STATE OF FLORIDA
IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT

CASE NO. 1D2023-3211
L.T. NO.: 2022 CA 000027

HARBOURAGE MARINA, LLC, A Florida limited liability company,

Appellant,

v.

DOLPHIN BAY OWNERS ASSOCIATION, INC., a Florida Not For Profit Corporation,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
IN AND FOR BAY COUNTY, FLORIDA

Initial Brief of Appellant Harbourage Marina, LLC

Julia Maddalena, Esq.
Florida Bar No: 111932
Hand Arendall Harrison Sale LLC
16901 Panama City Beach Pkwy, Suite 200
Panama City Beach, FL 32413
Phone: 850-769-3434
jmaddalena@handfirm.com
viseminger@handfirm.com
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

PRELIMINARY STATEMENT

Appellant, HARBOURAGE MARINA, LLC, is referred to as "Harbourage." Appellee, DOLPHIN BAY OWNERS ASSOCIATION, INC., is referred to as the "Association."

References to the record on appeal, filed on March 13, 2024, are in parentheses with an "R." followed by the page number, e.g. (R. 50). Exhibits attached to Harbourage's Motion for Summary Judgment are designated as "Motion Exhibit ____". References to the lower court's September 29, 2023, partial final judgment are in parentheses with an "F.J." followed by the page number and paragraph number(s), when appropriate, e.g. (F.J. 3:16).

STATEMENT OF THE CASE AND FACTS

I. Procedural History

Harbourage is the owner of a marina ("the Marina") located within the gated, residential subdivision of Dolphin Bay in Bay County, Florida. (R. 1775). Harbourage is the successor-in-interest to the original owners of the Marina and developers of the Dolphin Bay subdivision: Suntech Resort Developers of Florida, Inc., Howard D. Shelton, and Michael W. Hudlow

("Developers or "Declarant").[1] (R. 1784).

Developers incorporated Defendant, Dolphin Bay Owners Association, Inc. ("the Association") in 1998 as a homeowners' association in accordance with Chapter 617, Florida Statutes (1998)[2], by filing Articles of Incorporation with the State of Florida. (R. 1784, Motion Exhibit 1). The Declaration and By-Laws governing the corporation were also recorded in 1998.[3] (R. 1784, Motion Exhibit 2 & 3).

Although the real property comprising the Marina is located within the gates of Dolphin Bay, the Marina is a privately owned and operated amenity, not subject to the regulatory provisions of the recorded Declaration or the Association. (R. 1786, Motion Exhibit 2, Art. 2.2). Uniquely, the submerged land beneath the boat slips is owned in fee simple by Harbourage and those

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[1] Eventually the Marina and slips and would come to be owned and operated by Michael W. Hudlow and others through various land trusts.

[2] Declarations incorporate the law in effect at the time of recording in the official records. *Dimitri v. Commercial Ctr. of Miami Master Ass'n, Inc.*, 253 So. 3d 715, 718 (Fla. 3d DCA 2018) ("An association declaration is a contract…and normally, the statutes in effect at the time a contract is executed govern substantive issues arising in connection with that contract.").

[3] Section 617.301(6), Florida Statutes, defines the governing documents as "[t]he recorded declaration of covenants for a community, and **all duly adopted** and recorded amendments, supplements, and recorded exhibits thereto; and … [t]he articles of incorporation and bylaws of the homeowners' association, and **any duly adopted** amendments thereto." (emphasis added).

to whom Developers conveyed boat slips prior to Harbourage's purchase in 2021. (R. 1775, 1789). Thus, Harbourage has no submerged land lease with the State of Florida because the Marina was dredged and created by what is known as an "upland cut" basin. (R. 1532-33). Harbourage owns the majority of the slips, submerged land, the boat launch, and all of the waterfront property constituting the Marina. (R. 1789, 1790, Motion Exhibit 10).

Harbourage purchased the Marina from the Developer in 2021. (*Id*.). When the Association attempted to regulate Harbourage's Marina operations in 2022, Harbourage sued the Association for a declaratory judgment that the following restrictive covenants were void and unenforceable:

(1) Amendment to the Dolphin Bay Declaration of Covenants, Conditions, and Restrictions dated November 17, 2004, restricting and limiting slip ownership to lot owners only ("the 2004 Amendment");

(2) Amendment to the Dolphin Bay By-Laws dated July 23, 2009, restricting eligibility for serving on the Board of Directors of the Association to lot owners only ("the 2009 Amendment"); and

(3) 2011 Restrictive Covenant "Agreement" purporting to restrict and govern Marina operations and giving the Association substantial

authority and control over the Marina (referred to by the Association as the "Marina Agreement").

These are collectively referred to herein as "the Challenged Covenants." (R. 1265-1333).

Harbourage argued that the Association acted: a) unilaterally and without member or Harbourage approval; b) in conflict with superior provisions of the restrictive covenants; and c) in conflict with Florida law. Harbourage argued that the Challenged Covenants were void *ab initio* because the Association's amendments unilaterally amended the Declaration without authority or consent, and in violation of the Declaration and state law, and, therefore, constituted *ultra vires* acts. (*Id*.)

Harbourage moved for summary judgment on Count I of its Second Amended Complaint, but the trial court ruled in favor of the Association holding that Count I was barred by the five-year statute of limitations for breach of contract actions. (R. 1775-2038; F.J. 1-12). Thus, the trial court never considered the merits of Harbourage's arguments and entered the Order on appeal on September 29, 2023. (F.J. 11).

In the Order, the court held that "because this action was filed more than five years after said instruments were recorded, any claims challenging the validity of such instruments on the basis that they are void *ab initio* are

foreclosed." (F.J. 10:36). The trial court relied on this Court's opinions in *Silver Shells Corp. v. St. Maarten at Silver Shells Condo. Ass'n, Inc.*, 169 So. 3d 197, 198 (Fla. 1st DCA 2015) and *Hilton v. Pearson*, 208 So. 3d 108, 110 (Fla. 1st DCA 2016).

The court also ruled that Harbourage failed to raise the issue of conflicting contractual provisions in its pleading and therefore could not raise the issue on summary judgment. (F.J. 10:37).

Harbourage filed a motion for rehearing pursuant to Florida Rule of Civil Procedure 1.530, tolling the time to appeal. (R. 2058-2066). The trial court denied that motion on November 16, 2023. (R. 2078-2080). This appeal was timely filed on December 14, 2023.[4] (R. 2081-2098).

II. The relationship of the Marina to the Association.

The 1998 Declaration vests the Association with responsibility for the common areas, building standards on residential lots, and related matters. (R. 1808, *et seq*.; Motion Exhibit 2, Art. 1.1 & 1.9). The Declaration limits the Association's "rights and obligations" to: a) managing the Common Areas (R. 1812; Motion Exhibit 2, Art. II, III & V); b) enforcing maintenance standards

[4] Since this appeal of Count I, the trial court held a non-jury trial on October 2-3, 2023, on Counts II & III of Harbourage's Second Amended Complaint and the Association's Counterclaim and Third-Party Complaint. A Final Judgment was rendered on January 5, 2024, and is subject to pending cross appeals by both parties in Case Number 1D2024-0569.

applicable to Owners (R. 1820, Motion Exhibit 2, Art. V); c) purchase of insurance (R. 1820; Motion Exhibit 2, Art. VI); d) annexation of additional properties with the consent of the owner (R. 1824; Motion Exhibit 2, Art. VII); e) making and collecting assessments against owners and properties (R. 1826; Motion Exhibit 2, Art. VIII); f) enforcing architectural standards against the Owners (R. 1832; Motion Exhibit 2, Art. IX); and g) enforcing use restrictions and rules against the Owners and Properties (R. 1836; Motion Exhibit 2, Art. X).

Notably, the Association has no authority over the Marina as a privately owned and operated "Private Amenity" as defined in the Declaration. (R. 1811-13; Motion Exhibit 2, Art. 1.23 & 2.2). The Declaration sets forth a clear delineation of authority and responsibility between the Association and the Marina:

> Access to and use of any Private Amenity **is strictly subject to the rules and procedures of the owner of such Private Amenity**, and no Person gains any right to enter or to use any Private Amenity by virtue of membership in the Association or ownership or occupancy of a Unit.
> ...
> The ownership or operation of any Private Amenity may change at any time by virtue of, but without limitation, (a) the sale to or assumption of operations by an independent Person, (b) the establishment of, or conversion of the membership structure to, an "equity" club or similar arrangement whereby the members of a Private Amenity or an entity owned or controlled by its members become the owner(s) and/or operator(s) of the Private Amenity.....**No consent of the Association or any Owner shall**

> **be required to effectuate any change in ownership or operation of any Private Amenity, subject to the terms of any written agreements entered into by such owners.**
>
> Rights to use the Private Amenity will be granted only to such persons, and on such terms and conditions, as may be determined by their respective owners. Such owners shall have the right, from time to time in their sole and absolute discretion and without notice, to amend or waive the terms and conditions of use of their respective Private Amenities and to terminate use rights altogether. [emphasis added].

(*Id*.)(emphasis added).

The Developers specifically exempted the Marina from control of the Association and residential owners. *Id*. The governing documents do not allow the Association to unilaterally extend or enlarge its authority. (R. 1804). To the contrary, as owners and operators of the Marina, Developers retained the right to appoint one seat on the Association's Board of Directors. (R. 1816).

To amend the Declaration, an affirmative member vote of 75% of all Class A members is required. (R. 1848-49; Motion Exhibit 2, Art. 15.2(b)). Lot owners and slip owners are Class A members of the Association entitled to vote. (R. 1810, Motion Exhibit 2, Art. 1.15).

The Declaration protects the Developers and their assigns from future, adverse amendments in Article 15.2(c), which states: "No amendment may remove, revoke, or modify any right or privilege of the Declarant or the Class

"B" Member without the written consent of the Declarant or the Class "B" Member, respectively (or the assignee of such right or privilege)." (R. 1848-49).

The By-Laws are subservient to the Declaration and Articles of Incorporation. (R. 1877; Motion Exhibit 3, Art. I(1)). To amend the By-Laws, an affirmative vote of 2/3rds of the members is required. (R. 1891; Motion Exhibit 3, Art. XI).

In 2008, Harbourage Yacht Club at Dolphin Bay, Inc. ("HYC") was formed by the Marina owner as a private club to operate and manage the Marina. (R. 1789). HYC has its own Declaration, By-Laws and Articles of Incorporation. (R. 1789, Motion Exhibits 7-9). HYC is a management entity only and has never owned any real property at the Marina, including slips. (R. 1789). The members of HYC are the slip owners and renters in the Marina. (R. 1789) Each slip owner is entitled to one vote per slip on HYC business, and to amend the HYC Declaration, an affirmative vote of 75% of all voting interests is required. (R. 1789, 1914; Motion Exhibit 7, Art. XI(2)(a)).

III. The origin of the Challenged Covenants.

After turnover of the Association to the members, the Association recorded the 2004 Amendment attempting to limit fee simple Marina slip ownership to lot owners. (R. 1790, Motion Exhibit 12). The Association does

not dispute that it acted unilaterally in failing to obtain either the Developers' consent or a member vote of any kind. (R. 2047-2049). It is also undisputed that several slips were and still are owned by non-lot owners. (R. 1790, Motion Exhibit 11).

The Association later recorded the 2009 Amendment to the By-Laws to prohibit slip owners from serving on the Board of Directors for the Association. (R. 1792, Motion Exhibit 14). The Association does not dispute that it acted unilaterally in failing to obtain either the Developers' consent or a member vote of any kind. (R. 2047-2049).

Finally, in 2011, the Association attempted to regulate the Marina by recording a document entitled "Agreement" that represented itself as being between the Association, the HYC as a managing entity, and Southern Delta Trust, which owned a portion of the Marina. (R. 1792-93, Motion Exhibit 16). This purported Agreement vests Dolphin Bay lot owners with use rights to the boat launch; restricts the ability of the HYC to amend its own governing documents; requires advance approval of the Association for any improvements at the Marina; and automatically "amends" the governing documents of the HYC upon recording. (*Id.*). This document claims to run with the land in perpetuity. (*Id.*).

The Association does not dispute that it acted unilaterally in failing to obtain all fee simple slip owners' consent to this Agreement or a member vote of any kind as required by the 1998 Declaration and HYC Declaration. (R. 2047-2049). This "Agreement" is not signed by Harbourage. (R. 1792-93, Motion Exhibit 16).

SUMMARY OF THE ARGUMENT

The 2004 and 2009 Amendments and 2011 "Agreement" are void *ab initio* because they unilaterally attempt to extend the Association's authority well beyond the confines of the original 1998 Declaration, the Articles of Incorporation, and Florida law. The Challenged Covenants improperly attempt to wrestle control of the Marina, a private amenity owned by Harbourage that is not within the jurisdiction of the Association.

As to the 2011 "Agreement," the Association recorded a purported contract that was never authorized by HYC members or Association members, nor fully or lawfully executed by necessary fee simple owners. Harbourage has never consented to nor signed the Agreement, and its challenge was timely raised when enforcement was sought by the Association shortly after Harbourage took title to the Marina.

The trial court erred when it allowed the Association to invoke the statute of limitations as a shield for its intentional misconduct and unlawful

usurpation. Section 95.11(2)(b), Florida Statutes, does not apply to contracts that are void *ab initio*, including unilateral amendments to contracts. The Association cannot simultaneously hide behind the statute of limitations and enforce the Challenged Covenants.

The trial court also erred by ruling that Harbourage failed to raise the issue of conflicting contractual provisions in its pleadings. The court injected this argument *sua sponte* and failed to acknowledge Harbourage's allegations raising this issue in the Second Amended Complaint.

NATURE OF RELIEF SOUGHT

Harbourage asks this Court to enter an order reversing the trial court's Order dated September 29, 2023, and remanding to the trial court for entry of judgment in favor of Harbourage on Count I of its Second Amended Complaint; or, in the alternative, to order the trial court to consider the merits of Harbourage's arguments that the Association's unilateral actions are *ultra vires* and void *ab initio*.

ARGUMENT

I. THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT IN FAVOR OF THE ASSOCIATION BECAUSE A STATUTE OF LIMITATIONS DEFENSE IS NOT APPLICABLE TO UNLAWFUL ACTS THAT ARE VOID *AB INITIO*.

A. Standard of Review.

The First District Court of Appeal reviews orders granting summary judgment and interpretations of condominium declarations *de novo*. *Shores of Pan. Club, LLC v. Shores of Pan. Resort Cmty. Ass'n, Inc.*, 204 So. 3d 541, 543 (Fla. 1st DCA 2016). Here, the material facts are not in dispute and the arguments of the parties are premised on matters of law. Accordingly, this Court's review is *de novo*.

B. The statute of limitations cannot be raised to avoid actions that are void *ab initio*.

Florida's statute of limitations cannot make valid that which is void. *Reed v. Fain*, 145 So. 2d 858, 866 (Fla. 1962)(Holding that the statute of limitations is not applicable to a void deed). Moreover, a party to a contract cannot unilaterally amend that contract. *Tropicana Pools, Inc. v. Boysen,* 296 So. 2d 104, 108 (Fla. 1st DCA 1974)("It is 'hornbook law' requiring no citations of authority, except common sense, that a contract once entered into may not thereafter be unilaterally modified; Subsequent modifications require consent and 'a meeting of the minds' of all of the initial parties to the contract whose rights or responsibilities are sought to be affected by the modification.") Unilateral amendments are simply unenforceable. *SCG Harbourwood, LLC v. Hanyan*, 93 So. 3d 1197, 1200 (Fla. 2d DCA 2012).

As confirmed by the Florida Supreme Court and this Court, "a party cannot use the courts to enforce a provision of a void contract…." *Monarch Claims Consultants, Inc. v. Fleming*, 372 So. 3d 758, 762 (Fla. 1st DCA 2023)(quoting *Loc. No. 234 of United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Idus. of U.S. & Can. v. Henley & Beckwith, Inc*., 66 So. 2d 818, 821 (Fla. 1953)).

> [A]n agreement that is violative of a provision of a constitution or a valid statute, or an agreement which cannot be performed without violating such a constitutional or statutory provision, is illegal and void. *Lassiter & Co. v. Taylor*, 99 Fla. 819, 128 So. 14, 69 A.L.R. 689 [(1930)]. And when a contract or agreement, express or implied, is tainted with the vice of such illegality, no alleged right founded upon the contract or agreement can be enforced in a court of justice.

Id. This rule has been consistently applied in Florida. *See, e.g, Gables Ins. Recovery, Inc. v. Citizens Prop. Ins. Corp*., 261 So. 3d 613, 624 (Fla. 3d DCA 2018)(and cases cited therein); *Thomas v. Ratiner*, 462 So. 2d 1157, 1159 (Fla. 3d DCA 1984)("Said violation has rendered the retainer agreement void *ab initio*. The right to contract is subject to the general rule that the agreement must be legal and if either its formation or its performance is criminal, tortious or otherwise opposed to public policy, the contract or bargain is illegal."). It has also been applied to restrictive covenants for community associations. *See, e.g., Palm Bay Towers Corp. v. Brooks*, 466 So. 2d 1071, 1074 (Fla. 3d DCA 1984).

As confirmed by the Declaration, Harbourage's predecessor-in-interest created the Association and retained full ownership and authority over the Marina. The Association attempted to divest everyone but lot owners from owning slips in the marina and strip slip owners of their statutory right to serve on the Board of Directors without their consent. The Association unilaterally recorded amendments regulating the Marina – property not within the Association's regulatory purview – without unanimous consent of all affected parties, including the Developers, lot owners, and slip owners.

Recording an instrument that unilaterally takes Harbourage's property rights is akin to the recording of a forged deed, which cannot be rescued by a statute of limitations, and which is void *ab initio*. *Wahrendorff v. Moore,* 93 So. 2d 720, 722 (Fla. 1957)(Noting the connection between deeds and restrictive covenants); *Wright v. Blocker*, 144 Fla. 428, 436 (1940); *Moore v. Smith-Snagg*, 793 So. 2d 1000, 1001 (Fla. 5th DCA 2001)(Holding that "there is no statute of limitations in respect to the challenge of a forged deed, which is *void ab initio*.)"; *McAllister v. Breakers,* 981 So. 2d 566, 571 (Fla. 4th DCA 2008)(Holding that an association could not materially amend restrictions without beneficiary's consent); *Beau Monde, Inc. v. Bramson*, 446 So. 2d 164, 165-66 (Fla. 2d DCA 1984)("Since Beau Monde failed to receive the written consent of all of the record unit owners, who are members of the

corporation, and no meeting was held, Beau Monde's actions were *ultra vires* and therefore void.").

Designating a recorded document as an "amendment" to covenants does not give the Association free rein for illegal conduct after five years. *Pensacola Beach, LLC v. Am. Fid. Life Ins. Co.*, 294 So. 3d 976, 983 (Fla. 1st DCA 2020)("The title of a document does not control; its legal effect controls."). State law requires express consent of all affected real property owners, including the Marina and slip owners. *See* § 617.306(1)(c), Fla. Stat. (1998)("Unless otherwise provided in the governing documents as originally recorded, an amendment may not affect vested rights unless the record owner of the affected parcel and all record owners of liens on the affected parcels join in the execution of the amendment.").

Despite this, the Association sought to unliterally and unlawfully extend its regulatory authority in breach of the governing documents and state law, which resulting in a property taking that is void *ab initio*. Covenants running with the land can only be imposed by agreement of the owners of real property. *See, e.g., Endruschat v. Am. Title Ins. Co.*, 377 So. 2d 738, 741 (Fla. 4th DCA 1979).

The signatories to the 2011 "Agreement" did not include Harbourage, nor was it signed by all real property owners with interests in the Marina slips.

See Maxwell v. Edwards, 345 So. 3d 323, 325 (Fla. 4th DCA 2022)(Holding that one who is not a party to a settlement agreement cannot be bound by its terms). Harbourage signed no contract with the Association, and the mere passage of time does not cure that which is void from the outset. *Shands Teaching Hosp. v. Pendley*, 577 So. 2d 632, 634 (Fla. 1st DCA 1991)(Holding that a contract cannot bind those who are not parties to it).

It is the Association's unilateral usurping of Harbourage's property rights and violations of state law that differentiates this case from *Silver Shells Corp. v. St. Maarten at Silver Shells Condo. Ass'n, Inc.*, 169 So. 3d 197 (Fla. 1st DCA 2015) and *Hilton v. Pearson*, 208 So. 3d 108 (Fla. 1st DCA 2016), relied upon by the trial court.

In *Silver Shells*, the developer recorded an amendment to the declaration removing beach property from the common area two years before it turned over control of the association to the unit owners. The association argued that this was a breach of the provisions of the Declaration requiring conveyance of common areas to the association. However, the association failed to file suit on this singular act within five years of the members obtaining control of the association. *Id*. at 202. The appellate court found the claim time-barred because the challenge was "akin to a breach of contract action" and even if construed as a necessary reconciliation of

conflicting declaration terms, was not filed until more than 5 years after the members took control of the association.

Because the deed itself was valid, there was no contention that the developer acted contrary to Florida statute. There was also no question about the relative authority of the developer or the association. It was truly a contract interpretation case brought too late.

Here, the facts are very distinct. In Dolphin Bay, the Developers owned the Marina before they created the Association and never designated the Marina as common property. They never subjected the Marina to the Declaration or the Association's regulatory authority. The Association's unilateral amendments affect Harbourage as Marina owner and slip owner, and enforcement was sought by the Association *after* Harbourage took title in 2021. Unlike the association in *Silver Shells* who waited years to act, Harbourage acted almost immediately to file suit in early 2022 to challenge ongoing property infringements and unlawful overreach by the Association.

This case is also distinct from *Hilton*. The trial court relied on *Hilton* when ruling that "because this action was filed more than five years after said instruments were recorded, any claims challenging the validity of such instruments on the basis that they are void *ab initio* are foreclosed." (F.J. 10:36). However, this ruling conflates the concepts of voidable and void *ab*

initio and would render an entire body of caselaw useless. It cannot be sustained on appeal.

In *Hilton*, homeowners sued their association attempting to set aside certain amendments to the restrictive covenants. Their sole claim was that the association did not get 100% percent of the owners to authorize the amendments as required in the Declaration. *Hilton* at 108-09.[5] This was a purely internal dispute between the association and owners subject to its jurisdiction and control. This Court confirmed that the homeowners' claim was barred by the five-year statute of limitations "even if the suit alleges that the amendment was void because it was not properly enacted." *Id*. at 110.

Here, it is undisputed that the Association acted unilaterally and without vote by its own members and the HYC members to wrest control over the Marina, which is privately owned and operated and specifically exempted from Association control under the Declaration. This is much more akin to a void deed than a simple contract dispute, and the Association acted contrary to Florida statutes making its actions illegal and void *ab initio* – not just voidable *See, e.g., Lloyd v. Chicago Title Ins. Co.*, 576 So. 2d 310, 311 (Fla. 3d DCA 1990)(Holding that the recording of a void or forged instrument cannot create legal title or protect those who may claim under it); *Seaside*

[5] The Association did get 70% of the owners vote. *Id.* at 110

Town Council, Inc. v. Seaside Cmty. Dev. Corp., 347 So. 3d 89, 103 (Fla. 1st DCA 2021)(Tanenbaum, J., dissenting[6], noting legal deficiencies in homeowner associations' attempts to challenge and restrict commercial development in areas outside of their jurisdiction in Seaside, Florida).

Furthermore, even if one could construe this as a simple breach of contract action, it is undisputed that the Association's enforcement attempts continued well into 2021 when Harbourage purchased, rendering the breaches continual and ongoing. When a breach continues from the initial breach onward, as Harbourage alleged and proved, the limitations period only begins to run when the continuing breach stops. *See, e.g., City of Quincy v. Womack*, 60 So. 3d 1076, 1078 (Fla. 1st DCA 2011); *Chakra 5, Inc. v. City of Miami Beach*, 254 So. 3d 1056, 1071-72 (Fla. 3d DCA 2018)(Under the continuing torts doctrine, a cause of action in trespass does not accrue, and the statute of limitations does not begin to run, until the trespass ceases.").

There is no dispute that the Marina was never owned nor regulated by the Association. Yet the Association decided to invade the Marina's bundle of ownership rights under the guise of passing regulatory amendments in

[6] Dissenting only because the majority of the panel judges ruled that they would not decide the case on the Tipsy Coachman doctrine for an argument not preserved for appeal. *Id.* at 97.

plain contradiction to the development scheme of Dolphin Bay established in the Declaration. These violated the law and far exceeded the authority of the Association or its Board of Directors. Clearly and without factual dispute, the Association's acts were *ultra vires*, void from inception, and no statute of limitations can sanction these unlawful acts. *See, e.g., Word of Life Ministry v. Miller*, 778 So. 2d 360, 363 (Fla. 1st DCA 2001)(Rejecting statute of limitations assertion by Board of Directors who engaged in unauthorized acts in violation of the corporation's governing documents); *Moore v. Smith-Snagg*, 793 So. 2d 1000, 1001 (Fla. 5th DCA 2001)("Of course, there is no statute of limitations in respect to the challenge of a forged deed, which is *void ab initio.*"); *Gotshall v. Taylor*, 196 So. 2d 479, 481 (Fla. 4th DCA 1967)("The word 'nullity' means in law a void act or an act having no legal force or validity; invalid; null… If the requirements of the Constitution and the statutes are not complied with…, the attempt is a nullity…. and is void ab initio, and subsequent events will not breathe life into it.").

If the Association's theory is to prevail, then all community associations around the State of Florida will be free to unilaterally record documents exerting power and control over real property outside of their jurisdiction, in violation of state law, and with impunity, so long as the challenge comes more than five years after recording. A smart association would quietly

record such a document and wait to enforce it until five years had passed. When the private landowner objected, the association could successfully hide behind the statute of limitations to shield its power and land grab. This is simply unacceptable. The trial court's ruling encourages and protects unlawful misconduct by community associations.

Instead of addressing the merits of Harbourage's arguments regarding the Association's unilateral and unlawful acts, the trial court made a sweeping conclusion that any challenge to a restrictive covenant is barred five years after recording. This was error. The merits of Harbourage's motion should have been addressed by the trial court, and summary judgment granted in favor of Harbourage. This Court must reverse the trial court and remand with instructions for the trial court to enter judgment for Harbourage; or, in the alternative, instructing the trial court to rule on the merits of Harbourage's motion.

II. THE ASSOCIATION CANNOT SIMULTANEOUSLY HIDE BEHIND THE STATUTE OF LIMITATIONS AND TRY TO ENFORCE THE CHALLENGED COVENANTS IN EQUITY AGAINST HARBOURAGE WHEN THEY ARE VOID AND UNENFORCEABLE.

A. Standard of Review.

A legal issue surrounding a statute of limitations question is an issue of law subject to *de novo* review. *Green v. Cottrell*, 204 So. 3d 22, 26 (Fla. 2016).

B. The Association cannot assert the statute of limitations as a shield while pursuing affirmative relief for the same unlawful acts.

Harbourage filed the underlying lawsuit because the Association was interfering with the Marina's ongoing operations. Once filed, the Association counterclaimed against Harbourage to enforce the Challenged Covenants. (R. 675-868, 1334-1534). The Association cannot be permitted to hide behind improperly, illegally, and unilaterally recorded purported covenants while simultaneously asking the trial court to enforce those same covenants against Harbourage. This subverts the intent of the statute of limitations and sanctions fraudulent and oppressive conduct.

This Court has held that "statutes of limitation, including Section 95.23, are designed to prevent undue delay in bringing suits on claims and to suppress fraudulent and stale claims asserted when all proper vouchers and evidence are lost and after the facts have become obscure from the lapse of time, defective memory, or death and removal of witnesses…." *Whaley v. Wotring*, 225 So. 2d 177, 181 (Fla. 1st DCA 1969). None of these issues exist here, particularly when the Association relies on the very same unlawfully adopted covenants to pursue legal relief against Harbourage.

This logic has been explained in similar appellate cases. *See, e.g., Ding v. Jones*, 667 So. 2d 894, 896 (Fla. 2d DCA 1996)("We conclude that in such a situation, the right to defend against an affirmative counterclaim in

an action by reason of a statute of limitation defense is waived when one possessing such a statute of limitation defense is the one who initiates the action."); *Allie v. Ionata*, 503 So. 2d 1237, 1239 (Fla. 1987)("[A] party otherwise barred from *instituting* an action because of a time limitation is freed from that bar when he acts in a *defensive* posture…. A party who seeks affirmative relief, whether through an original complaint or a counterclaim, effectively asserts that he is prepared to prosecute all aspects of that matter. Having sufficient knowledge of the facts to support a complaint and sufficient evidence to prosecute that complaint, he must be prepared to defend against any affirmative defenses arising therefrom. **Thus, once a party files an affirmative action, he cannot thereafter profess to be surprised by or prejudiced by affirmative defenses or compulsory counterclaims that stem from that action**.")(emphasis added).

Although the procedural posture for this appeal is slightly different, the fact remains that the Association sought affirmative relief from the trial court to enforce the Challenged Covenants against Harbourage in the underlying lawsuit. This Court has cited *Allie* with approval in an analogous case, *Word of Life Ministry, Inc. v. Miller*, 778 So. 2d 360 (Fla. 1st DCA 2001), cited *infra*.

In *Word of Life Ministry*, two individuals sued a corporate church and the purported directors for misappropriation of church assets. The church

and directors argued that amendments to the articles of incorporation in 1979 gave them authority to act. When the individuals challenged the legality of the amendments, which were invalidly adopted without a member vote and therefore void, the church argued that the statute of limitations prevented this challenge from proceeding. The trial court agreed with the church, but this Court reversed judgment finding that the challenge could be raised even though the amendments occurred decades prior based on *Allie*.[7]

Given the Association's counterclaim against Harbourage, the trial judge should have considered the merits of Harbourage's motion to confirm the illegality of the Challenged Covenants. *See One Harbor Fin. Ltd. Co. v. Hynes Properties, LLC*, 884 So. 2d 1039, 1045 (Fla. 5th DCA 2004)(citing *Katz v. Woltin,* 765 So.2d 279 (Fla. 4th DCA 2000)(Recognizing that where a contract is illegal, no action may be brought on it, whether in law or in equity)); *Castro v. Sangles,* 637 So.2d 989 (Fla. 3d DCA 1994)(Holding that no action may be maintained on an illegal agreement).

III. THE CHALLENGED COVENANTS ARE VOID AND UNENFORCEABLE BECAUSE THEY CONFLICT WITH STATE LAW.

[7] This Court further noted that the act was *ultra vires*, void and of no effect. This portion of the holding is discussed *supra*.

A. Standard of Review.

Statutory interpretation is subject to the *de novo* standard of review. *Lombardi v. Southern Wine Spirits*, 890 So. 2d 1128, 1129 (Fla. 1st DCA 2005).

B. The Association cannot be permitted to violate state law with impunity.

Chapter 617, Florida Statutes (1998), is the applicable substantive law.[8] Section 617.303(1) mandated that "[t]he powers and duties of an association include those set forth in this chapter and, except as expressly limited or restricted in this chapter, those set forth in the governing documents." Section 617.305(1) was also clear that "[e]ach member and the member's tenants, guests, and invitees, and each association, are governed by, and must comply with, this chapter, the governing documents of the community, and the rules of the association." Accordingly, by law the Association must comply with Chapter 617, Florida Statutes, and failure to do so renders any actions void *ab initio*.

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[8] The Dolphin Bay Declaration has no *Kaufman* language -- *Kaufman v. Shere*, 347 So. 2d 627, 628 (Fla. 3d DCA 1977) – which would incorporate substantive statutory revisions over time. (R. 1803; Motion Exhibit 1, Articles of Incorporation, Introduction Para. citing Chapter 617 (the "Act") with no reference to future amendments). Accordingly, the binding substantive law to apply to this dispute comes from Chapter 617, Fla. Stat. (1998).

C. The 2004 Amendment limiting slip ownership to lot owners only is void *ab initio*.

Section 617.306(1)(c), Florida Statutes (1998), required that "[u]nless otherwise provided in the governing documents as originally recorded, an amendment may not affect vested rights unless the record owner of the affected parcel and all record owners of liens on the affected parcels join in the execution of the amendment." There is no provision in the original Declaration waiving this requirement.

It is undisputed that the Association did not obtain a member vote approving this amendment[9] or the required Developer consent. This amendment violates section 617.306(1)(c), Florida Statutes, and is void *ab initio*.

D. The 2009 Amendment limiting eligibility for the Board of Directors to lot owners only is void *ab initio*.

Section 617.306(7) provides that "[a]ll members of the association shall be eligible to serve on the board of directors, and a member may nominate himself or herself as a candidate for the board at a meeting where the election is to be held."[10] Unlike other provisions in Chapter 617 (later to

[9] A consistent theme for this Association.
[10] This is the same today under section 720.306(9)(a), Florida Statutes. The narrow exceptions adopted by the Florida Legislature do not apply here.

become Chapter 720), there is no qualifying language allowing the Association to deviate from these requirements. *C.f.* § 720.306(1)(a), Fla. Stat. ("Unless a lower number is provided in the bylaws..."); § 720.306(4), Fla. Stat. ("Unless law or the governing documents require otherwise..."); § 720.306(7), Fla. Stat. ("Unless the bylaws require otherwise...).

The plain language of section 617.306(7) trumps any attempts to restrict eligibility of members to serve on the Board of Directors. The 2009 Amendment changing the language to state that only lot owners can serve on the Board of Directors directly violates state law because it excludes and disenfranchises certain members of the Association, i.e., slip owners.

Furthermore, it is undisputed that no member vote was taken, which would have included slip owners. This violates section 617.306(1)(c), Florida Statutes, further rendering this amendment void *ab initio* and unenforceable.

E. The 2011 Restrictive Covenants adopted to impose control over the Marina are void *ab initio*.

Section 720.31(6), Florida Statutes, provides as follows:

> An association may enter into agreements to acquire…memberships and other possessory or use interests in lands or facilities, including, but not limited to,… marinas….Subsequent to recording the declaration, agreements acquiring leaseholds, memberships, or other possessory or use interests not entered into within 12 months after recording the declaration may be entered into only if authorized by the declaration as a material alteration or substantial addition to the common areas or association property. **If the declaration is**

> **silent, any such transaction requires the approval of 75 percent of the total voting interests of the association**.….This subsection is intended to clarify law in existence before July 1, 2010.[11]

"Florida courts have 'the right and the duty' to consider the legislature's recently enacted statute clarifying its intent…." *Madison at Soho II Condo. Ass'n, Inc. v. Devo Acquisition Enterprises, LLC*, 198 So. 3d 1111, 1115 (Fla. 2d DCA 2016). A 75%-member vote is statutorily required. The failure to notice Association members, as required by law (in addition to the Declaration) and get the approval of 75% of the members makes the 2011 Challenged Covenant void *ab initio*. The Association cannot be permitted to ignore Florida law with impunity, and summary judgment should have been granted in favor of the Association.

IV. THE CHALLENGED COVENANTS ARE VOID AND UNENFORCEABLE BECAUSE THEY EXCEED THE AUTHORITY OF THE BOARD OF DIRECTORS OF THE ASSOCIATION.

A. Standard of Review.

Interpretation of restrictive covenants is a question of law subject to a *de novo* review on appeal. *Le Scampi Condo. Ass'n, Inc. v. Hall*, 200 So. 3d 187, 190 (Fla. 2d DCA 2016).

[11] This language has remained unchanged from enactment in 2010 to present.

B. The Board of Directors had no authority to act as it did.

It is black letter law that every corporate board of directors must have authority to act or its actions are *ultra vires*, void and unenforceable**.** *Buddin v. Golden Bay Manor, Inc*., 585 So. 2d 435, 437 (Fla. 4th DCA 1991)("A Board's action which contravenes an express provision of the governing documents of a cooperative or which contravenes a right reasonably inferred therefrom is an ultra vires act and must be declared invalid.").

No board has authority to act contrary to its governing documents or state law – including the Association. In *Beau Monde, Inc.,* the Second District Court of Appeal was asked to review the actions of a condominium board who purchased land and terminated a maintenance agreement without noticing a meeting and obtaining unanimous consent of the membership as required by statute. The appellate court confirmed that the board's actions were "ultra vires and therefore void." *Beau Monde, Inc.* at 167. The court was clear that "when a specific statute or a provision in the articles of incorporation requires unanimous consent, that statute or provision controls." *Id*. at FN 1.

As this Court has recognized, the statute of limitations does not apply to acts that are "ultra vires, void, null and of no effect." *Word of Life Ministry, Inc.* at FN 10. In *Word of Life Ministry*, decades after an unauthorized

amendment was adopted, the corporate church attempted to rely on its unlawful amendment to justify its actions in dispensing with church property. This Court held: “Void ab initio, the ersatz amendment has not improved with age. Nor did filing with the Department of State breathe life into a dead letter.” The Court found the statute of limitations inapplicable to “the initial, ultra vires amendment, **which bears some legal resemblance to a wild deed**.” *Id*. (emphasis added).

Likewise, Florida law is clear that the Association is limited to the powers vested by statute or the governing documents. Both the 1998 Declaration and the HYC Declaration require a 75% vote of their respective members to amend those documents. The Board of Directors for each corporation are entitled to approve rules and regulations subservient to the Declarations, but neither has authority to circumvent and contradict the terms of their own Declarations without the requisite amendment process and member vote. None of the Challenged Covenants were adopted with the required member vote, and like *Word of Life* and *Beau Monde*, cannot be enforced by the Association.

The actions of the Board of Directors of the Association in relation to the Challenged Covenants exceed their authority under the law and render

the covenants *ultra vires*, void *ab initio* and unenforceable. As such, summary judgment should have been granted in favor of Harbourage.

V. THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT IN FAVOR OF THE ASSOCIATION BECAUSE HARBOURAGE PROPERLY RAISED THE ISSUE OF CONFLICTING CONTRACTUAL PROVISIONS IN ITS PLEADINGS.

A. Standard of Review.

The interpretation of written pleadings is reviewed *de novo*. *Banuchi v. Dep't of Corr.*, 122 So. 3d 999, 1001 (Fla. 1st DCA 2013).

B. The trial court improperly injected a new legal argument in its Order.

The Association never challenged the sufficiency of Harbourage's pleading, and as confirmed by the hearing transcript, this issue was not even broached during oral argument. Instead, it was mentioned for the first time in the Order rendered by the judge.

It is improper for the court to inject legal arguments into the proceedings when not raised by the parties. *See Jones v. Sayer*, 313 So. 3d 126, 127 (Fla. 4th DCA 2021)("Where an order adjudicates issues neither presented by the pleadings nor litigated by the parties, it denies fundamental due process and must be reversed."). As confirmed by this Court, "[e]specially in a bench trial, where the judge 'is the decider of the claims and defenses of the parties,' the court must not 'become a party's advocate and

raise a legal issue sua sponte.'" *Ford Motor Credit Co., LLC v. Parks*, 338 So. 3d 1070, 1079 (Fla. 1st DCA 2022)(citations omitted).

Even if there was a pleading deficiency, "[u]nder Florida law, a trial court is without jurisdiction to hear and determine matters which are not the subject of appropriate pleadings and notice, …[but] when an issue is tried by implied consent, due process concerns are alleviated." *Kraus v. Kraus*, 344 So. 3d 634, 636 (Fla. 3d DCA 2022)(inner citations omitted). "Implied consent arises when arguments and evidence are presented on the issue without objection by the opposing party*." Id.*

The Association never challenged the sufficiency of Harbourage's pleading, and it was error for the trial court to raise an argument waived by the parties and tried by consent.

C. Harbourage properly raised the issue of conflicting contractual provisions in its Second Amended Complaint.

Furthermore, Harbourage properly alleged in Count I that "[t]he 2004 and 2009 Amendments ... conflict with express rights granted to Harbourage's predecessor-in-interest [, and] are unreasonable and unenforceable." (R. 1275, ¶40). Harbourage also alleged that "[t]he 2011 Agreement...conflicts with express rights within the Declaration .... [and] is an unreasonable restriction on the operations of the Private Amenity marina...." (R. 1275, ¶41). The express rights granted to the Developers as

prior marina owner include those in Article 2.2 of the Declaration, which was discussed in Harbourage's motion for summary judgment.[12]

The Association argued that subsequent amendments modify or supplant conflicting contract provisions, but that is not true for restrictive covenants in homeowner associations. There is a hierarchy of documents that cannot inherently conflict and simultaneously exist. Like statutes, conflicting provisions cannot remain unresolved by simple amendment. *See, e.g.,* § 720.306(1)(e), Fla. Stat. (setting forth requirements for amendments to include strikethroughs for deleted language and underlining for new language).

This is true of the Association's governing documents and those of the HYC. *See, e.g., Joy v. Oaks Club Corp*., 343 So. 3d 632, 637 (Fla. 2d DCA 2022) ("The Club is neither a homeowners nor a condominium association subject to Florida's statutory framework for such entities. Nevertheless, the concept that a declaration of covenants takes precedence over articles of incorporation and bylaws is still wholly applicable to the Club, a nonprofit corporation organized under chapter 617 of the Florida Statutes."); *Heron at Destin W. Beach & Bay Resort Condo. Ass'n v. Osprey at Destin W. Beach*,

[12] Other conflicting provisions were cited in Harbourage's motion and supporting exhibits, which Harbourage incorporates herein.

94 So. 3d 623, 628 (Fla. 1st DCA 2012)(Explaining that a declaration acts as the “constitution” of a nonprofit master association and “strictly governs the relationships among the members and the association….”). The governing documents contain an irreconcilable conflict, and the conflict is ripe for court determination as to what is enforceable against Harbourage.

Furthermore, reconciliation of conflicting provisions would not be barred by the statute of limitations. *See Harris v. Aberdeen Prop. Owners Ass'n, Inc.*, 135 So. 3d 365, 369 (Fla. 4th DCA 2014)(“[B]ecause Harris filed suit within five years of taking title, it was error for the trial court to enter summary judgment based on the statute of limitations with respect to Harris's request for declaratory relief regarding the competing 2004 POA and HOA amendments.”); *Riverside Ave. Prop., LLC v. 1661 Riverside Condo. Ass'n, Inc*., 325 So. 3d 997, 999 (Fla. 1st DCA 2021)(Reversing summary judgment on basis of statute of limitations and noting that cause of action under governing documents accrued when dispute arose among parties, occurring even after owner took title).

Harbourage took title in 2021 and timely filed the underlying lawsuit in 2022 to resolve conflicting provisions within the governing documents by declaratory action. The merits of Harbourage’s motion should have been addressed by the trial court.

VI. THE CHALLENGED COVENANTS ARE VOID AND UNENFORCEABLE BECAUSE THEY CONFLICT WITH THE DOLPHIN BAY DECLARATION.

A. Standard of Review.

Interpretation of restrictive covenants is a question of law subject to a *de novo* review on appeal. *Le Scampi Condo. Ass'n, Inc. v. Hall*, 200 So. 3d 187, 190 (Fla. 2d DCA 2016).

B. Article 2.2 of the Declaration supersedes the conflicting Challenged Covenants.[13]

Article 2.2 of the Declaration establishes the Marina as a private amenity with total autonomy, whereas the Challenged Covenants represent a sharp departure from this declaration of independence. The Board through the Challenged Covenants tried to limit slip ownership to lot owners; bar slip owners from serving on the Board of Directors; disapprove amendments to the HYC governing documents even if those amendments are approved by HYC members; control use of the Marina; prevent construction within the Marina by the real property owner; and vest lot owners with a perpetual right

[13] Additional conflicting provisions were cited by Harbourage in its motion. For example, the inherently contradictory language on Exhibit "C" to the Declaration that was part of the 2004 Amendment, which says that it applies only to owners of bay front lots in Phase 1 yet purports to limit slip ownership for everyone. Harbourage focuses on Article 2.2 as the most significant conflicting provision but reserves and incorporates herein all arguments presented in its motion for summary judgment and other arguments before the trial court.

to use the boat launch without compensation. For Harbourage - a capitalistic, for-profit business - this is death by regulation, and it represents a clear overreach by the Board outside of its jurisdiction.

"[R]estraints [on the use of real property] 'are not favored and are to be strictly construed in favor of the free and unrestricted use of real property.'" *Leamer v. White*, 156 So.3d 567, 572 (Fla. 1st DCA 2015), quoting *Wilson v. Rex Quality Corp.*, 839 So.2d 928, 930 (Fla. 2d DCA 2003). A plain reading of Article 2.2 debunks the Board's attempts to supersede it without a member vote and without the Developers' or Harbourage's consent.

Article 2.2 of the Declaration provides that "[a]ccess to and use of any Private Amenity is **strictly subject** to the rules and procedures of the owner of such Private Amenity, and no Person gains any right to enter or to use any Private Amenity by virtue of membership in the Association or ownership or occupancy of a Unit."

Article 2.2 likewise contemplated the future creation of the HYC and potential sale to third parties stating: "The ownership or operation of any Private Amenity may change at any time by virtue of, but without limitation, (a) the sale to or assumption of operations by an independent Person, (b) the establishment of, or conversation of the membership structure to, an

"equity" club or similar arrangement whereby the members of a Private Amenity or an entity owned or controlled by its members become the owner(s) and/or operator(s) of the Private Amenity....."

Importantly, Article 2.2 confirms that "[r]ights to use the Private Amenity will be granted only to such persons, and on such terms and conditions, as may be determined by their respective owners. **Such owners shall have the right, from time to time in their sole and absolute discretion and without notice, to amend or waive the terms and conditions of use of their respective Private Amenities and to terminate use rights altogether**." (emphasis added).

Article 2.2 continues to exist in the Declaration today. The Board of Director's unilateral usurpation and conversion of – and continuing trespass on -- Harbourage's property rights must be ruled by this Court to be *ultra vires* and void *ab initio*. To permit the passage of time to cure illegal, unauthorized, and predatory acts flies in the face of public policy and encourages dictatorial acts by community association boards.

CONCLUSION

Harbourage respectfully asks this Court to enter an order reversing the trial court's Order dated September 29, 2023, and remanding for entry of judgment in favor of Harbourage on Count I of its Second Amended

Complaint; or, in the alternative, order that the Association cannot employ the statute of limitations as a shield for its illegal behavior and remand for the trial court to rule on the merits of Harbourage's motion for summary judgment.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Initial Brief of Appellant was prepared using Arial 14-point font in compliance with Florida Rule of Appellate Procedure 9.045(b), and that the word count of applicable sections totals 8,206 words in compliance with Florida Rule of Appellate Procedure 9.210(a)(2)(B).

HAND ARENDALL HARRISON SALE, LLC

/s/ Julia Maddalena

Julia Maddalena, Esq.
Florida Bar No: 111932
16901 Panama City Beach Pkwy, Suite 200
Panama City Beach, FL 32413
Phone: 850-769-3434
jmaddalena@handfirm.com
viseminger@handfirm.com
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that pursuant to Fla. R. Civ. R. Rule 2.516(b)(1)(A) the foregoing document was filed with the Florida Courts e-filing Portal on this 30th day of April, 2024, and served to:

Michael P. Dickey, Esq.
Jacob S. Cook, Esq.
Dunlap & Shipman, P.A.
836 Jenks Avenue
Panama City, Florida 32401
Email: mdickey@dunlapshipman.com
stephanie@dunlapshipman.com
Attorneys for Appellee

HAND ARENDALL HARRISON SALE, LLC

/s/ Julia Maddalena
Julia Maddalena, Esq.
Florida Bar No: 111932
Attorney for Appellant