IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT, IN AND FOR LAKE COUNTY, FLORIDA

CASE NO.: 10-CA-4156

STEPHEN W. CLUNEY and DONNA L. CLUNEY, as Trustees of the Cluney Family Trust, dated September 15, 2000,

Plaintiffs,

vs.

THE CASCADES OF GROVELAND HOMEOWNERS' ASSOCIATION, INC., a Florida not-for-profit corporation, in its capacities as the subdivision's mandatory membership association and as the representative of its collective membership,

Defendant.
_____/

COMPLAINT

COMES NOW, Plaintiff STEPHEN W. CLUNEY and DONNA L. CLUNEY, as Trustees of the Cluney Family Trust, dated September 15, 2000, by and through their undersigned counsel, and hereby file this, their Complaint against Defendant THE CASCADES OF GROVELAND HOMEOWNERS' ASSOCIATION, INC., a Florida not-for-profit corporation, in its capacities as the subdivision's mandatory membership association for the Cascades of Groveland and as the designated representative of its membership pursuant to Fla.R.Civ.P.1.221, and state:

PARTIES

1. STEPHEN W. CLUNEY and DONNA L. CLUNEY, as Trustees of the Cluney Family Trust, dated September 15, 2000 (hereinafter the "Cluneys") are the Trustees of the Cluney Family Trust (hereinafter the "Cluney Family Trust"), which maintains its situs in Lake County, Florida.

2. On March 16, 2006, the Cluneys acquired, via Special Warranty Deed, that certain property described as:

> Lot 25, of The Cascades of Groveland-Phase 1, according to the Plat thereof as recorded in Plat Book 54, Page 52 through 65 of the Public Records of Lake County, Florida (hereinafter "Lot 25").

3. The Cluneys purchased Lot 25 from the developer, Levitt and Sons of Lake County, LLC, a Florida limited liability company (hereinafter Levitt and Sons"). Also on March 16, 2006, a certificate of occupancy was issued by Lake County, Florida, approving the occupancy of the single family residential dwelling constructed thereon. The Cluneys reside on Lot 25 and the property is their homestead.

4. As a result of the purchase of Lot 25, the Cluneys are deemed to be "members" of the Defendant association, THE CASCADES OF GROVELAND HOMEOWNERS' ASSOCIATION, INC. (hereinafter the "Association"), under the applicable provisions of Chapter 720, Fla. Stat., and the Association's governing documents.

5. The Defendant Association is a Florida corporation not-for-profit and, pursuant to the applicable provisions of Chapter 720, Fla. Stat., is a mandatory membership homeowners' association. Further, and pursuant to Fla.R.Civ.P.1.221, the Defendant Association is the lawfully designated representative of its membership arising from all disputes and controversies of common interest to its membership. As such, the Plaintiffs herein bring this declaratory

action against Defendant Association in its capacities as the mandatory membership association for the Cascades of Groveland and as the legally designated representative of its entire membership.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over this proceeding pursuant to § 26.012, Fla. Stat., and § 86.01, Fla. Stat., in that the causes of action herein relate to the validity of certain recorded amendments to portions of the Association's governing documents as more particularly set forth below in this Complaint.

7. Venue is also proper in Lake County, Florida, because the real property which forms the basis for the litigation herein is located in Lake County, Florida, and all or substantial portions of the transactions and wrongs complained of herein, occurred or are continuing to occur in Lake County, Florida. Further, the Defendant Association maintains an office in which said Defendant transacts its customary business in said county.

ALLEGATIONS COMMON TO ALL COUNTS

8. As mentioned above, the Cluneys purchased Lot 25, in Phase 1 of that certain subdivision referred to as "The Cascades of Groveland". The Cascades of Groveland is now called "Trilogy Orlando" (hereinafter the "Subdivision").

9. The Subdivision was originally platted by the then developer, Levitt and Sons in or about the year 2004.

10. Upon its platting, the developer, Levitt and Sons, brought within the Subdivision's strictures three phases of land described as Phase 1, Phase 2, and Phase 3, respectively. Phase 1 is comprised of 275 platted lots, Phase 2 is comprised of 241 platted lots, and Phase 3 is comprised of 93 platted lots. In total, Phases 1 – 3 contain 609 bona-fide, platted

lots. In addition, the developer, Levitt and Sons also owned an adjoining parcel of land, comprised of approximately 216 acres which it intended to ultimately plat into bona-fide lots and described that land as proposed Phases 4 and 5.

11. However, planned Phases 4 and 5 were never platted by the developer. Instead, this property is made up of approximately 216 acres of raw, undeveloped land without roadways or infrastructure.

12. In November of 2007, Levitt and Sons filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court, Southern District of Florida, Broward Division.

13. At all relevant times leading up to its bankruptcy filing, Bank of America held a first mortgage over all of the platted lots in Phases 1 through 3, the 216 acres of raw land in proposed Phases 4 and 5, as well as some common properties, including a recreational complex and clubhouse that was under construction during 2007.

14. At or prior to the time Levitt and Sons filed for bankruptcy protection, Bank of America initiated an action in the Broward Circuit Court to seek the appointment of a receiver over Levitt and Sons and its various developer entities in the State of Florida.

15. On March 4, 2008, the Broward Circuit Court issued its Order appointing Andrew J. Bolnick as a Receiver over the developer entities and its development projects, including The Cascades at Groveland (now known as Trilogy Orlando).

16. Ultimately, Bank of America, as the secured lender for the Levitt and Sons development projects, foreclosed, and obtained title, to the real properties that Levitt and Sons had owned in the Subdivision, including the separate parcel of approximately 216 acres in the adjoining, but unplatted Phases 4 and 5. As such, Bank of America acquired control, by virtue of

its appointment of the Receiver and the attendant foreclosure, of 371 of the 609 platted lots in Phases 1 through 3 and the 216 contiguous acres of raw, undeveloped land in proposed Phases 4 and 5. Third party property owners, including the Cluneys herein, own the remaining 238 lots.

17. At the time that the Receiver was appointed, the Subdivision's governing documents included that certain Declaration of Restrictions and Protective Covenants for The Cascades of Groveland dated March 7, 2005 and recorded on April 15, 2005 in Official Records Book 0230, Pages 2344-2391, of the Public Records of Lake County, Florida (hereinafter the "Declaration"). The Declaration also included, as an exhibit attached thereto, the Association's Bylaws. A true and correct copy of the Declaration is attached hereto and incorporated herein as Exhibit "A".

18. Thereafter, Bank of America sold or otherwise conveyed Levitt and Sons' remaining 371 lots in Phases 1 – 3 of the Subdivision and the approximately 216 acres in proposed Phases 4 and 5 to a home builder known as Shea Homes.

19. The primary issue which forms the basis for the claims and causes of action herein, however, centers upon that certain Supplemental Declaration of Restrictions and Protective Covenants for the Cascades of Groveland dated July 30, 2009, and recorded that same day in Official Records Book 0386, Pages 3941-3950 of the Public Records of Lake County, Florida (hereinafter the "Supplemental Declaration"). A true and correct copy of the subject Supplemental Declaration is attached hereto and incorporated herein as Exhibit "B".

20. The Supplemental Declaration was executed by the Receiver. Ostensibly, the recording of this Supplemental Declaration was designed to facilitate a favorable sale of Levitt and Sons' prior real properties in, or contiguous to, the Subdivision to a third-party home builder

known as Shea Homes. As mentioned above, Shea Homes took title to the developer's properties in June of 2010.

21. In substance, the Supplemental Declaration, in Article IV, subjected proposed, but unplatted Phases 4 and 5 to the provisions of the Declaration (and the Supplemental Declaration), thus bringing approximately 216 acres of raw, unplatted land, into the Subdivision.

22. Of greater importance, however, is that the Supplemental Declaration purports to amend Article III, Sections 1, 2, and 3, as well as Article VI, Sections 1 and 8 of the Declaration, among other changes therein.[1]

23. Specifically, the Supplemental Declaration adversely alters the proportionate voting interests appurtenant to the Subdivision by creating an additional 216 votes (one vote per acre of proposed Phases 4 and 5) notwithstanding that the Declaration, as originally recorded, did not authorize such a procedure, and only authorized voting rights upon: (a) the platting of those phases into actual, bona-fide, platted lots; and (b) the annexation of those lots into the Subdivision. In this case, the Supplemental Declaration purports to annex the approximately 216 acres of raw land into the Subdivision and then improperly assigns one vote per acre, thus creating 216 additional votes (for a total of 825 membership votes in the Association), wherein prior to the recording of the Supplemental Declaration, the Subdivision was comprised of a total of 609 membership votes.

24. § 720.306(1)(c), Fla. Stat., states:

> Unless otherwise provided in the governing documents as originally recorded or permitted by this chapter or chapter 617, an amendment may not materially and adversely alter the proportionate voting interest appurtenant to a parcel or increase the proportion or percentage by which a parcel shares in the common expenses of the

[1] The proposed Supplemental Declaration was not approved, or consented to, by the non-developer Lot Owners within the Subdivision nor their lien holders- and was not submitted to, nor approved by, any prior judicial tribunal.

> association unless the record parcel owner and all record owners of liens on the parcels join in the execution of the amendment. For purposes of this section, a change in quorum requirements is not an alteration of voting interests.

25. As provided for under the above referenced statute, an amendment may not materially or adversely alter the proportionate voting interest appurtenant to a parcel unless the record parcel owners and all record owners of liens on the parcels join in the execution of the amendment. Here, the record parcel owners and the record owners of the liens on those parcels did not join in the execution of the Supplemental Declaration. Further, the Declaration, as originally recorded, does not provide for the alteration of proportionate voting interests in this manner either. Nor is there any separate provision under either Chapter 720 or Chapter 617 that specifically authorizes such action in the absence of the requisite consents of the parcel owners and those having liens on those parcels.

26. The proportionate voting interests have been affected as follows: Prior to the amendment, the non-developer membership had 238 out of 609 votes, or 39.08% of the total votes in the Association. After the Supplemental Declaration was recorded, the non-developer members retained 238 votes; however, the total number of Association votes was increased from 609 to 825. As a result, the non-developer membership proportionate voting interest was decreased from 39.08% of the total votes to 28.80%. The mere fact that the Declaration, as originally recorded, reserved onto the developer, the right to amend the Declaration unilaterally does not suffice to satisfy the specific requirement under § 720.306(1)(c) that the Declaration, as originally recorded, actually provide for an alternative amendment process that materially and adversely alters the proportionate voting interest of its membership without the requisite consent of all lot owners and lien holders thereon.

27. Therefore, and as result of the foregoing, Shea Homes, which acquired the 216 acres in proposed Phases 4 and 5, now has 216 votes that it otherwise would not have under the terms of the Declaration as originally recorded. Further, Shea Homes merely acquired the properties of Levitt and Sons but not its liabilities. Shea Homes did not succeed by merger or consolidation to Levitt and Sons, either. Thus, Shea Homes is not the "developer" as defined under the terms of the Declaration and as provided for under Chapter 720, Fla. Stat. Rather, Shea Homes is simply a builder that owns platted lots within the first three phases of the subject Subdivision and the 216 contiguous acres of raw, unplatted land, among certain other common parcels. Thus, and because the developer no longer retains any right or interest in the Subdivision, under the Declaration both non-Shea Homes property owners and Shea Homes each became "Class A" members, having one vote per lot within Phases 1 through 3.

28. Separately, the Supplemental Declaration also purports to increase the proportion or percentage by which a parcel shares in the common expenses of the Association, again in violation of § 720.306(1)(c), Fla. Stat.

29. Specifically, the Supplemental Declaration purports to arbitrarily assign an allocation of 20% of the annual assessments of the Association per lot (those lots without a certificate of occupancy) in Phases 1, 2, and 3, and a 10% per acre allocation in proposed Phases 4 and 5, without regard to the actual, budgeted expenses of the Association assessments charged to the membership as a whole.

30. As provided for under the terms of the Declaration (as originally recorded), those lots that have constructed a home thereon, consume certain services that are otherwise not consumed by vacant lots (those lots without certificates of occupancy). By way of example, there are certain lot-specific Association expenses, such as home lawn maintenance, cable

television, and Internet services that are utilized by those lots with homes built thereon. The non-lot specific component of the assessments are those common expenses that are generally beneficial to all lots within the Subdivision, such as maintenance of the Subdivision's gated entry ways, the perimeter walls, insurances, property manager fees and other common expenses.

31. Although § 720.308(1)(a), Fla. Stat., allows for differences in assessments among classes of parcels "based upon the state of development thereof, levels of services received by the applicable members or other relevant factors", in the instant case, the Supplemental Declaration purports to assign a fixed, arbitrary allocation of percentages to the vacant lots (owned by Shea Homes) in the amount of 20% of the overall assessments for each lot, plus 10% for each acre of land in proposed Phases 4 and 5 without regard to the actual expenses incurred by the Association on an annual basis.

32. As set forth above, § 720.306(1)(c), Fla. Stat., specifically states that an amendment may also not…"increase the proportion or percentage by which a parcel shares in the common expenses of the association unless the record parcel owner and all record owners of liens on the parcels join in the execution of the amendment." The Supplemental Declaration therefore violates the provisions of § 720.306(1)(c), Fla. Stat., in that each record owner of a parcel within the Subdivision and all lien holders thereon did not approve, join in, or consent to any such "fixed" allocation that unfairly shifts the burden of assessments from one class of members to another class of members within the Subdivision.

33. In the instant case, the arbitrary allocation of percentages set forth above is not grounded in economic reality and has the impact of shifting the majority of the Association's expenses, via assessments, to the non-majority homeowners, for non-lot specific expenses.

34. Further, the Declaration, as originally recorded, did not authorize this process and, as mentioned above, the Supplemental Declaration was drafted, created, executed and recorded, without the consent of all parcel owners and their respective lien holders. As such, and in this regard, the shifting of the burdens onto the non-Shea Home homeowners as purported under the Supplemental Declaration violates § 720.306(1)(c), and 720.308(1)(a), Fla. Stat.

35. Since the Supplemental Declaration was recorded, the Association conducts its elections and renders its assessments in violation of the above described statutes and in violation of the Declaration, as originally recorded. As such, the Cluneys have initiated this action to obtain the remedies available under law by virtue of these violations.

36. In or about March of 2010, the Cluneys sent e-mails to the Association requesting the opportunity to discuss the issues raised herein. The Association never responded to those requests. On August 17, 2010, the Cluneys through counsel served their demand letter requesting that the Association meet to address these issues. See, Exhibit "C" attached hereto. The Association refused to meet and instead sent a responsive letter attached hereto as Exhibit "D".

37. Further, and prior to the August 17, 2010, letter the Cluneys attended several meetings of the Board of Directors of the Association to address these concerns. Stephen W. Cluney was belittled and shouted down at those meetings. Thus, it is clear to the Cluneys that the Association will not take appropriate action to correct these deficiencies, retroactive to the date of the recorded Supplemental Declaration, and therefore the Cluneys have no other option but to initiate this lawsuit.

38. All conditions precedent to this action have occurred or have otherwise been waived.

COUNT I

ACTION FOR DECLARATORY RELIEF

39. This is an action for declaratory relief pursuant to the applicable provisions of Chapter 86, Fla. Stat.

40. Plaintiffs reallege and reincorporate paragraphs 1 through 38 as if fully set forth herein.

41. As more particularly alleged in this Complaint, and as a result of the ongoing breaches and violations of law arising from the purported Supplemental Declaration, there exists a bona-fide dispute between the Plaintiffs and the Defendant Association which presently requires resolution through a declaration by this Honorable Court. By virtue of the allegations set forth above in this Complaint, Plaintiffs possess an actual, direct, and immediate interest in obtaining a declaration as to the disputed issues.

42. Plaintiffs are therefore entitled to a declaration from this Court regarding the adverse and antagonistic interests of said Defendant Association against Plaintiffs.

43. The relief sought herein is not merely sought for the giving of legal advice or the answer to questions propounded from curiosity, but rather is necessary to resolve an actual, current and justifiable controversy between Plaintiffs, as members of the Association, and the Defendant Association herein.

44. Plaintiffs have retained the undersigned attorney to represent their interest all for which said Defendant is liable pursuant to the applicable provisions of the Declaration and § 720.305(1), Fla. Stat.

WHEREFORE, it is respectfully requested that this Honorable Court issue its declaration directing: (a) that the complained of provisions in the Supplemental Declaration as set forth in

this Complaint be determined voided and of no force and effect *nunc pro tunc* to July 30, 2009; (b) that this Court make such declarations as to the appropriate voting and assessment related procedures in connection with the Association's governance of the Subdivision; (c) issue its declaration to direct the Association to revise its budgets and assessments to conform to the Court's declaration herein; (d) direct the Association to properly render curative assessments from date of recordation of Supplemental Declaration forward and to refund any assessments that were overpaid by the lot owners with homes thereon by virtue of the inequitable and disproportionate allocation of assessments in favor of the vacant lot property owners; (e) award the Cluneys their reasonable attorney's fees, costs, and prejudgment interest on any amounts refunded to the Cluneys; and (e) grant such other and further relief as this Court may deem just, equitable, and proper.

DATED this 13th day of September, 2010.

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