

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT  
IN AND FOR COLLIER COUNTY, FLORIDA

KIMBERLY ANN SCHNELL MITCHELL,  
and DONNIE GENE MITCHELL, and  
DOLPHIN POINT, LLC, a Florida limited  
liability company,

Plaintiffs,

v.

CASE NO.: 2019-CA-3254

THE CLUB AT LA PENINSULA, INC., a  
Florida Corporation

Defendant.

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**PLAINTIFFS STATEMENT OF FACTS**

Plaintiffs, KIMBERLY ANN SCHNELL MITCHELL, DONNIE GENE MITCHELL,  
and DOLPHIN POINT, LLC, hereby file their statement of facts in accordance with the Court's  
Amended Agreed Case Management Plan and Order dated December 9, 2022 (Doc #157), as  
follows:

1. Plaintiffs KIMBERLY ANN SCHNELL MITCHELL and DONNIE GENE MITCHELL ("the Mitchells") own the single family residence at 85 Pelican Street West, Isle of Capri, in Collier County, Florida. Adjacent to 85 Pelican Street West is a 2.15 acre parcel ("the Subject Parcel") which is the subject of the dispute. The Subject Parcel is unimproved, with the exception of four tennis courts located thereon, and is owned by Dolphin, a limited liability company owned by the Mitchells.

2. The Subject Parcel is located within the development known as La Peninsula. On August 19, 1986, the original developer of La Peninsula recorded the Declaration of Covenants, Conditions and Restrictions of La Peninsula at Official Records Book 1213, Page 770 of the

Public Records of Collier County, Florida (“the Declaration”). Defendant, the Club at La Peninsula, Inc. (“The Club”) is defined as the “Master Association” in the Declaration. In the Declaration, the original developer and Declarant stated that it intended to develop La Peninsula with approximately 213 condominium units to be located in various condominiums together with certain recreational facilities and other improvements. The La Peninsula development currently includes seven condominiums, a clubhouse and pool area and other common areas. Four of the condominiums have twenty-five (25) residential units, one has nineteen (19) residential units, one has twenty (20) residential units and one has thirty-seven 37 residential units. The current number of condominiums units in La Peninsula is one hundred seventy six (176).

3. Dolphin owns and holds the Declarant rights under the Declaration which have been assigned several times with Dolphin being the last assignee. In 2013, Dolphin’s predecessor in title entered into a settlement agreement with the Club and the Club agreed to recognize the rights of the owner of the Subject Parcel as the Declarant under the Declaration, subject to a partial assignment of architectural control rights to the Club as to areas other than the Subject Parcel.

4. On September 18, 2015, the Club recorded an Amended and Restated Declaration of Covenants, Conditions and Restrictions of La Peninsula at Official Records Book 5195, Page 3784 of the Public Records of Collier County, Florida (“Claimed A & R Amendment”). The Claimed A & R Amendment purports to remove or delete provisions in the Declaration which granted certain rights and privileges to the Declarant. The Club did not follow the procedural requirements to amend the Declaration and did not obtain the necessary votes to amend the Declaration. The Claimed A & R Amendment also violates the terms in the Declaration and violates the provisions in the settlement agreement.

5. In 2007, Dolphin's predecessor in title, Aircraft Investment, LLC ("Aircraft"), acquired title to the Subject Parcel by Warranty Deed from a former Developer of La Peninsula, Twin Dolphins Equity Partners, LTD. The Warranty Deed from Twin Dolphins to Aircraft is attached to the Amended Complaint ("Complaint") as Exhibit "A". Also in 2007, Twin Dolphins executed a Bill of Sale and Assignment to Aircraft which included the assignment and transfer of all rights held by Twin Dolphins as developer and as Declarant under the Declaration, a copy is attached to the Complaint as Exhibit "B".

6. In 2017, the Mitchells acquired title to the Subject Parcel from Aircraft via the Special Warranty Deed, a copy of which is attached as Exhibit "C" to the Complaint. On December 18, 2017, Aircraft executed an Assignment and Assumption of Development Rights, Permits, Contracts, Declarant Rights and Other Intangible Rights in favor of the Mitchells which assigned and transferred all of Aircraft's rights as Declarant and developer under the Declaration. The Assignment was recorded at Official Records Book 5543, Page 3395 the Public Records of Collier County, Florida and a copy is attached as Exhibit "D" to the Complaint.

7. On December 3, 2019, the Mitchells deeded the Subject Parcel to Dolphin via the Warranty Deed recorded at Official Records Book 5708, Page 3362 the Public Records of Collier County, Florida, a copy of which is attached as Exhibit "E" to the Complaint. On August 14, 2020, the Mitchells executed an Assignment and Assumption of Development Rights in favor of Dolphin which assigned and transferred all of the Developer and Declarant rights under the Declaration. The Assignment was recorded at Official Records Book 5804, Page 3045 the Public Records of Collier County, Florida and a copy is attached as Exhibit "F" to the Complaint.

8. One of the rights reserved to the Declarant in the Declaration is a limited right to amend the Declaration. In particular, Section 11.3 of the Declaration provides:

“Notwithstanding anything herein to the contrary, the Declarant may amend this Declaration for any purpose without the consent of the Members so long as it owns any property or units in La Peninsula and provided such amendment doesn’t materially and adversely effect the plan of development for La Peninsula.”

9. On February 12, 2013, Aircraft exercised its right to amend the Declaration and recorded a Declarant Amendment to Declaration of Covenants, Conditions and Restrictions which was recorded at Official Records Book 4886, Page 1681 the Public Records of Collier County, Florida, a copy of which is attached as Exhibit “G” to the Complaint (“the Declarant Amendment”). In the Declarant Amendment, Aircraft added a new Section 11.12 which states:

“11.12 Amendments to Declaration. Notwithstanding anything to the contrary herein contained, no amendment to this Declaration shall be effective which shall impair or prejudice the rights or priorities of Declarant, under the Declaration, the organizational documents of the Association and/or any rules and regulations promulgated thereunder, without the specific written approval of Declarant so long as Declarant owns any property or units subject to the Declaration. In addition and notwithstanding anything to the contrary contained herein, no amendment to this Declaration shall be effective which shall eliminate or modify the provisions to this Section 11.12 and any such amendment shall be deemed to impair and prejudice the rights of Declarant.”

10. On May 15, 1998, the Club entered into an agreement with a prior developer, S. Charles Bennett, III, as Trustee, setting forth various rights and obligations as between the Club and the developer/Declarant under the Declaration. A copy of this agreement is Exhibit B to the Counterclaim. On or about May 10, 2012, the Club filed suit in the Circuit Court of Collier County, Florida under Case Number 2012-CA-1775 (“the 2012 Lawsuit”) against Aircraft alleging various violations of the agreement and outstanding obligations of Aircraft as successor

developer and Declarant under the Declaration<sup>1</sup>. In particular, the Club alleged that (i) Aircraft assumed all of the prior developer's obligations and interests relative to La Peninsula, (ii) Aircraft as assignee of the prior developer stands in the shoes of Bennett and was bound by the May 15, 1998 agreement, (iii) Aircraft was responsible for certain needed seawall repairs, landscaping and road resurfacing and (iv) that the Subject Parcel was a common element which Aircraft was obligated to convey to the Club.

11. Aircraft filed a Counterclaim in the 2012 Lawsuit in which it alleged that (i) all of the rights as "developer" and "Declarant" under the Declaration had been assigned to Aircraft, (ii) the Club had wrongfully interfered with Aircraft's prior attempts to transfer the Subject Parcel, (iii) the Club had no rightful claim to the Subject Parcel, and (iv) the Club had acted in complete disregard of Aircraft's vested declarant rights under the Declaration. The Counterclaim brought claims for slander of title, declaratory judgment and unjust enrichment.

12. The 2012 lawsuit was settled at mediation on March 14, 2013. A copy of the Mediated Settlement Agreement is attached as Exhibit "H" to the Complaint ("the Settlement Agreement"). Pursuant to the Settlement Agreement, the Club agreed to recognize the rights of Aircraft as the owner of the Subject Parcel and the rights of Aircraft as the Declarant under the Declaration, subject to a partial assignment of architectural control rights to the Club as to all areas other than the Subject Parcel. The Club also agreed in the Settlement Agreement to approve construction of up to thirty-seven (37) condominium units on the Subject Parcel and to take whatever steps necessary to cancel and remove from the public records a Memorandum of Agreement the Club had recorded by which it put the May 15, 1998 agreement with S. Charles Bennett in the public record.

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<sup>1</sup> By Order entered on June 8, 2020, this Court agreed to take judicial notice of the 2012 Lawsuit.

13. Contrary to provisions in the Declaration and the Settlement Agreement, the Club recorded the Claimed A & R Amendment on September 18, 2015. The Claimed A & R Amendment purports to remove or delete provisions which grant rights and privileges to Dolphin as Successor Declarant, including the following: (i) deleting Section 2.2 which previously stated that Declarant was not required to following any predetermined sequence or order of improvement and development, and may add to, subtract from, or make changes in the site plan regardless of the fact that such actions may alter the relative voting strength of the various types of membership in the association, (ii) deleting Section 6.3 which reserved the right to the Declarant for a perpetual easement, and (iii) amending Section 11.3 to remove the ability for a Declarant to make amendments for any purpose without the consent of the members so long as it owns any property or units in La Peninsula and providing such amendment “doesn’t materially and adversely effect the plan of development for La Peninsula”. Neither Aircraft, the Mitchells or Dolphin ever consented to or provided written approval for the Claimed A & R Amendment.

14. The Club has wrongfully interfered and refused to cooperate with Plaintiffs’ efforts to begin the tennis court removal and relocation process, and otherwise attempted to prevent Plaintiffs from exercising their lawful developer and successor declarant rights associated with the Subject Parcel.

15. The Club’s interference and refusal to cooperate with Plaintiffs’ ownership and developer and successor declarant rights in the Subject Parcel constitute a breach of the Master Declaration, and The Club’s obligations under the 2013 Memorandum of Settlement and under the Temporary Easement, which is also a breach of The Club’s implied duties of good faith and fair dealing regarding its obligations thereunder.

16. Examples of The Club's wrongful acts and interference with Plaintiffs' ownership, developer and successor declarant rights regarding the Subject Parcel include the following:

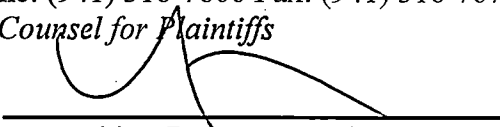
- (a) Making verbal threats to the Mitchells at the Subject Parcel in an attempt to intimidate them from using or accessing the Subject Parcel;
- (b) Damaging landscaping on the Subject Parcel;
- (c) Preventing or impairing maintenance and landscaping of the Subject Parcel;
- (d) Demanding the Mitchells get The Club's consent to landscape and preventing the Mitchells use or access to the tennis courts on the Subject Parcel;
- (e) Filing code enforcement complaints regarding the Mitchells' use and occupancy of the Subject Parcel;
- (f) Failing and refusing to acknowledge written notice of intent sent on behalf of Plaintiffs to start the removal and replacement of the tennis courts process or cooperate with Plaintiffs' efforts to begin the relocation process;
- (g) Failing and refusing to provide access to the relocation area designated for constructing the four replacement tennis courts or for staging construction materials and equipment;
- (h) Failing and refusing to approve or otherwise cooperate in good faith with Plaintiffs' efforts to remove and relocate the tennis courts in connection Plaintiffs' efforts to develop the Subject Parcel;
- (i) Failing and refusing to recognize Plaintiffs' vested developer and successor declarant rights associated with the Subject Parcel; and
- (j) Recording a purported amendment to the Master Declaration in an attempt to remove or delete certain declarant rights and privileges associated with the Subject Parcel without written approval of Aircraft or Plaintiffs.

Plaintiffs, KIMBERLY ANN SCHNELL MITCHELL, DONNIE GENE MITCHELL, and DOLPHIN POINT, LLC, reserve the right to supplement this Statement of Facts upon further discovery or as may be granted by leave of Court.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I electronically filed the foregoing document on December 3<sup>th</sup>, 2022 with the Clerk of Court using the Florida Courts E-filing Portal which will send electronic copies to: **Wayde P. Seidensticker, Jr., Esquire**, Seidensticker & San Filippo, LLC, 791 10<sup>th</sup> Street South, Suite 202, Naples, Florida 34102 at [wps@sandslawoffices.com](mailto:wps@sandslawoffices.com); [wserve@sandslawoffices.com](mailto:wserve@sandslawoffices.com); [psf@sandslawoffices.com](mailto:psf@sandslawoffices.com), *Co-counsel for Plaintiffs* and **Jeffrey D. Fridkin, Esquire, and Michael T. Traficante, Esquire**, Grant Fridkin Pearson, P.A., 5551 Ridgewood Drive, Suite 501, Naples, Florida 34108 at [jfridkin@gfpac.com](mailto:jfridkin@gfpac.com); [mtraficante@gfpac.com](mailto:mtraficante@gfpac.com); [tfriedman@gfpac.com](mailto:tfriedman@gfpac.com); [nkusy@gfpac.com](mailto:nkusy@gfpac.com), *Counsel for Defendant*.

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