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

CASE NO.: 07-CA-005132

MARINA SOUTH SHORE
 CONDOMINIUM ASSOCIATION, INC., a
 Florida corporation not-for-profit,

 Plaintiff,

 vs.

 PUNTA GORDA ISLES, SECTION 22
 HOMEOWNERS ASSOCIATION, INC., a
 Florida corporation not-for-profit

 Defendant.

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ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

THESE CAUSES came before the Court for hearing on Monday, November 26, 2007, and were continued for further hearing to Friday, November 30, 2007, on both Plaintiff's Motion for Summary Judgment and Defendant's Motion for Partial Summary Judgment. Having reviewed the Motions, the record, arguments of counsel and being otherwise fully advised in the premises, the Court hereby finds that there is no undisputed issue of material fact or law concerning the following:

- 1) Plaintiff, MARINA SOUTH SHORE CONDOMINIUM ASSOCIATION, INC., is a condominium association pursuant to Chapter 718 of the Florida Statutes.
- 2) Defendant, PUNTA GORDA ISLES, SECTION 22 HOMEOWNERS ASSOCIATION, INC., is a homeowners association pursuant to Chapter 720 of the Florida Statutes.

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Charlie Green, Lee County Clerk of Circuit Court

Deputy Clerk DLESLIE
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3) Defendant, PUNTA GORDA ISLES, SECTION 22 HOMEOWNERS ASSOCIATION, INC., is the homeowners association that maintains the common and other areas which are located throughout Burnt Store Marina and Country Club development.

4) Defendant, PUNTA GORDA ISLES, SECTION 22 HOMEOWNERS ASSOCIATION, INC., entered into the following agreements which were attached as Composite Exhibit "1" to Plaintiff's Motion for Summary Judgment: a) The Golf Course Lease; b) Golf Carts Lease Agreement; c) Independent Contractor Agreement; and d) Irrigation Services Agreement. The golf course which is the subject of the above-referenced agreements is hereinafter referred to as the "Golf Course."

5) On May 30, 2007, Defendant PUNTA GORDA ISLES, SECTION 22 HOMEOWNERS ASSOCIATION, INC., called a Special Meeting of its members for the stated purpose of adjusting its 2007 budget and requiring an increase in annual assessments for the year 2007 in the amount of \$300.00 per unit for the operation of the Golf Course.

6) Defendant PUNTA GORDA ISLES, SECTION 22 HOMEOWNERS ASSOCIATION, INC., further anticipates an additional assessment relating to the Golf Course in 2008 of \$400.00 per unit.

7) As evidenced by the Proxy Form, 2008 Projected Assessment Information and Section 22, 2007 Budget Reforecast attached to the Complaint filed in the instant action as Composite Exhibit "E," and Defendant's Answer to paragraph 12A of the Complaint, the above-referenced \$400.00 increase in the assessment for 2008 would represent twice the amount of the current amount assessed by Defendant PUNTA

GORDA ISLES, SECTION 22 HOMEOWNERS ASSOCIATION, INC., to Plaintiff's members who are also members of Defendant PUNTA GORDA ISLES, SECTION 22 HOMEOWNERS ASSOCIATION, INC.

8) Defendant, PUNTA GORDA ISLES, SECTION 22 HOMEOWNERS ASSOCIATION, INC., intends to levy additional and increased assessments for 2007 against its members for costs solely relating to the Golf Course.

9) These additional costs which Defendant, PUNTA GORDA ISLES, SECTION 22 HOMEOWNERS ASSOCIATION, INC., intends to assess against its members related to the Golf Course include, but are not limited to the following expenditures: utilities, maintenance, management, insurance, taxes, infrastructure, grounds keeping, and operations.

10) As evidenced by Defendant's Answer to paragraph 13 of the Complaint, Defendant, PUNTA GORDA ISLES, SECTION 22 HOMEOWNERS ASSOCIATION, INC., anticipates that increased assessments will continue throughout the term of the Lease Agreement for the Golf Course.

11) The payment of any assessments related to the Golf Course does not afford Plaintiff's members with any rights to play golf on the Golf Course.

12) In accordance with the unrefuted statements contained within the Affidavit of Jim Murphy, the Burnt Store Marina and Country Club development was, prior to the imposition of the assessment for the Golf Course, operated on a "pay as you go" basis wherein individual members of Defendant did not pay assessments associated with the amenities available within the development. The amenities within the development consisted of restaurants, golf course, health club, racquet club and marina. These

amenities, prior to institution of this action, were owned, operated and controlled by an entity other than Defendant.

13) The Court finds that the above-referenced assessments, both past and anticipated, and the execution of the Lease and associated documents (See paragraph 5, supra), by the Defendant has fundamentally changed the nature of the Burnt Store Marina and Country Club development by making every owner responsible for funding the leasing, operation, and maintenance of the Golf Course, Club House, and related systems and facilities.

14) This Court finds that Defendant was without authority to take the above-referenced actions because they fundamentally changed the general plan of development for Burnt Store Marina and Country Club by shifting the burden of funding the leasing, operation, and maintenance of the Golf Course and related facilities to the owners through an assessment. Holiday Pines Property Owners Association, Inc., v. Wetherington, 596 So. 2d 84 (Fla. 4th DCA 1992).

15) Furthermore, this Court has reviewed the applicable Declarations governing Defendant PUNTA GORDA ISLES, SECTION 22 HOMEOWNERS ASSOCIATION, INC., including:

- A. The amendment to the Declaration for Defendant recorded on February 28, 1979, in the Official Record Book 1333, Page 115 of the Public Records of Lee County Florida, and attached to the Complaint as Exhibit D-1;
- B. The Declaration dated September 14, 1979, and recorded June 5, 1980 in the Official Record Book 1432, Page 249 of the

Public Records of Lee County Florida and attached to the Complaint as Exhibit D-2;

C. This April 6, 1983 Declaration recorded April 11, 1983, in the Official Record Book 1665, Page 4512 of the Public Records of Lee County Florida, and attached to the Complaint as Exhibit D-3.

D. The August 2, 1983 Declaration recorded August 3, 1983, in the Official Record Book 1683, Page 206 of the Public Records of Lee County Florida and attached to the Complaint as Exhibit D-4.

16) Article 12 of the April 6, 1983 Declaration and Article 17 of the September 14, 1979 Declaration, specifically state the Defendant's purpose as follows:

The purpose of the Association shall be to (a) maintain the areas designated as common areas of the said plat of Punta Gorda Isles, Section 22, (b) maintain landscaping and other improvements on the entrance and adjacent areas thereof, (c) maintain a guardhouse, (d) take such actions as the Association is authorized pursuant to its Articles of Incorporation and Bylaws to take to maintain the residential quality of Punta Gorda Isles Section 22, including Tract C and adjacent lands described above.

17) The above-referenced Declarations authorize Defendant to levy and collect assessments for the maintenance of the common areas and other specifically enumerated properties, and for the costs of enforcing the restrictive covenants set forth in the relevant Declarations that govern the properties within the Burnt Store Marina and Country Club development.

18) It is undisputed that there are no documents that include the Golf Course as a common area element of Burnt Store Marina and Country Club. It is also undisputed that there are no documents that include the Golf Course as one of the areas enumerated within the Declarations that Defendant is responsible for maintaining, i.e., the guardhouse, landscaping and other improvements on the entrance and adjacent areas.

19) The Declarations do not contain any language stating that Defendant may lease, operate or maintain any real property that is not enumerated therein, or that the Defendant may obligate its members to pay for the costs of maintaining, leasing, or operating real property that is not common area or the enumerated property specified in the Declarations.

20) This Court finds that Defendant's action regarding the leasing, operating and maintenance of the Golf Course and related facilities for which it seeks to assess its members was ultra vires. S&T Anchorage, Inc. v. Lewis, 575 So. 2d 696 (Fla. 3rd DCA 1991).

21) Further, it is undisputed that the Articles of Incorporation pursuant to which Defendant was created are those referenced in paragraphs 17 and 18 of the Complaint and attached thereto as Exhibit "A." These Articles of Incorporation are hereinafter referred to as the "Articles of Incorporation."

22) It is undisputed that the relevant Amended and Restated Bylaws for the Defendant are those dated August 6, 2002, recorded August 23, 2002, in the Official Record Book 3712, Page 3061 of the Public Records of Lee County Florida and

attached as composite Exhibit "B" to the Complaint. These Amended and Restated Bylaws are hereinafter referred to as the "Bylaws."

23) In accordance with the Declarations, Articles of Incorporation and Bylaws, Defendant PUNTA GORDA ISLES, SECTION 22 HOMEOWNERS ASSOCIATION, INC., does not have the authority or obligation to maintain, lease or operate the Golf Course or related facilities.

24) It is well established in Florida that, as a corporation, a homeowner's association cannot act in any way that is not authorized in its articles of incorporation or bylaws; and that the articles and bylaws must be construed in a manner that is consistent with the applicable declarations of covenants for the subdivision, and that the applicable declarations are the superior document. S&T Anchorage v. Lewis, 575 So. 2d 696 (Fla. 1991) and Westwood Community Two Association, Inc., v. Lewis, 687 So. 2d 296 (Fla. 4th DCA 1997).

25) As a matter of law, and in accordance with the Declarations, Articles of Incorporation and Bylaws, Defendant PUNTA GORDA ISLES, SECTION 22 HOMEOWNERS ASSOCIATION, INC., does not have the authority to levy assessments against Plaintiff's members to maintain, lease or operate the Golf Course or related facilities.

26) This Court has considered Defendant's argument that Chapter 607, Florida Statutes provide the Defendant, as a not-for-profit corporation, has all powers not inconsistent with law, including the power to lease and operate the Golf Course and the power to assess its members. However, as previously stated, it is well established that the Defendant's powers are necessarily limited to fulfilling the duties and responsibilities

imposed upon it by its own Declarations. S&T Anchorage v. Lewis, 575 So. 2nd 696 (Fla. 1991), Westwood Community Two Association, Inc., v. Lewis, 687 So. 2d 296 (Fla. 4th DCA 1997) and Armstrong v. The Ledges Homeowners' Association, Inc., 633 S.E. 2d 78 (N.C. 2006).

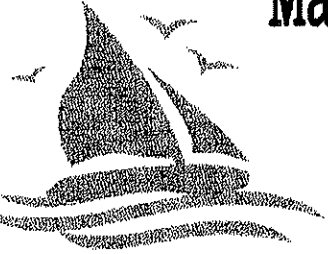
IT IS THEREFORE ORDERED AND ADJUDGED THAT

27) Defendant's Motion for Partial Summary Judgment is hereby Denied.

28) Plaintiff's Motion for Summary Judgment is hereby Granted, and as to Count II of the Complaint, the Court hereby declares that:

- a) Defendant has exceeded its authority in pursuing the lease, operation and maintenance of the Golf Course and all activities and facilities related thereto, including the execution of: a) the Golf Course Lease; b) the Golf Carts Lease Agreement; c) the Independent Contractor Agreement; and d) Irrigation Services Agreement.
- b) Any attempt by the Defendant to assess Plaintiff's members for the leasing, management or operation of the Golf Course, or any activities or facilities related thereto, is a violation of Defendant's governing documents in that it would constitute a radical and fundamental change in the development.
- c) Defendant's actions to lease, manage or operate the golf course and related facilities, exceed the scope and purpose of Defendant's governing documents.
- d) Any attempt by Defendant to levy any assessments on Plaintiff's members that are associated with the leasing, maintenance, or

Marina South Shore Condominium Association



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Office: (941) 639-4208 ~ Fax: (941) 637-7976

FACSIMILE TRANSMITTAL SHEET

To: Andy Solis	From: John Holmes
Fax:	Date: January 28, 2008
Phone:	Pages: 10 plus cover sheet
RE:	



operation of the Golf Course, or for any activity or facility related thereto, is a violation of Defendant's governing documents as they pertain to Plaintiff's members.

e) Defendant does not have the authority to continue to assess Plaintiff's members for costs associated with the Golf Course regardless of the duration of the Lease Agreement.

f) In accordance with the Declarations, Defendant is responsible for maintaining and/or operating the: (a) administration, operation, maintenance, repair and replacement of the Common Areas and pay all costs and expenses thereof to maintain the areas designated as common areas on the said plat of Punta Gorda Isles, Section 22; (b) maintain landscaping and other improvements on the entrance and easement/adjacent areas thereof; and (c) maintain the guardhouse located at the entrance way to the development, as well as the cost of guards or security personnel that may be provided in said guardhouse.

Each of the foregoing is specifically referenced in the Declarations.

29) Plaintiff, as the prevailing party is entitled to an award of its costs pursuant to Chapter 86, Florida Statutes.

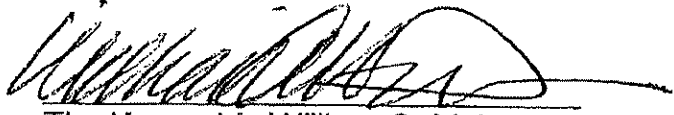
30) In accordance with Florida Statutes §720.305, this Court finds that Plaintiff is the prevailing party in this litigation as it pertains to Count II and is entitled to recover its reasonable attorney's fees and costs. This Court reserves jurisdiction to determine the amount of Plaintiff's attorney's fees and cost as well as any additional amounts as

determined by this Court to be necessary to reimburse Plaintiff's members for assessments levied by Defendant to fund its expenses of the litigation.

31) This Court hereby reserves jurisdiction to determine any remaining issues contained within Count I of the Complaint.

DONE AND ORDERED in Fort Myers, Lee County, Florida on this 24^{4th day} of January, 2008.

^ [Redacted]



The Honorable William C. McIver
Circuit Court Judge

Conformed Copies to:
Andrew I. Solis, Esquire (counsel for Plaintiff)
Mark H. Muller, Esquire (counsel for Defendant)

COPIES AND/OR
ENVELOPES WERE NOT
PROVIDED AS REQUIRED
BY THE COURT.