Property Owners Association . . .
>
> 11. . . . [N]o bulkhead or seawall shall be built until plans have been approved by the Property Owners Association .
>
> 14. It is the duty of each lot owner to keep his lot clean of weeds, grass and trash . . . If this is not done, the Property Owners Association reserves the right to contact said lot owner before requesting the county to clean thelot . . .

(R. 69-72) and (A. 10-13)(sic).

These provisions in the modified subdivision's restrictions grant certain powers to PPA. Interestingly, Respondents suggest that the property owners did not grant any powers to PPA, an incorporated association, but rather retained these powers for an unincorporated association. (R. 3 & 32-33). Respondents maintain this position simply because the modified restrictions refer to Palm Point Property Owners Association, rather than to Palm Point

Property Owners Association of Charlotte County, Inc. (R. 3 & 32-33). This technical argument lacks merits on two grounds. First, the modified restrictions refer to the property owners as organizing as Palm Point Property owners Association on June 12, 1981. (R. 69) and (A. 10). Not coincidentally, on June 12, 1981, PPA was incorporated to promote "the best interests of the property owners of Palm Point Subdivision." (A. 3). By indicating the date of organizing in their 1983 restrictions, the property owners were acknowledging by reference their incorporation. Secondly, counsel's argument fails to recognize how loosely the English language is used. Frequently, people refer to a corporation without indicating its incorporated status. For instance, people often refer to Ford without indicating its legal name of Ford Motor Company, Incorporated. In fact, Respondents have referred to PPA without denoting its incorporated status. (R. 11). Petitioner acknowledges that in documents with potential legal ramifications, it is more desirable to use the precise legal name of an entity. However, in this situation to require such precision would ignore all common sense.

There is not an express provision in the modified subdivision restrictions granting PPA specific enforcement power. However, there has been an implicit assignment of that power to PPA. The holding in Kelly suggests that the language used in the subdivision's restrictions is indicative of the declarant's intentions to assign certain powers to an association. In their modified restrictions, the Palm Point property owners expressly provided broad review and approval powers for PPA. (R. 69-72) and

(A. 10-13). Additionally, these property owners granted PPA certain powers to maintain the appearance of the community. These express provisions indicate that the property owners desired to empower PPA with the necessary authority to maintain the integrity of the subdivision. Applying the court's rationale in Kelly, it is reasonable to conclude that the property owners did assign to PPA the power to enforce these subdivision restrictions.

Further, the fact that Kelly involved an implicit assignment from the original grantor would not change the result in this case. Collectively, the property owners of Palm Point vicariously represent the original grantor. The original grantor did not retain any powers to himself personally but did set forth regulations for the supervision and administration of these restrictive covenants. He subsequently sold and conveyed all of his real property interests in Palm Point. This grantor certainly anticipated that the property owners would create an association to carry out the purposes and regulations set forth. Having granted the ability to amend and modify, the grantor must have contemplated the need for enfocement. The mere failure to expressly so state cannot prevent the property owners from "... acting in concert through an association of the individual ... owners." Kelly at 27. As a result, the Palm Point property owners collectively hold all the power as reserved in the restrictions by the original grantor. This implicit assignment of the property owners' rights to enforce the restrictions gives PPA standing to bring suit in this case.

4. Policy Reasons Supporting Standing for PPA

In ruling on PPA's standing under either the representation theory or the derivative theory, this Court must recognize the need for homeowners' associations.

> Home owners associations . . . appear to be a relatively modern device, a natural outgrowth of the development of housing projects on a large scale, particularly in urban communities where the general good of all within the community requires adherence to some common standards. Everybody's business is no one's business. Hence, the enforcement of such standards had to be centralized and home owners associations came into being.

Merrionette Manor Homes, a 1956 decision, at 558 (sic).

The court in Douglaston Civic Ass'n, Inc. v. Galvin, 324 N.E.2d 317 (N.Y. 1974), noting the importance of permitting associations to enforce common standards stated that:

> We reach this result [of finding standing for a homeowners' association to challenge a zoning variance] simply in recognition of the modern day fact of life that participation by neighborhood groups in land use decisions has grown from the exception to the rule. While often informal and disorganized, it is a practice that needs to be encouraged lest a neighborhood becomes "nickel-and-dimed" to death by gas stations, beauty parlors, taverns and the like.

Id. at 321.

As the New York court realized almost two decades ago, this Court must now recognize that if PPA is denied standing to bring suit, the harm caused by this Respondents' violation will continue without redress, and the integrity of the subdivision as a whole could be jeopardized. Petitioner is aware that any one of the individual property owners could prosecute this claim and stop the harm caused by Respondents' violation. But, individual property owners are reluctant to bring this suit. The expense of suing to

enforce the subdivision restrictions often greatly exceeds the financial ability of many property owners. Additionally, the property owners realize that by bringing this suit, they will become the "unofficial caretakers" of the subdivision, resulting in other owners looking to them to bring suit every time a restriction is violated. This responsibility is one that the property owners need to avoid.

For practical reasons, if this Court bars PPA from proceeding with this action, the harm caused by Respondents will fester and ultimately debilitate this subdivision. By preventing the one entity organized specifically to protect this subdivision from restriction violations like the Respondents', others will be encouraged to violate the subdivision's restrictions. Slowly, one violation at a time, the neighborhood will be "nickel-and-dimed" to death by undesirable and illegal structures.

Denial of standing will also adversely affect PPA's ability to operate. Many of the property owners will see PPA as an ineffective organization and will not seek its approval prior to construction. Additionally, those property owners who seek but fail to get PPA's approval, will be inclined to build anyway, knowing that PPA cannot prevent them from going ahead. Without the power to enforce the restrictions, review for compliance becomes a meaningless and futile process. PPA will not have a viable reason to continue its existence and will disband.

Denying PPA standing has ramifications beyond the scope of this case. This Court will be sending a message across Florida to all homeowners' associations and to all residents of subdivision-

restricted communities. The message sent will be that unless the technical rules of real property law are strictly complied with, chiefly that the original grantor establish the association and expressly assign enforcement powers to it, the association is a powerless entity which is more figurative than functional. Such a ruling will impact older communities more harshly than newer ones, because many older communities were created before there was a recognized need for homeowners' associations. Thus, the original grantors of many of these older communities, like Palm Point, did not establish a homeowners' association. Often the subsequent property owners in these communities, as in Palm Point, did create such an association. If this Court denies PPA standing, all similarly situated homeowners' associations will be useless entities.

Furthermore, to grant a homeowners' association standing to sue is entirely consistent with the underlying purposes of subdivision restrictions. Such restrictions are designed to protect all of the property owners within the community. These restrictions ensure that property is used in a manner that enhances the overall quality of life for residents within the community. Homeowners' associations are formed for the same reasons subdivision restrictions are used - to benefit all the properties within a community. Allowing homeowners' associations to act on behalf of the residents ensures that the actions taken inure to the benefit of all residents and not just to the benefit of a few. Additionally, empowering the homeowners' association to act ensures that actions necessary to preserve the community will

be taken.

The consequences of denying PPA standing are severe, not only to the Palm Point Subdivision, but also to many other Florida communities. Faced with the importance of this decision, this Court must find that PPA has standing to bring suit for enforcement of the restrictions of Palm Point Subdivision.

5. Conclusion

This Court should recognize that PPA has representative standing and derivative standing to bring suit to enforce the subdivision restrictions of Palm Point Subdivision. In essence, representative standing only requires satisfying the Hunt criteria, which PPA does, and does not require an assignment of the grantor's power to bring such enforcement proceedings. Derivative standing does require an assignment, but the assignment can be implicit, as it is in the case at bar. Additionally, PPA should be found to have standing for policy reasons. A holding otherwise will adversely affect Palm Point Subdivision, PPA, and all other similarly situated communities.

B. RIGHT TO BRING A CLASS SUIT TO ENFORCE THE SUBDIVISION'S RESTRICTIONS

1. Introduction

Fourteen property owners within the Palm Point Subdivision each assigned to PPA their chose in action against Respondents. (R. 21 & 156). PPA then filed the Second Amended Complaint as the representative of the class consisting of all property owners within Palm Point Subdivision. (R. 155-164). The trial court denied PPA's request to be certified as a class representative and

prohibited the suit to proceed as a class action. (R. 176). Additionally, the court entered an order dismissing the action but giving leave to amend. (R. 177).

"The very purpose of a class suit is to save a multiplicity of suits, to reduce the expense of litigation, to make legal processes more effective and expeditious and to make available a remedy that would not otherwise exist." Tenney v. City of Miami Beach, 11 So.2d 188, 189 (Fla. 1942). A class action is an appropriate device for the case at bar. Petitioner recognizes that one suit resulting in the granting of an injunction would terminate the need of all other interested parties to further prosecute this issue. However, that alone does not conclusively mean that this claim brought as a class action would not save multiplicity of suits. Multiplicity of suits has been related to the situation "in which there are, or may be, several actions pending at the same time." 42 Am. Jur. 2d Injunctions 50 (1969) [emphasis added]. Thus, bringing this claim as a class action will avoid the potential of having each property owner file suit and of having seventy-two cases pending in Circuit Court. Avoiding the necessity for the property owners to file suit individually will reduce the total expense incurred to obtain an injunction and allow the court to operate more efficiently by enabling it to devote attention to other matters, rather than to identical claims of the property owners.

There must be in existence a clearly defined class in order to maintain a class action. Bobinger v. Deltona Corp., 563 So.2d 739, 742 (Fla. 2d DCA 1990). The class in this suit comprises the

property owners of Palm Point Subdivision. That description is sufficient to allow the action to proceed. Id. In addition to the existence of a class, the prerequisites to bringing a class action under Rule 1.220, Florida Rules of Civil Procedure, must be satisfied. The prerequisites under this Rule are as follows:

> (1) the members of the class must be so numerous that separate joinder is impracticable,
>
> (2) the claim . . . of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim . . . of each member of the class,
>
> (3) the claim . . . of the representative party is typical of the claim . . . of each member of the class,
>
> (4) the representative party can fairly and adequately protect and represent the interests of each member of the class, and,
>
> (5) the claim is maintainable pursuant to Rule 1.220(b).

Fla. R. Civ. P. 1.220 (a) and (b).

2. Numerosity Principle

The Florida courts have not definitively established a minimum number of members necessary to establish a class. Trawick Florida Practice and Procedure 4-8 (1991). "Ordinarily, a class should exceed 50 members to qualify. The general test for impracticability is whether the names and number of members of the class will be unstable." Id. A slightly different view is expressed in American Jurisprudence, Second Edition.

> The impracticability of joinder may flow from the large number of persons interested, from the facts that some are not within the jurisdiction or their whereabouts are unknown, or that if all members of the class were made parties to the suit it would be

> subject to continued abatement by the death of some, so that a decree would be prevented or unduly delayed.

59 Am. Jur. 2d Parties 56 (1987).

In the case at bar, joinder of all class members is impractical. There are seventy-two property owners within Palm Point Subdivision. (R. 19). Class membership is inherently unstable, as property ownership changes whenever homes are sold, foreclosed, or devised at death. Joinder is further complicated since some property owners reside outside of Florida. (R. 157). Additionally, with seventy-two owners, problems, such as illness or death, will cause delays in the action. In sum, joinder is not practical because of the great expense and difficulty encountered with investigating who the property owners are, where they reside, and how to contact them, as well as the probable delays incurred in prosecuting the claim.

3. Commonality of Interests Principle

Questions of law and fact must be common to all class members. Fla. R. Civ. P. 1.220(a)(2). In Port Royal, Inc. v. Conboy, 154 So.2d 734 (Fla. 2d DCA 1963), the court identified several factors to be considered when evaluating commonality of interests.

> The common . . . interest must be in the object of the action, in the result sought to be accomplished in the proceedings, or in the question involved in the action. There must be a common right of recovery based on the same essential facts.

Id. at 737.

The class members in the instant suit have a common interest in the object of the action, namely enforcement of the

subdivision's restrictions. Their motivations for wanting enforcement may vary. While some owners may seek enforcement for aesthetic reasons, others may seek enforcement for financial reasons, fearing that a violation negatively affects the value of their property. Nonetheless, the class members share an interest in the object of the action.

Similarly, the class members have a common interest in the result sought to be accomplished. The result sought is issuance of an injunction, a remedy commonly granted for breach of subdivision restrictions. See, Pelican Island Property Owners Ass'n, Inc. v. Murphy, 554 So.2d 1179 (Fla. 2d DCA 1989); Daniel v. May, 143 So.2d 536 (Fla. 2d DCA 1962); and, 42 Am. Jur 2d Injunctions 69.

The questions presented in this action are also common to all members. Specifically, all of the legal questions to be addressed center around whether the subdivision's restrictions are valid and enforceable, and whether an injunction is an appropriate remedy.

The claims of the class members are based on the same essential facts. To satisfy this requirement, all the members' claims must arise from the "same practice or course of conduct." Powell v. River Ranch Property Owners Ass'n, Inc. 522 So.2d 69, 70 (Fla. 2d DCA 1988). All of the members' claims resulted from the Respondents' violation of the subdivision's restrictions.

In summary, questions of law and fact in the claim raised by PPA are common to each member of the class. Each member was harmed by the same conduct and each member seeks to enforce the

subdivision restrictions with an injunction.

4. Typicality Principle

"The typicality principle has to do with the class representative(s) vis-a-vis the class members." Bobinger at 745. The question presented by the typicality principle is whether PPA and the class members have similar causes of action. In satisfying this principle, PPA, through the assignments of the choses in action, must have acquired an interest sufficient to give it a cause of action similar to that of the property owners. As such, the validity of the assignments is critical.

Generally, in Florida, a cause of action can be assigned. Selfridge v. Allstate Ins. Co., 219 So.2d 127, 128 (Fla. 4th DCA 1969). In particular, "a cause of action growing out of injury to property may be assigned especially when the assignee . . . has acquired title to property." Florida Power Corp. v. McNeely, 125 So.2d 311, 318 (Fla. 2d DCA 1960) [emphasis added]. Considering that "especially" means "particularly; mainly; . . .", Webster's New World Dictionary 496 (College Edition 1954), the court's statement does not mean that a chose in action for injury to real property can only be assigned along with title to that property. Rather, the use of "especially" suggests that normally a chose in action for injury to real property is assignable and this is particularly true when the chose is transferred with title.

In Abstract Co. of Sarasota v. Roberts, 144 So.2d 3 (Fla. 2d DCA 1962), the Second District Court of Appeal reinforced the notion that a chose in action for injury to real property can be assigned without transferring title. In that case, Roberts

conveyed property to Wade by warranty deed. The property was then conveyed several times by warranty deed until Storm acquired it by warranty deed. All of the deeds in the chain of title were general warranty deeds and did not contain any exceptions for an outstanding easement. Storm discovered the easement on the property, which was a breach of the warranty covenant. Storm transferred the property subject to the easement to Abstract. Additionally, Storm assigned his rights of action for all claims against Roberts to Abstract. Subsequently, Roberts filed for foreclosure against Abstract. Abstract counterclaimed with a breach of warranty. The trial court dismissed the counterclaim. The District Court of Appeals, holding the assignment valid, reversed the lower court. Id.

Abstract stands for two propositions: 1.) a chose in action for injury to real property can be assigned without transferring title to the harmed property; and, 2.) an action based on breach of a property covenant can be maintained by someone who has no connection to the land as an owner or assignee at the time the breach occurs.

Thus, the fourteen Palm Point property owners' assignments of their choses in action arising from the violations of the subdivision restrictions to PPA are valid. (R. 156). These valid assignments give PPA standing to bring suit against the Respondents. "... [S]ince that plaintiff [PPA] had acquired an assignment of any right of action his grantor might have had before the suit was brought, he thereby became the real party in interest", and necessarily has sufficient interest to prosecute

the action. Florida Power at 318.

Among the bundle of rights held by each of the property owners is the chose in action against the Respondents. The property owners who did not make an assignment still retain this element of property ownership. This right to bring suit is identical to the right which PPA holds. Therefore, PPA's claim is typical of the class members' claim. The fact that PPA's claim arose from an assignment, while the class members' claims are derived from injury to their real property, does not change the result. "... Florida Rule 1.220 [does] . . . not require that class certification be denied merely because the claim of one or more class representatives arises in a factual context that varies somewhat from that of other plaintiffs." Powell at 70.

5. Adequate Representation Principle

The adequate representation principle consists of two elements: 1.) the relationship of the representative's interest to those of the class members; and, 2.) the manner in which the representative prosecutes the case. Bobinger at 746; Trawick at 4-8; and, 59 Am. Jur. 2d Parties 58.

The first component of adequate representation requires that the representative's interest not be antagonistic to the class members' interests. Bobinger at 746. PPA's interest clearly is not adverse to the class members' interest. In fact, it is just the opposite. PPA does not own any real property within or outside of Palm Point Subdivision that might result in it taking an adversarial position to that of the class members. Furthermore, all of PPA's members are property owners in Palm

Point Subdivision. This ensures that PPA reflects the desires and objectives of the class members.

Secondly, the representative has a fiduciary duty to "vigorously prosecute the rights of the class through qualified counsel." 59 Am. Jur. 2d Parties 58. PPA has a strong commitment to this cause, as demonstrated by its willingness to pursue this claim despite three trial court dismissals followed by appellate review. To handle this claim, PPA engaged attorneys who are active members in good standing with The Florida Bar and qualified to prosecute this action.

Since PPA has no interests adverse to the class members and since it will continue to diligently prosecute this claim through qualified counsel, PPA can adequately serve as the class representative.

6. Maintainable Claim Principle

In addition to the above requirements to bring a class suit, the claim must be of a nature that lends itself to a class action. Under Rule 1.220, Florida Rules of Civil Procedure, a claim is maintainable as a class action if:

> . . . the party opposing the class has acted . . . on grounds generally applicable to all the members of the class, thereby making final injunctive relief . . . concerning the class as a whole appropriate.

Fla. R. Civ. P. 1.220(b)(2).

In this action, Respondents acted the same toward all class members. Respondents constructed a pool, stem wall and dock, all in violation of the subdivision's restrictions. (R. 37-43). Respondents' actions affected all of the members of the class

similarly, and the class sought to rectify the problem with an injunction. Injunctive relief is an appropriate remedy for enforcing subdivision restrictions. Pelican Island at 1182; and, Daniel at 538. This claim is maintainable as a class action under Rule 1.220(b).

7. Conclusion

A class action with PPA serving as representative is appropriate for this suit. The prerequisites for a class suit are satisfied. The class consists of at least seventy-two property owners, which makes joinder impracticable. Respondents' action affected each member adversely, and the harm caused can be "cured" by issuance of an injunction.

PPA is the natural choice for class representative. Its chief purpose is to protect the interests of the property owners and to ensure that the integrity of the community is maintained. Bringing suit to enforce the subdivision restrictions is an activity specifically within PPA's purpose. PPA's claim is similar to those of other class members and its interests are aligned with the class members'. PPA has demonstrated a willingness and ability to properly and vigorously prosecute this action, and thus, would adequately represent the class members.

C. RIGHT OF PPA AND INDIVIDUAL PROPERTY OWNERS TO JOIN AS PLAINTIFFS TO BRING SUIT TO ENFORCE THE SUBDIVISION'S RESTRICTIONS

1. Introduction

In the verified Third Amended Complaint, sixteen Palm Point Subdivision property owners joined PPA as additional plaintiffs.

(R. 178-202). An order was entered dismissing PPA with prejudice and dismissing the sixteen property owners without prejudice to file a new and independent action. (R. 207-208).

2. Dismissal of PPA

The Florida Rules of Civil Procedure permits joinder of proper parties. "All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs . . ." Fla. R. Civ. P. 1.210(a). See also Pepple v. Rogers, 104 Fla. 462, 140 So. 205 (1932). Of course, if this Court finds that PPA has standing to bring suit to enforce the covenants, then it satisfies the requirements of Rule 1.210(a), and can be properly joined.

A liberal interpretation of Rule 1.210(a) would have allowed joinder of PPA with the Palm Point property owners. In this context, the interest of PPA arises not from the actual violation of the covenants, but rather from the enforcement of them. Even if PPA does not suffer a direct injury like the property owners, it stands to suffer indirectly. As set out in its Articles of Incorporation and in the modified restrictions of June 1983, PPA is charged with the power to review building proposals and to determine whether each proposal violates the subdivision's restrictions. The final judicial ruling on the merits of this case will determine whether the Respondents violated the subdivision restrictions. Thus, the ruling on the merits of this case will substantially affect how PPA operates and even if it will continue to exist. Therefore, PPA has "an interest in the subject of the action" and could have properly

been joined as a plaintiff along with the sixteen property owners.

3. Dismissal of Property Owners

Assuming that the Circuit Court properly dismissed PPA, the court should not have dismissed the sixteen property owners. Fla. R. Civ. P. 1.250(a) provides that "[m]isjoinder of parties is not a ground for dismissal of an action. Any claim against a party may be severed and proceeded with separately." The court, in Roberts v. Keystone Trucking Co., 259 So.2d 171 (Fla. 4th DCA 1972), elaborated on the meaning of this rule.

> Ordinarily, neither a misjoinder of parties nor a misjoinder of causes of action is a proper basis for dismissal of a complaint. If there is a misjoinder, the proper procedure is to sever the claims and to thereafter proceed separately with such thereof as to which the court has jurisdiction, dismissing only as to the parties . . . over which the court has no jurisdiction.

Roberts at 174. This rule that misjoinder is not grounds for dismissal is well established by the Florida Courts. See, Harrell v. Hess Oil and Chemical Corp., 287 So.2d 291 (Fla. 1973); Alanco v. Bystrom, 544 So.2d 217 (Fla. 3d DCA 1989); and, Accent Homes, Inc. v. Narco Realty, Inc., 566 So.2d 5 (Fla. 4th DCA 1990).

It is evident that the trial court erred in dismissing the claim of the sixteen property owners. The property owners should have been permitted to continue this action without being subject to the inconvenience and expense of refiling their claim.

4. Conclusion

PPA is a proper party to this action. PPA should be considered a proper party because it has standing to bring suit and a common interest with the property owners in seeking relief.

Even if PPA lacks standing to enforce the restrictions, it can be considered a proper party because of its interest in the subject of this action. As a proper party, PPA should be joined as a plaintiff along with the sixteen property owners.

Alternatively, if this Court rules that PPA is not a proper party, then PPA alone should be dismissed. The property owners should not be dismissed and should be allowed to continue this action without being forced to refile their claim.

D. PROMULGATION OF A NEW RULE OF CIVIL PROCEDURE TO SETTLE DISPUTES AFFECTING PROPERTY OWNERS ASSOCIATIONS

1. Introduction

The circumstances of this case portray a need for property owners associations, such as PPA, to enforce rights and protect subdivision interests. Ironically, the one entity specifically designed by these property owners and selected by them to seek such legal redress is currently without a legal remedy or procedure. If such a remedy is and remains unavailable to PPA and to other property owners associations even by legislative action, then this Court should promulgate a rule of civil procedure specifically tailored to permit property owners associations to bring such enforcement proceedings.

2. Historical Precedent

On two prior occasions this Court has dealt efficiently and effectively with judicial process shortcomings to provide readily available procedures to comparable property owners associations that had brought lawsuits on behalf of their memberships. Finding the 1975-76 Florida Legislature's attempt to fashion a remedy for

condominium associations to be an impermissible incursion into the exclusive prerogative of the judicial system, this Court then adopted Florida Rules of Civil Procedure 1.221 entitled Condominium Associations, which became effective on January 1, 1981. Avila South Condominium Ass'n, Inc. v. Kappa Corp., 347 So.2d 599 (Fla. 1976) Due to the unique features of such associations, this Court recognized that a need existed for procedures to settle disputes affecting unit owners concerning matters of common interest. By promulgating this Rule, condominium associations gained the capacity to seek judicial relief for and on behalf of all unit owners as to all such matters.

Similarly, the peculiar needs of mobile homeowners' associations were decisively addressed by this Court with the adoption of Rule 1.222, which became effective September 22, 1988. Lanca Homeowners v. Lantana Cascade, 541 So.2d 1121 (Fla. 1988) Clothed with this new rule of procedure, Lanca then had authority, as the park's homeowners association, to represent all the mobile park's home owners in a class action.

3. Policy Reasons Favoring a New Rule of Civil Procedure

Recognition of the need for a new rule to serve property owners associations would be both the threshhold and the basis for such action by this Court. Without reiterating here the policy reasons supporting standing for PPA (beginning on page 19 of this brief), the need for property owners associations has been demonstrated for several decades and has been judicially recognized. Merrionette Manor Homes Improvement Ass'n, Inc. v. Heda, 136 N.E.2d 556 (Ill. App 1956) and Douglaston Civic Ass'n,

Inc. v. Galvin, 324 N.E.2d 317 (N.Y. 1974). The rationales set forth above are equally pertinent here and are urged in support of such a rule of procedure.

Such associations permit the residents themselves through a representative form of organization to monitor, direct, encourage, regulate and enforce the affairs of their subdivision for the welfare and betterment of the entire subdivision. Such purposes and functions should be fostered and supported by the judicial system and their legitimate efforts not be allowed to wither and die for lack of a procedure or remedy.

Denial of a rule of procedure will severely hamper the effectiveness of PPA and other property owners associations across the State. Unlike condominium associations which routinely include the authority to make and enforce assessments upon their members, voluntary associations, such as PPA, derive their strength and continuity from the ability to timely handle and resolve current problems and matters. Members view an organization which is mired in administrative or judicial red tape as ineffective and a waste of their dues money. A procedural rule enabling a property owners association to proceed expeditiously to challenge violations of subdivision restrictions will greatly bolster its credibility and its performance.

The legal doctrines of privity of estate or privity of contract should not become stumbling blocks. Such doctrines serve well in other contexts to ensure that the courts are not congested with actions brought by parties having no standing. This Court in Osius recognized this principle in stating:

> The violation of a restrictive covenant . . . 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. Id at 865.

As noted above, the property owners association by the very terms of its organizational structure and membership requirements will represent the subdivision property owners. The association simply serves as the alter ego of the subdivision property owners who have long been judicially recognized as the beneficiaries of restrictive covenants. Thus the objectives of these legal doctrines of privity will be resolved in a different manner.

4. Proposed Text for a New Rule of Civil Procedure

The following text is proposed for a new rule of procedure designed to resolve the unique dilemma as to standing faced by property owners associations:

> **Rule 1.223 SUBDIVISION PROPERTY OWNERS' ASSOCIATION**
>
> A subdivision property owners' association may institute, maintain, settle, or appeal actions or hearings in its name on behalf of all property owners concerning matters of common interest, including, but not limited to: the common property; structural components of a building or other improvements; mechanical, electrical, and plumbing elements serving the subdivision property; and protests of ad valorem taxes on commonly used facilities. If the association has the authority to maintain a class action under this section, the association may be joined in an action as representative of that class with reference to litigation and disputes involving the matters for which the association could bring a class action under this section. Nothing herein limits any statutory or common-law right of any individual property owner or class of property owners to bring any action which may otherwise be available. An action under this rule shall not be subject to the requirements of Rule 1.220.

This language tracks substantially the terminology now contained in Rule 1.222 entitled Mobile Homeowners' Association. Since the circumstances and contexts involving subdivision property owners associations appear to be substantially similar to those of mobile property owners associations, the provisions of a new rule of procedure could be about the same.

5. Conclusion

The needs of property owners associations generally and of PPA in particular can most effectively be satisfied by adoption of a new rule of civil procedure. Such a remedy lies beyond the reach of the Florida Legislature and falls squarely within the province of this Court.

V. CONCLUSION

Based upon the representation and derivative theories, PPA has standing to prosecute this action for injunctive relief against the Respondents for violation of the subdivision restrictions for Palm Point Subdivision. As such, it is respectfully urged that this Court reverse the trial court's October 16, 1990 order of dismissal and to properly reinstate this claim against the Respondents.

If this Court finds that PPA does not in and of itself have standing to enforce the subdivision's restrictions, it is respectfully urged that PPA be certified as the class representative for the property owners, that the May 13, 1991 order of dismissal be reversed and that this action be duly reinstated.

If this Court finds that PPA does not itself have standing and should not be a class representative, it is respectfully urged that this Court reverse the trial court's order of dismissal entered October 3, 1991 and reinstate this action with PPA joined as a proper party plaintiff along with the sixteen property owners of Palm Point Subdivision.

If this Court finds that PPA is not a proper party to this action, it is respectfully urged that this Court affirm the October 3, 1991 order of dismissal for PPA and reverse the October 3, 1991 order of dismissal of the sixteen property owners, allowing the property owners to continue to prosecute this case.

As an alternate solution to benefit not only PPA but all other subdivision property owners associations similarly situated, if this Court finds that PPA does not itself have standing and should not be a class representative as the law now provides, it is respectfully urged that this Court adopt a new rule of civil procedure designed to grant standing to subdivision property owners associations and then direct that this action proceed in the trial court with PPA serving as the class representative for the Palm Point Subdivision property owners.

Respectfully submitted,
this the 23rd day of December, 1992.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing document has been furnished to ROBERT A. DICKINSON, ESQUIRE, 460 S. Indiana Avenue, Englewood, Florida 34223, Attorney for Respondents, by mail, this 23rd day of December, 1992.

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APPENDIX

APPENDIX
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