IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

WALDEN LAKE COMMUNITY ASSOCIATION, INC., BRUCE GARCEAU, and GEORGE CLIFFORD and JOANNA CLIFFORD, as Trustees of the Clifford Revocable Trust,

Plaintiffs,

Case No. 15-CA-7755

v.

Division R

VISIONS GOLF, LLC,

Defendant.
_____/

DEFENDANT VISIONS GOLF, LLC'S MOTION TO DISMISS COMPLAINT

Defendant Visions Golf, LLC, by and through its undersigned counsel, hereby moves to dismiss the Complaint for Declaratory and Injunctive Relief filed by Plaintiffs Walden Lake Community Association, Inc. ("Master Association"), Bruce Garceau, and George Clifford and Joanna Clifford, as Trustees of the Clifford Revocable Trust. The Complaint should be dismissed for failure to state a cause of action. In support, Defendant Visions Golf, LLC states as follows:

1. Plaintiffs filed a four-count Complaint seeking (1) declaratory judgment; (2) temporary injunction; (3) permanent injunction; and (4) class action certification.

2. Plaintiffs assert that the golf courses owned by Defendant Visions Golf "are encumbered with mutual negative equitable easements restricting the use of the Walden Lake golf courses to use solely as golf courses." Comp. at ¶¶ 36, 67. The Complaint fails to identify any restrictive covenant which expressly requires Defendant Visions Golf to maintain a golf

course on its real property in perpetuity. *Id.* at ¶¶ 40-63. Instead, Plaintiffs assert 63 general paragraphs which mostly describe numerous plats and various homeowners declarations upon which they assert collectively restrict the use of the golf course, notwithstanding that the golf courses are not encumbered by those declarations or plats.

THE MASTER ASSOCIATION LACKS STANDING

3. Plaintiff Master Association lacks standing to seek enforcement of any restrictive covenant against the golf course. Plaintiff Master Association fails to allege that it is a party to a restrictive covenant or that a restrictive covenant was made for the benefit of Plaintiff Master Association. Although Plaintiff Master Association claims that it has authority to enforce restrictions against the golf course, it identifies no restrictive covenants set forth in the Master Declaration, nor any other agreement to which it is a party that gives it the power to restrict the use of the golf course.

4. The Master Declaration makes absolutely no reference whatsoever to golf in the entire document. The golf course property was never added as one of the "Properties" to which the Master Declaration applied.[1] Because there are no allegations that the golf course was one of the "Properties" included in the Master Declaration, none of the covenants of the Master Declaration would be applicable to the golf course, including any purported right of Plaintiff Master Association to enforce any restrictive covenants. Plaintiff Master Association makes a broad assertion that the Master Declaration provides it with the function and authority to "cover both the original planned community of Walden Lake, and subsequent additions to Walden Lake,

[1] "Properties" is a defined term in the Master Declaration of Covenants, Conditions and Restrictions for Walden Lake, portions of which Plaintiffs incorporated into their Complaint. "Properties" is limited to only those properties, specifically identified by legal description, which are brought within the jurisdiction of Plaintiff Master Association, and Plaintiffs do not allege, nor could they, that the golf course property has been brought within the jurisdiction of Plaintiff Master Association and thus made subject to the Master Declaration.

which occurred prior to when the development of the Walden Lake community was completed by the developer. The authority of WLCA [Plaintiff Master Association] to require Defendant's property to conform to the Master Plan for Walden Lake has existed from the creation of WLCA and has never been relinquished." Complaint, ¶10. This representation by Plaintiffs is not supported by the express terms of the Master Declaration, Article VII, Section 1(a):

> "until such time as such additions are made to the Properties in the manner hereinafter set forth, neither the Exhibit C land nor any other real property owned by the Declarant or any other person or party whomsoever, other than the Properties, shall in any way be affected by or become subject to the Declaration."

The golf course was never added as one of the Properties to the Master Association, and thus, is not encumbered by any restrictions therein.

5. The Master Declaration merely states, "Declarant and said owners desire to create an exclusive residential community known as Walden Lake." It does not state that they desire to create a golf course community or that Plaintiff Master Association has any authority or power over the golf course. Thus, Plaintiffs' allegations in paragraphs 5, 10 and 11 of the Complaint are contradicted by the language of the Master Declaration.

6. The Complaint also fails to allege the authority of Plaintiff Master Association to seek to enforce covenants in declarations which clearly were created by separate and distinct homeowner's associations for different and specific subdivisions. The Complaint has multiple references to separate subdivision plats and declarations within Walden Lake. Plaintiffs fail to allege that any of the Plaintiffs have standing to enforce any of the contractual restrictive covenants set forth in those declarations. One exception exists, however, for Plaintiffs who may have standing to enforce restrictive covenants pursuant to the applicable declaration for Forest Club if they are able to demonstrate that the Forest Club declaration encumbers the golf course.

7. Plaintiff Master Association also has no standing to assert any rights based on the plat or declarations for Walden Lake Fairway Villas, as the owners in Walden Lake Fairway Villas are not members of Plaintiff Master Association. Thus, the allegations of paragraph 42 and 49 should be stricken.

8. In addition to the deficiencies for Plaintiff Master Association's standing noted above, the conditions precedent for Plaintiff Master Association to acquire standing have not been satisfied.

9. Because this action involves a matter in controversy in excess of $100,000, Plaintiff Master Association must first obtain the approval of a majority of the voting interests of its members before it may bring this action. Section 720.303(1), Florida Statutes, provides, in pertinent part:

> Before commencing litigation against any party in the name of the association involving amounts in controversy in excess of $100,000, the association must obtain the affirmative approval of a majority of the voting interests at a meeting of the membership at which a quorum has been attained.

10. The Complaint does not allege that Plaintiff Master Association has obtained such an approval vote from its members nor has it alleged generally that all conditions precedent to the bringing of this action have been met or satisfied.

11. Further, Plaintiff Master Association, together with the homeowners, lack standing to enforce the Restrictions and Easement Agreement, attached to the Complaint as Exhibit "B." As the Complaint admits, neither Plaintiff Master Association nor the "purchasers of the home sites adjacent to the golf course" were parties to the Restrictions and Easement Agreement. Complaint, ¶24.

12. Plaintiff Master Association claims to have rights under paragraph 2 of the Restrictions and Easement Agreement, and quotes or relies on paragraph 2 in its allegations in paragraphs 23, 25, 26, 27 and 30 of the Complaint and as generally referenced in Count I. These allegations are inconsistent with the terms of and content of the Restrictions and Easement Agreement, attached as Exhibit "B" to the Complaint. Paragraph 2 is entitled "Restrictions" and expressly states:

> The restrictions in this paragraph 2 are *intended solely for the benefit of Developer and Sun City*, may be modified only by Fairways, Sun City and Developer in writing and *no party shall have the right to claim an interest in the benefits of the restrictions.*

Complaint, Exhibit "B" (emphasis added).

13. Plaintiffs are not entitled to maintain an action if they do not own and hold the rights they seek to enforce. *Your Construction Center, Inc. v. Gross,* 316 So. 2d 596 (Fl. 4th DCA 1975); *Greenwald v. Triple D Properties, Inc.,* 424 So. 2d 185, 187 (Fla. 4th DCA 1983). "Without any indicia of ownership that would sufficiently identify the true owner . . . at the time the Plaintiff filed this action, the Plaintiff is unable to prove that it had standing to bring the action." *Progressive Express Inc. Co. v. McGrath Community Chiropractic,* 913 So. 2d 1281, 1285 (Fla. 2d DCA 2005); *Oglesby v. State Farm Mutual Automobile Ins. Co.,* 781 So. 2d 469 (Fla. 5th DCA 2001). Standing requires that the party prosecuting the action have a sufficient stake in the outcome and that the party bringing the claim be recognized in the law as being a real party in interest entitled to bring the claim. This entitlement to prosecute a claim in Florida courts rests exclusively in those persons granted by substantive law, the power to enforce the claim. *Kumar Corp. v Nopal Lines, Ltd,* 462 So. 2d 1178 (Fla. 3d DCA 1985). Plaintiffs fail to attach any purported assignment of Developer rights under paragraph 2 of the Restrictions and Easements Agreement.

14. As provided in the Comments to Rule 1.120, Florida Rules of Civil Procedure, "Consistency between the allegations of the pleadings and the terms and contents of the exhibits is absolutely essential. In the event of inconsistency, the exhibits will control." S*ee Franz Tractor Co.*, 566 So. 2d at 526. Thus, all claims based on paragraph 2 of the Restrictions and Easement Agreement should be dismissed.

15. Even if Plaintiff Master Association could overcome its pleading deficiencies regarding standing set forth above, Plaintiff Master Association also fails to demonstrate standing under Rule 1.221 of the Florida Rules of Civil Procedure. Rule 1.221 provides in pertinent part that the homeowner's association may institute an action:

> [I]n its name on behalf of all association members concerning matters of common interest to the members, including, but not limited to: (1) the common property, area, or elements; … (4) representations of the developer pertaining any existing or proposed commonly used facility.…

16. Plaintiff Master Association fails to demonstrate and allege that the subject matter of the Complaint concerns matters of common interest to all the members regarding any common elements or common areas specific to Plaintiff Master Association or that the representations by the Developer pertain to an "existing or proposed commonly used facility." Clearly, the golf course is not a common area or a common element of Plaintiff Master Association, nor is it a commonly used facility for Plaintiff Master Association. The golf course has never been subject to the Master Declaration. The golf course is an independent business whose members and other players pay for the privilege of the use of the golf course. Moreover and equally significant, the golf course is not of common interest to all the members as each subdivision and the members within each subdivision do not share the same restrictive covenants contained in their declarations. All members within the association do not have or share the same common

interests. Because the golf course is not part of any common area or common element is not and never has been a commonly used facility for the members. Plaintiff Master Association is attempting to fit a square peg in a round hole and does not have the allegations necessary to fall within Rule 1.221. For this additional reason, Plaintiff Master Association lacks the necessary standing to bring it within the scope of Rule 1.221.

17. Because Plaintiffs lack standing to assert their purported claims in the Complaint, the claims should be dismissed.

FAILURE TO ATTACH DOCUMENTS UPON WHICH COMPLAINT IS BASED

18. Plaintiffs seek to enforce restrictive covenants and easements against Defendant Visions Golf. The Complaint repeatedly references vague "mutual negative equitable easements" and "restrictions" which purportedly require Defendant Visions Golf to reopen and maintain a golf course.

19. As alleged restrictions concerning lands, no action may be brought unless such restrictions are derived from a writing. Fla. Stat. § 725.01. However, the Complaint fails to attach the documents which purportedly restrict the use of Defendant Visions Golf's real property to a golf course only. A restriction will not be enforced unless it is included or referenced in a document of record or referred to in any muniment of title, plat or other document.

20. Claims based on written documents must be attached to the Complaint. Fla. R. Civ. P. 1.130(a). Plaintiffs attempt to assert that the collective plats and association declarations are the basis of its rights. Plaintiffs further claim they were assigned the rights held by the Developer. Complaint at ¶ 31. However, Plaintiffs failed to attach to the Complaint the written documents setting forth the restrictions and assignments upon which the causes of action are

brought. Thus, the Complaint should be dismissed. *See Conklin v. Cohen,* 287 So. 2d 56, 60 (Fla. 1973); *City of St. Petersburg,* 640 So. 2d 149, 150 (Fla. 2d DCA 1994); *Diaz v. Bell Microproducts-Future Tech, Inc.,* 43 So. 2d 138, 140 (Fla. 3d DCA 2010)(complaint that failed to attach written document that formed basis of its claim for relief failed to state cause of action); *Jeff-Ray Corp. v. Jacobson,* 566 So. 2d 885, 886 (Fla. 4th DCA 1990**)**(reversing trial court for denying motion to dismiss where alleged assignment was not attached to complaint as required by Rule 1.130).

21. In order to plead its defenses, Defendant Visions Golf is entitled to notice of the specific restrictions and covenants Plaintiffs are seeking to enforce. Under Rules 1.110 and 1.130 of the Florida Rules of Civil Procedure, Defendant Visions Golf is not required to guess the basis for Plaintiffs' claims. Plaintiffs have to attach the declarations and restrictive covenants to the Complaint, so Defendant Visions Golf may fairly evaluate the claims asserted. Plaintiffs should attach the complete 1993 Restrictions and Easement Agreement, including its exhibits, as Exhibit "B" to the Complaint. They documents are not too voluminous. For example, the 1986 Master Declaration is only 22 pages.

22. The Complaint seeks declaratory and injunctive relief interpreting written restrictions on real property. Nonetheless, the Complaint does not attach the specific writings which allegedly restrict the real property, and fails to apprise Defendant Visions Golf of the nature and extent of its claims. Defendant Visions Golf is unable to respond due to the ambiguity of Plaintiffs' claims. Because the Complaint fails to attach the alleged written restrictions that Plaintiffs rely upon, or the relevant excerpts thereof, the Complaint should be dismissed.

FAILURE TO STATE A CAUSE OF ACTION

23. The Complaint should be dismissed for failure to state a cause of action pursuant to Rule 1.140(b)(6). Applicable restrictive covenants, if any, must be derived from specific property owned by each landowner. The Complaint fails to allege the particular restrictions as to each parcel of real property at issue. This pleading deficiency is compounded by Plaintiffs' failure to attach the operative restrictive covenants to the Complaint. Because the Complaint fails to apprise Defendant Visions Golf of the nature, extent and written basis for the claims asserted, Defendant is unable to frame a responsive pleading, and the Compliant should be dismissed.

General Scheme of Development Theory

24. Plaintiffs have failed to allege a cause of action for implied restrictions on the golf course based on a general scheme.

25. A "general building scheme" is defined in the Second District Court of Appeal as "one under which a tract of land is divided into building lots, to be sold to purchasers by deeds containing *uniform restrictions*." *Fiore v. Hilliker,* 993 So. 2d 1050, 1053 (Fla. 2d DCA 2008) (emphasis added).

26. In order to assert a claim for "general building scheme," Plaintiffs are required to allege that negative covenants were imposed uniformly on all property. In order to enforce implied easements based on the general scheme theory, Plaintiffs must allege and demonstrate that, at the time of creation, there is "a mutuality of covenant and consideration, or . . . that mutual negative equitable easements are created." *Fiore,* 993 So. 2d at 1053. The legal extent of an easement "must be ascertained from the intention of the parties, in light of surrounding

circumstances, *at the time the easement was created.*" *Walters*, 450 So. 2d at 1142 (emphasis in original).

27. Implied reciprocal negative easements imposed as a general building scheme are exceptions to the statute of frauds to avoid injustice. However, in this case there are no allegations that uniform restrictions were imposed on any property owned by Plaintiffs and which were also imposed on the golf course. Instead, the Complaint alleges there were numerous written declarations specific to each subdivision.

28. The Walden Lake community has many subdivisions, created over the span of many years. If Plaintiffs had attached the relevant declarations and covenants to the Complaint as required by Rule 1.130(a), it would be plainly apparent that the declarations and covenants are anything but uniform. It is more convenient for Plaintiffs' purposes to make vague, general allegations regarding the declarations and restrictive covenants, rather than attaching them to the Complaint.

29. Each subdivision may have had uniform restrictions that applied between each of the lot owners of the subdivision, but those restrictions applied only to the property contained within that subdivision. Plaintiffs cannot simply allege a collection of separate references related to "golf" contained in selected declarations that are recorded only against a particular subdivision. Such cannot be read together to constitute the type of uniform mutual restrictive covenants necessary to impose an implied negative reciprocal easement as a part of a general building scheme.

30. Further, pleading a claim for a general scheme requires a "general building scheme involving mutual covenants." *Fiore*, 993 So. 2d at 1053. The Complaint fails to allege

facts showing that the properties subject to the Master Association have the same, uniform mutual covenants. Indeed, the Complaint fails to allege any mutual restrictions.

31. There are no allegations in the Complaint taken from any of the subdivision declarations that indicate that the identical restriction in that declaration was also a part of any restriction which encumbered the golf course.

32. Moreover, the restrictions upon which Plaintiffs attempt to assert the general building scheme are derived from plats and declarations covering the period from 1977 through 2013. Complaint, ¶¶42-63. Clearly, these diverse references to golf in separate subdivision declarations are inadequate for creating uniform mutual covenants, and clearly such would not be contemporaneous.

33. A negative easement restrains the owner of real property regarding how he can use his property. The Complaint fails to identify anything that would qualify as a mutual negative easement imposed on the golf course property. Again, the failure to allege mutual negative easements, as required to plead a general scheme, is compounded by Plaintiffs' failure to attach the declarations and restrictions to the Complaint.

34. Plaintiffs are seeking to enforce restrictive covenants, a form of contract. The relevant covenants at issue need to be attached to the Complaint, so Defendant Visions Golf and the Court may identify which plaintiffs may enforce which restriction.

35. The Complaint seeks to enforce restrictive covenants against Defendant Vision Golf's real property, but contains no legal description of the allegedly dominant and subservient land. In the Walden Lake community, no golf courses were platted. The Complaint does not allege, nor could it, that a legal description of a golf course is on any plat. No plat references a restricted use on golf course property.

Enforcement of Restrictions and Easement Agreement

36. Pursuant to the express language of the 1993 Restrictions and Easement Agreement, only the Developer or Sun City may enforce paragraph 2, entitled, "Restrictions." Restrictions, Section 2. Restrictions and Easement Agreement, ¶2.

37. Exhibit "B" to the Complaint clearly provides that the restrictions in paragraph 2 are only for the benefit of "Developer and Sun City" and that "no other party shall have the right to claim an interest in the benefits of the restrictions." Paragraph 2 states as follows:

> The restrictions in this paragraph 2 are *intended solely for the benefit of Developer and Sun City*, may be modified only by Fairways, Sun City and Developer in writing and *no party shall have the right to claim an interest in the benefits of the restrictions.*

Complaint, Exhibit "B" (emphasis added).

Failure to State Claim for Declaratory Relief

38. The Complaint seeks declaratory relief by blending together separate theories: general scheme/implied negative reciprocal easements and restrictive covenants. Comp., ¶¶66-67.

39. Parties who seek declaratory relief must allege facts showing that

> there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interest are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity. *These elements are necessary in order to maintain the status of the proceeding as being judicial in nature and therefore within the constitutional powers of the courts.*

Santa Rosa County v. Administration Commission, Div. of Admin. Hearings, 661 So. 2d 1190, 1192-93 (Fla. 1995)(quoting *May v. Holley,* 59 So.2d 636, 639 (Fla. 1952)).

40. Count 1 merely recites the elements of a claim for declaratory relief. Florida state courts require the pleading of ultimate facts.

41. The Complaint seeks a declaration of rights under recorded declarations and restrictive covenants, but fails to identify which plaintiff is entitled to enforce which restriction. There are many subdivisions within the Walden Lake community, and they each have different restrictive covenants. The Complaint cherry-picks restrictive covenants without linking them to a particular plaintiff or the golf course that is going to be rezoned. Defendant Visions Golf cannot reasonably respond to a claim that does not separate which plaintiff is seeking to enforce which restriction.

42. Further, it is fundamental to pleading a cause of action based on a restrictive covenant that the plaintiff 1) identify the parcel of property subject to the restrictive covenant; 2) identify the party who claims to have a right to enforce such restriction and how the party is injured; 3) identify the restrictive covenant which is sought to be enforced; and 4) how the restrictive covenant has been violated. In seeking a declaratory judgment as to restrictive covenants against the golf course, Plaintiffs need to assert these elements. Further, Plaintiffs fail to state a claim for declaratory judgment by the failure to articulate that another party (Vision Golf) has or "reasonably may have an actual, present, adverse and antagonistic interest." The Complaint lacks any allegation as to the "antagonist and adverse interest" of Vision Golf as it relates to any restrictive covenants. Instead, the Complaint appears to be a poorly-pled effort claiming that Vision Golf has breached a restrictive covenant.

43. For these reasons, Count 1 should be dismissed.

Failure to State Claims for Injunction

44. In addition to the basis for dismissal set forth above, Counts 2 and 3 of the Complaint seek injunctive relief, should also be denied for failure to state a cause of action. An injunction must be based upon:

> 1) the likelihood of irreparable harm; 2) the unavailability of an adequate remedy at law; 3) substantial likelihood of success on the merits; and 4) consideration of the public interest.

Richard v. Behavioral Healthcare Options, Inc., 647 So. 2d 976, 978 (Fla. 2d DCA 1994).

45. However, the Complaint fails to define exactly what Plaintiffs seek to enjoin, and such extraordinary equitable relief must be as limited as possible. An injunction must be narrowly tailored, but the Complaint fails to specify the exact conduct Plaintiffs seek to have enjoined. Plaintiffs' vague claims for injunctive relief do not articulate the action sought to be enjoined, and therefore fail to state a claim upon which relief may be granted.

46. Moreover, Plaintiffs also fail to state a cause of action for injunctive relief because the Complaint is a transparent attempt to do indirectly what they clearly cannot do directly. Because Plant City's exercise of its zoning authority is a legislative function, Plaintiffs may not seek injunctive relief which encroaches upon the legislative prerogative of Plant City in its consideration of Defendant's rezoning application. Because Plaintiffs cannot seek to enjoin Plant City from performing its legislative function, Plaintiffs should not be permitted to do an "end around" by seeking to enjoin Defendant from participating in the very same process Plaintiffs are unable to enjoin.

47. The relief sought by Plaintiffs for an injunction infringes on Defendant's constitutional right to petition the government for redress of its grievances, as protected by the United States Constitution and Florida Constitution. The right to petition the government to

"take official action" is "one of the most precious liberties" guaranteed by the United States Constitution and the Florida Constitution, and it extends to petitions before all branches, agencies, and departments of the government. *Curry v. State*, 811 So. 2d 736, 742-43 (Fla. 4th DCA 2002)(considering U.S. Const., amend. I. and Art. I, § 5, Fla. Const.); *see also Jacobson v. Se. Pers. Leasing, Inc.*, 113 So. 3d 1042, 1048 (Fla. 1st DCA 2013)(right includes petitions of private actors seeking personal gain).

48. Further, neither Plaintiffs' claim for temporary injunction nor claim for permanent injunction alleges that the requested injunctive relief is in the public interest.

49. Because the Complaint fails to state a cause of action for injunctive relief, Counts 2 and 3 should be dismissed.

Failure to State Claim for Class Action

50. Count 4 should be dismissed because the Compliant fails to plead a cause of action for class certification. Rule 1.220 of the Florida Rules of Civil Procedure provides the following:

> Prerequisites to Class Representation. Before any claim or defense may be maintained on behalf of a class by one party or more suing or being sued as the representative of all the members of a class, the court shall first conclude that (1) the members of the class are so numerous that separate joinder of each member is impracticable, (2) the claim or defense of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim or defense of each member of the class, (3) the claim or defense of the representative party is typical of the claim or defense of each member of the class, and (4) the representative party can fairly and adequately protect and represent the interests of each member of the class.

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

51. Generally, the plaintiff must allege the existence of a class, demonstrate that the four prerequisites specified in Rule 1.220(a) are satisfied, and that the action meets the criteria for one of the three types of class actions defined in Rule 1.220(b). The rule also requires the pleader to define the alleged class and specify the approximate number of class members. The four prerequisites of subsection (a) of the rule are usually referred to as the principles of numerosity, commonality, typicality and adequacy.

52. Paragraph 80(b) of the Complaint contains a cursory allegation of numerosity. This paragraph does not state a specific quantity but only that the class is "so numerous that separate joinder of each member is impracticable." This allegation falls short of the pleading requirement that the complaint specify the approximate number in the class. Further, the property owners are easily identified and are not so numerous as to necessitate a class action.

53. Claims related to real property and its purchase are generally inappropriate for class actions. "[A]ll land is considered unique." *Henry v. Ecker,* 415 So. 2d 137, 140 (Fla. 5th DCA 1982). Given the presumption that every real estate parcel is unique, real property cases are ill suited for class-action treatment. *See, e.g., Darms v. McCulloch Oil Corp.,* 720 F.2d 490, 493 (8th Cir. 1983)(class certification properly denied where real estate buyers charged developers with fraud; each purchase was a separate transaction with individual facts). The proposed class action claim must allege a common right of recovery based upon the same essential facts. *State Farm Mut. Auto. Ins. Co. v. Kendrick,* 822 So. 2d 516, 517 (Fla. 3d DCA 2002)(quoting *Colonial Penn Ins. Co. v. Magnetic Imaging Sys. I, LED.,* 694 So. 2d 852, 853 (Fla. 3d DCA 1997)). Simply because the plaintiffs allege the same theory of recovery does not mean that legal or factual commonality exists among the proposed class members.

54. Here, each parcel of real property is unique. The restrictive covenants applicable to each subdivision within the Walden Lake community vary. The restrictions on each parcel vary. The timing, reliance and plats associated with each purchase of a lot within Walden Lake is not the same for each owner. The need for individual examination of each landowner's factual circumstances in order to determine whether a cause of action exists is fatal to Count 4. Any class with the requisite commonality for a class action would not satisfy the numerosity requirement.

55. "The primary concern in determining commonality is whether the representative members' claims arise from the same course of conduct that gave rise to the other claims, and whether the claims are based on the same legal theory." *Terry L. Braun, P.A. v. Campbell,* 827 So. 2d 261, 267 (Fla. 5th DCA 2002). Merely pointing to common issues of law is insufficient to meet the commonality or typicality requirement when the facts required to prove the claims are different between class members.

56. Here, Plaintiff Master Association is not an adequate class representative. The Complaint fails to identify any property the Master Association owns, so Defendant is unable to evaluate what rights this Plaintiff may have.

57. Each member of the proposed class is a property owner. Moreover, each property owner deraigns its title and rights based on different and distinct documents in the chain of title specific to its property. The individual plaintiffs have not alleged facts showing that the plats, restrictions, easements, timing of purpose and reliance associated with their lots are "typical" or share anything in common with the other purported members of the class. Thus, there are insufficient allegations of commonality or typicality to support a claim for class action.

58. Count 4 should be dismissed because the Complaint fails to allege facts necessary to show numerosity, commonality and typicality.

WHEREFORE, Defendant Visions Golf, LLC, requests that the Complaint be dismissed, as set forth above, and any further appropriate relief.

/s Alice R. Huneycutt
ALICE R. HUNEYCUTT, ESQUIRE
Florida Bar No. 293105
DARRIN J. QUAM, ESQUIRE
Florida Bar No. 995551
STEARNS WEAVER MILLER WEISSLER
ALHADEFF & SITTERSON, P.A.
401 East Jackson Street, Suite 2200
Post Office Box 3299
Tampa, Florida 33601
Telephone: (813) 222-5031
Facsimile: (813) 222-5089
Primary: ahuneycutt@stearnsweaver.com
Secondary: jbenford@stearnsweaver.com
Primary: dquam@stearnsweaver.com
Secondary: lwade@stearnsweaver.com
Attorneys for Defendant Visions Golf, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 17, 2015, the undersigned counsel electronically filed the foregoing Defendant Visions Golf, LLC's Motion to Dismiss Complaint through the Florida Courts E-Portal, and served via electronic mail to Counsel for Plaintiffs, Harley Herman, Esq. @ (info@hermanandhermanesq.com.)

/s Alice R. Huneycutt
ALICE R. HUNEYCUTT, ESQUIRE
Florida Bar No. 293105
DARRIN J. QUAM, ESQUIRE
Florida Bar No. 995551
STEARNS WEAVER MILLER WEISSLER
ALHADEFF & SITTERSON, P.A.
401 East Jackson Street, Suite 2200
Post Office Box 3299
Tampa, Florida 33601
Telephone: (813) 222-5031
Facsimile: (813) 222-5089
Primary: ahuneycutt@stearnsweaver.com
Secondary: jbenford@stearnsweaver.com
Primary: dquam@stearnsweaver.com
Secondary: lwade@stearnsweaver.com
Attorneys for Defendant Visions Golf, LLC