AVATAR V. GUNDEL: IMPACTING DEVELOPERS AND HOMEOWNER ASSOCIATION LAW ACROSS THE STATE OF FLORIDA

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I. INTRODUCTION

Avatar Properties Inc. ("Avatar") is a for-profit company that was founded in 1986.[1] It is headquartered in Davenport, Florida and its line of

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business includes developing residential communities that contain single-family lots.[2] As part of its business operations, Avatar developed a retirement community designed exclusively for individuals aged fifty-five and older.[3] This community is named Solivita, and is located in Polk County.[4] Solivita includes both individual residential parcels and commercial parcels.[5] In Solivita, Avatar constructed recreational facilities including a spa, fitness center, dining venues, indoor and outdoor pools, parks, tennis courts, bocce courts, and pickleball courts.[6] These recreational facilities were constructed on land that Avatar owned and not on land designated as common areas of the Solivita Community.[7] These recreational facilities were known as "the Club."[8]

In order to purchase a home within Solivita, the buyer must become a permanent member of the Club.[9] Each permanent member of the Club is required to pay membership fees, which represents the expenses of the Club.[10] In addition, each permanent member of the Club must pay a perpetual membership fee, which was profit for Avatar.[11] The perpetual membership fee was determined by Avatar.[12] Neither the individual homeowners nor the Solivita Community Association (the "HOA") "had any input over the Club" operations.[13]

Further, every deed to a residential lot in Solivita included a membership in the Club.[14] In other words, every purchaser of a residential

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1. *Avatar Properties Inc*, BLOOMBERG, http://www.bloomberg.com/profile/company/0065039D:US#xj4y7vzkg (last visited Dec. 22, 2023) [hereinafter *Avatar Properties Bloomberg*]; Initial Brief of Appellant Avatar Properties, Inc. at 1, Avatar Props., Inc. v. Gundel, No. 2D21-3823, 2022 WL 28235, at *1 (Fla. 2d Dist. Ct. App. June 7, 2022).

2. *Avatar Properties Inc*, APOLLO, http://www.apollo.io/companies/Avatar-Properties-Inc/55f22299f3e5bb0b2d001efa (last visited Dec. 22, 2023) [hereinafter *Avatar Properties Apollo*]; Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 1.

3. Avatar Props., Inc. v. Gundel, No. 6D23-170, slip op. at 1 (Fla. 6th Dist. Ct. App. June 22, 2023); Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 1.

4. *Avatar Props., Inc.*, slip op. at 1; Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 1.

5. *Avatar Props., Inc.*, slip op. at 1; Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 1.

6. *Avatar Props., Inc.*, slip op. at 1–2.

7. *Id.* at 1.

8. *Id.*

9. *Id.* at 2.

10. *Id.*

11. *Avatar Props., Inc.*, slip op. at 2.

12. *Id.*

13. *Id.* at 2.

14. Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 1.

home in Solivita was required to regularly pay the Club Membership Fee.[15] Such fees were extensively disclosed to prospective purchasers.[16] Before selling homes in Solivita, Avatar recorded the Master Declaration and the Club Plan; the Master Declaration established the Solivita Community Association, Inc. as the operating entity for the community and required each homeowner to be a member of the HOA.[17]

The Club Membership Fee included a profit for the Club.[18] The Club Membership Fee was set by Avatar and increased by one dollar per month until a cap set by Avatar was reached.[19] Further,

> The assessment imposed by Avatar for Club membership had two components, and a separate invoice was generated for each. One component was the amount required for Club expenses, which was to be shared proportionally by each resident. The second component was for a membership fee, which represented an annual profit charged to each landowner and payable to Avatar.[20]

The Club Facilities are commercial properties and are not common areas owned by the HOA.[21] While the HOA operated the community property, Avatar operated the Club Facilities as commercial property.[22] A third-party company, Evergreen Lifestyles Management, sent to each homeowner "monthly assessments on behalf of the Association and Avatar."[23] Between May 2013 and February 2021, Avatar collected $34,786,034.48 in Club Membership Fees.[24] These fees were used to cover the costs of operating the

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15. *Id.*; *see Avatar Props., Inc.*, slip op. at 2.
16. Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 1.
17. *Avatar Props., Inc.*, slip op. at 23.

> (1) Assessments.–For any community created after October 1, 1995, the governing documents must describe the manner in which expenses are shared and specify the member's proportional share thereof.
>
> (a) Assessments levied pursuant to the annual budget or special assessment must be in the member's proportional share of expenses as described in the governing document, which share may be different among classes of parcels based upon the state of development thereof, levels of services received by the applicable members, or other relevant factors.

FLA. STAT. § 720.308(1)(a) (2023).

18. *Avatar Props., Inc.*, slip op. at 4.
19. *Id.* at 4 n.3.
20. *Id.* at 4.
21. Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 27.
22. *Avatar Props., Inc.*, slip op. at 36.
23. *Id.* at 4 n.2.
24. Final Judgment at 3, Gundel v. Avatar Props., Inc., No. 2017-CA-001446, 2021 WL 11678795, at *2 (Fla. 10th Cir. Ct. Nov. 2, 2021).

Club Facilities and to generate some profit to Avatar for offering the private facilities.[25]

A class action lawsuit was filed against Avatar, alleging that through the Club Membership Fees, Avatar was collecting a profit in violation of section 720.308 of the Florida Statutes.[26]

This Case Comment argues that Avatar's collection of Club Membership Fees does not violate the aforementioned statute, and advises that clubs that operate private facilities should be kept separate from homeowners' associations.[27] Part I of this Comment provides a background of the relevant facts of the case.[28] Part II of this Comment is a brief discussion of Chapter 720.[29] Next, this Comment will review the trial court's decision in the class action lawsuit.[30] This Comment will also discuss the Sixth District Court of Appeal's de novo review of the case.[31] In Part IV, this Comment will then argue that the Sixth District Court of Appeal erred in deciding that Avatar collected fees in violation of section 720.308 of the Florida Statutes.[32] This Comment will argue that Chapter 720.308 does not apply to commercial property and that the Club for which Avatar collected fees was commercial property.[33] Further, this Comment will argue that even if the statute did apply to the Club Membership Fees collected by Avatar, the limitation on expenses does not apply to the profit and expenses of a for-profit club owner.[34] This Comment will also discuss some of the implications of the Sixth District Court of Appeal's decision.[35] Finally, in light of these implications, this Comment will conclude that fees due to clubs such as the one operated by Avatar, should *always* be billed and kept separate from assessment's due to homeowners' associations.[36]

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25. Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 44–45.
26. *Avatar Props., Inc.*, slip op. at 5, 24.
27. *See* discussion *infra* Parts I–V.
28. *See* discussion *infra* Part I.
29. *See* discussion *infra* Part II.
30. *See* discussion *infra* Section III.A.
31. *See* discussion *infra* Section III.B.
32. *See* discussion *infra* Part IV.
33. *See* discussion *infra* Section IV.A.
34. *See* discussion *infra* Section IV.B.
35. *See* discussion *infra* Section IV.C.
36. *See* discussion *infra* Part V.

II. LEGISLATIVE HISTORY

Florida's Homeowners' Association Act established the rights and obligations of purchasers and developers of fee simple homes.[37] The Homeowners' Association Act is codified in Chapter 720, Florida Statutes.[38] The prevailing purpose behind the Florida's Homeowners' Association Act is to "protect the rights of association members without unduly impairing the ability of such associations to perform their functions."[39] Further, "[t]he Florida Homeowners' Association Act is another effort by the legislature to place some reasonable restrictions on free-market transactions."[40] Specifically, Chapter 720 gives statutory recognition to corporations that operate residential communities in Florida and provides procedures for operating a homeowners' association.[41]

The Homeowner's Association Act, section 720.301 of the Florida Statutes, governs the formation, management, powers, and operation of homeowners' associations in Florida and applies to not-for-profit organizations that operate homeowners' associations.[42] Along with Florida's Homeowner's Association Act, there are other state laws that impact Florida's HOA's that will be discussed throughout this Comment.[43]

The statutes found in Chapter 720 do not apply to a community that is intended for commercial, industrial, or nonresidential use.[44] Additionally, they also do not apply to commercial or industrial parcels in a community that contains both residential parcels and parcels intended for commercial or industrial use.[45] Section 720.302(1) states the following: "[t]he purposes of this chapter are to give statutory recognition to corporations not for profit that operate residential communities in this state . . . ."[46] Further, section

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37. *See* 8B FLA. JUR. 2D *Business Relationships* § 463 (2023); Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 2; Act effective July 1, 2007, ch. 2007–183, § 1, 2007 Fla. Laws 1 (codified at FLA. STAT. § 720.3085).

38. Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 2.

39. FLA. STAT. § 720.302(1) (2023).

40. Avatar Props., Inc. v. Gundel, No. 6D23-170, slip op. at 14 (Fla. 6th Dist. Ct. App. June 22, 2023).

41. 8B FLA. JUR. 2D, *supra* note 37, § 463.

42. *Florida HOA Laws and Resources*, HOMEOWNERS PROT. BUREAU, http://www.hopb.co/florida (last visited Dec. 22, 2023); *see* FLA. STAT. § 720.301 (2023).

43. *Florida HOA Laws and Resources*, *supra* note 42; *see, e.g.*, FLA. STAT. §§ 718.102, 718.111(1)(a), 719.101 (2023).

44. FLA. STAT. § 720.302(3)(a).

45. *Id.* § 720.302(3)(b).

46. *Id.* § 720.302(1).

720.302(5) states that corporations that govern homeowners' associations are also governed by Chapters 607 and 617 of the Florida Statutes.[47]

III. CASE HISTORY

As stated earlier in this Comment, in April of 2017, plaintiffs brought a class action lawsuit against Avatar.[48] The plaintiffs sought to declare the assessments for Avatar's Club profit illegal under section 720.308 of the Florida Statutes, and sought to have the payments of those assessments to be returned.[49] The plaintiffs argued that section 720.308 only permits assessments for expenses.[50]

Plaintiffs then filed a Second Amended Class Action Complaint which contained twelve counts.[51] In 2018, the trial court granted the class certification for four of the twelve counts.[52] The class was composed of "all persons who currently or previously owned a home in Solivita and who have paid a Club Membership Fee under the Club Plan on or after April 26, 2013."[53]

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47. *Id.* § 720.302(5).

48. Avatar Props., Inc. v. Gundel, No. 6D23-170, slip op. at 5, 24 (Fla. 6th Dist. Ct. App. June 22, 2023).

49. *Id.* at 5.

50. *Id.*

51. *Id.* at 24.

52. *Id.* at 25 (White, J., dissenting). The class was certified as to Counts II, V, partially VI, and VIII. *Avatar Props., Inc.*, slip op. at 25 (White, J., dissenting). Count I was for titled Declaratory Relief—Applicability of HOA Act. Second Amended Class Complaint and Demand for Jury Trial at 16, Gundel v. Avatar Props., Inc., No. 2017-CA-001446, 2017 WL 11817060, at *10 (Fla. 10th Cir. Ct. Sept. 15, 2017). Count II was titled Declaratory Relief—Voting Rights. *Id.* at 17. Count III was titled Declaratory Relief—Club Property. *Id.* at 18. Count IV was titled Declaratory Relief—Fiduciary Duty. *Id.* at 19. Count V was titled Declaratory Relief—Invalidity of Perpetual Covenant. *Id.* at 21. Count VI was titled Injunctive Relief—Prohibiting Future Profit from Club Membership Fee. Second Amended Class Complaint and Demand for Jury Trial, *supra* note 52, at 22. Count VII was titled Injunctive Relief—Violation of FDUTPA. *Id.* at 23. Count VIII was titled Violation of § 720.308, Fla. Stat. *Id.* at 31. Count IX was titled Breach of Fiduciary Duty. *Id.* at 33. Count X was titled Violation of FDUTPA. *Id.* at 35. Count XI was titled Unjust Enrichment. Second Amended Class Complaint and Demand for Jury Trial, *supra* note 52, at 37.

> It certified a class for Counts II, V, partially VI (as to alleged direct violation of section 720.308), and VIII. The trial court found that its January 2018 order resolved Counts I and III. The trial court found that its January 2018 order had resolved Counts I and III. It also concluded that Counts IV, VI (except as partially certified), VII, IX, X, XI and XII were not amenable to class certification.

Avatar Props., Inc., slip op. at 25 (White, J., dissenting).

53. Final Judgment at 1, Gundel v. Avatar Props., Inc., No. 2017-CA-001446, 2021 WL 11678795, at *1 (Fla. 10th Cir. Ct. Nov. 2, 2021).

The Second District Court of Appeal affirmed the class certification.[54] Norman Gundel, William Mann, and Brenda N. Taylor were the class representatives.[55]

A. *Trial Court*

At the trial court, the plaintiffs argued that section 720.308 of the Florida Statutes only permits an assessment for expenses, and not for profit.[56] On the other hand, Avatar pointed to section 720.302(3)(b), which states that Chapter 720 does not apply to "[t]he commercial or industrial parcels in a community that contains both residential parcels and parcels intended for commercial or industrial use."[57] Avatar argued that since the Club Facilities are commercial properties, Chapter 720 did not apply.[58] Avatar further argued that even if Chapter 720 did apply, the Club Membership Fee did not violate the "proportional share of expenses" limitation in section 720.308.[59] Ultimately, the entire case rested upon the interpretation of statutory terms.[60]

In January 2018, an order was entered that granted, in part, a motion for summary judgment in Avatar's favor.[61] The trial court ruled in the plaintiffs' favor, finding that section 720.308 did not permit an assessment for profit.[62] Further, the court held that section 720.308(3) prohibited assessing a

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54. *Avatar Props., Inc.*, slip op. at 25 (White, J., dissenting). The class certification was affirmed in its entirety, "except to the extent that it excluded former homeowners from the class with respect to Count VIII." *Id.*

55. Final Judgment, *supra* note 24, at 1.

56. *Avatar Props., Inc.*, slip op. at 5.

57. Initial Brief of Appellant Avatar Properties, Inc. at 34, Avatar Props., Inc. v. Gundel, No. 2D21-3823, 2022 WL 28235, at *34 (Fla. 2d Dist. Ct. App. June 7, 2022); FLA. STAT. § 720.302(3)(b) (2023).

58. Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 27.

59. *Id.* at 44, 46–47.

60. *Avatar Props., Inc.*, slip op. at 26 (White, J., dissenting).

61. *Id.* at 24. The trial court entered various orders. *Id.* Some of these additional orders are outside the scope of this Case Comment. *See* discussion *supra* Part I. On October 12, 2021, the court entered the aforementioned order granting the partial summary judgment on Avatar's Third Affirmative Defense based on section 720.302(3)(b) and the order granting Plaintiff's motion for partial summary judgment as to liability for violation of section 720.308. Final Judgment at 2, Gundel v. Avatar Props., Inc., No. 2017-CA-001446, 2021 WL 11678795, at *2 (Fla. 10th Cir. Ct. Nov. 2, 2021). Further, the court denied Avatar's Renewed Motion for Final Summary Judgment and Incorporated Memorandum of Law. *Id.* The trial court also denied the Defendant's Motion for Reconsideration of the Court's Oral Ruling on Section 720.3086. *Id.* The court struck Avatar's seventh, eighth, and ninth affirmative defenses. *Id.* These defenses were waiver, ratification, and estoppel. *Id.* The court granted Plaintiff's Motion for Reconsideration and/or Clarification Regarding Ruling on Affirmative Defenses 7, 8, and 9. Final Judgment, *supra* note 24, at 2.

62. *Id.*

membership fee on Solivita's homeowners.[63] The trial court concluded that: "the Club Plan is not a 'declaration' under section 720.301(4); the Club Plan is a 'governing document' under section 720.301(8)(a); the Club Property, including the Club Facilities, is not a 'common area' under section 720.301(2); and the Club Property, including the Club Facilities, is commercial property under section 720.302(3)(b)."[64]

B. *Appellate Court(s)*

On January 1, 2023, this case was transferred from the Second District Court of Appeal to the Sixth District Court of Appeal and the court reviewed the trial court's decision de novo.[65] Relying on section 720.302(3)(b), Avatar argued that the statute did not apply because the Florida Homeowner's Act does not apply to commercial enterprises.[66]

"The trial court held that section 720.308(3) prohibits the homeowners of Solivita from being assessed a membership fee (the profit component of the Club's operation)," and the Sixth District Court of Appeal affirmed.[67] The Sixth District Court of Appeal pointed to the legislation that set forth the statutory framework for its decision.[68]

The appellate court affirmed the trial court's order.[69] The court was mindful of the probability that its ruling could have far-reaching effects on homeowners associations throughout the state, and therefore it certified the following question to the Florida Supreme Court as one of great public importance: "Whether an assessment or amenity fee, pursuant to section 720.301(1), which if not paid can result in a lien against a residential owner's parcel of land, can include charges for fees to the developer or others in excess of the actual expenses for the amenities?"[70]

In the concurring opinion, Justice Stargel explained that the trial court decision was affirmed because "the Club Plan implemented by Avatar [fell] outside of the legislative framework set forth in chapter 720."[71] However,

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63. *Avatar Props., Inc*., slip op. at 11.
64. *Id.* at 24 (White, J., dissenting).
65. *Id.* at 1 n.1, 5.
66. *Id.* at 7. Avatar relied on section 720.302(3)(b) of the Florida Statutes which states that the Florida Homeowners' Association Act does not apply to the "commercial or industrial parcels in a community that contains both residential parcels and parcels intended for commercial or industrial use." *Id.*
67. *Avatar Props., Inc.*, slip op. at 11.
68. *Id.*
69. *Id.* at 17.
70. *Id.* at 17–18.
71. *Id.* at 18 (Stargel, J., concurring).

Justice Stargel further explained that the dissent correctly delineated the court's obligation to determine the plain meaning of a statute based on the text.[72]

In his dissent, Justice White emphasized the need to focus on the plain text of the statute.[73] After a lengthy analysis of the statutory text, Justice White concluded that section 720.308(1)(a) only applied to special assessments or annual budget assessments by the association.[74] Since the Club Membership Fee fell into neither of these categories, Justice White concluded that the majority erred in finding that the fee violated the statute.[75] In addition, Justice White found that even if the statute did apply, the commercial property exemption is broad enough to exclude the Club from the HOA's community.[76] Ultimately, the dissent concluded with Gundel's scathing viewpoint: "[i]n sum, Appellees invite us to adopt arguments clothed in swatches of the statute stitched together, and ignore the rest of the contextual, structural, and textual fabric of chapter 720. The majority accepts that invitation. I must decline."[77]

Nevertheless, the Sixth District Court of Appeal posed a certified question to the Florida Supreme Court.[78] The Supreme Court has discretion to review any decision of a district court of appeal that presents a "question certified by it to be of great public importance."[79]

IV. ARGUMENT

The Sixth District Court of Appeal erred in granting summary judgment to the plaintiffs.[80] The court erred for two reasons: (1) Chapter 720 does not apply to the portion of Solivita owned by Avatar because it is commercial property,[81] and (2) even if the statute applies, the limitation on expenses does not apply to the profit and expenses of a for-profit developer concerning commercial properties that the developer owns.[82] Further, the court's decision can have far-reaching and catastrophic consequences for Florida and its numerous homeowner association communities.[83]

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72. *Avatar Props., Inc.*, slip op. at 18.
73. *Id.* at 26 (White, J., dissenting).
74. *Id.* at 33.
75. *Id.*
76. *Id.* at 36.
77. *Avatar Props., Inc.*, slip op. at 37.
78. *See id.* at 17–18.
79. FLA. CONST. art. V, § 3(b)(4).
80. *Avatar Props., Inc.*, slip op. at 37 (White, J., dissenting).
81. *Id.* at 36.
82. *See id.*
83. *Id.* at 17.

A. *Commercial Property*

As discussed above, Chapter 720 of the Florida Statutes does not apply to a community composed of property primarily intended for commercial, industrial, or other nonresidential use.[84] In fact, "[C]hapter 720 does not apply to the 'commercial or industrial parcels in a community that contains both residential parcels and parcels intended for commercial . . . use.'"[85] Section 720.302(1) of the Florida Statutes states that "[t]he purposes of [the] chapter are to give statutory recognition to corporations not for profit that operate residential communities in this state."[86] Thus, the Club Facilities are commercial properties and are exempt from Chapter 720 of the Florida Statutes.[87]

The Club Plan disclosures and acknowledgments unambiguously revealed the mandatory fees for the Club Facilities, which showed that the Club Facilities would not be operating at cost but would generate a profit.[88] The Club Facilities are not common areas, and the Court of Appeals' ruling would limit privately-owned facilities, such as the Club Facilities, to operating on an at-cost basis like non-profit homeowners' associations must do with common areas.[89] "The very concept of a commercial property encompasses the anticipation of making a profit and not being limited to operating on an at-cost basis."[90] Thus, section 720.308 only limits expenses about annual budgets of homeowners' associations for association expenses, not to profit and expenses of for-profit developers.[91]

Treating commercial Club Facilities as common areas owned by a non-profit homeowners' association would limit developers like Avatar to operating its private, commercial Club Facilities on an at-cost basis.[92] Looking back to the purpose of the Homeowners' Association Act: "[t]he purposes of this chapter are to give statutory recognition to corporations not for profit that operate residential communities in this state, to provide procedures for

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84. *See id.* at 7; discussion *supra* Section III.A, Part IV; Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 27.

85. *Avatar Props., Inc.*, slip op. at 7.

86. FLA. STAT. § 720.302(1) (2023).

87. *See id.*; *Avatar Props., Inc.*, slip op. at 36 (White, J., dissenting); Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 27.

88. Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 30.

89. *Id.* at 27–28.

90. *Id.*

91. *Id.* at 28; *see* FLA. STAT. § 720.308(1)(a) (2023).

92. Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 33; *see* Valencia Rsrv. Homeowners Ass'n v. Boynton Beach Assocs., XIX, LLLP, 278 So. 3d 714, 719 (Fla. 4th Dist. Ct. App. 2019).

operating homeowners' associations, and to protect the rights of association members without unduly impairing the ability of such associations to perform their functions."[93] In other words, "Chapter 720 [of the Florida Statutes] does not even purport to regulate commercial properties or their operations."[94]

B. *Expenses*

According to section 720.308(1)(a) of the Florida Statutes,

> [a]ssessments levied pursuant to the annual budget or special assessment must be in the member's proportional share of expenses as described in the governing document, which share may be different among classes of parcels based upon the state of development thereof, levels of services received by the applicable members, or other relevant factors.[95]

Section 720.308(1)(b) of the Florida Statutes states:

> While the developer is in control of the homeowners' association, it may be excused from payment of its share of the operating expenses and assessments related to its parcels for any period of time for which the developer has, in the declaration, obligated itself to pay any operating expenses incurred that exceed the assessments receivable from other members and other income of the association.[96]

Further, section 720.308(4)(b) explains that "[e]xpenses incurred in the production of nonassessment revenues, not in excess of the nonassessment revenues, shall not be included in the assessments. If the expenses attributable to nonassessment revenues exceed nonassessment revenues, only the excess expenses must be funded by the guarantor."[97] The limitation on expenses found in section 720.308 does not apply to the profit and expenses of a for-profit developer concerning commercial properties the for-profit developer owns (e.g., Club Facilities).[98]

Avatar is a for-profit developer of Solivita, a community that includes residential and commercial parcels.[99] Avatar built recreational facilities such

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93. FLA. STAT. § 720.302(1) (2023).
94. Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 37.
95. FLA. STAT. § 720.308(1)(a).
96. *Id.* § 720.308(1)(b).
97. *Id.* § 720.308(4)(b).
98. Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 28.
99. *Id.* at 1.

as "a spa and fitness center, dining venues, indoor and outdoor pools, parks, tennis courts, bocce courts, and pickleball courts" on the land Avatar owns and not on the land designated as common areas.[100] As mentioned above, each homeowner had to become a permanent member of the Club and thus pay a membership fee, representing the expenses of the for-profit Club.[101] In addition to the membership fee, every homeowner was required to pay a perpetual membership fee, which was a profit for Avatar.[102] The limitation on expenses found in section 720.308 does not apply to Avatar concerning the commercial property it owns and operates in Solivita.[103]

In summary, even if section 720.308 did apply to Avatar's private commercial property, the limitation on expenses does not apply to Avatar's profit and expenses concerning the commercial properties it owns in Solivita.[104]

C. *Far-reaching Consequences*

As of 2017, 9,753,000 people lived in 48,000 community associations across Florida.[105] In 2022, there were about 48,500 homeowners' associations in Florida.[106] Further, almost 9.7 million Florida residents live within these communities, where homeowners' associations operate.[107] This constitutes approximately half of all Florida residents.[108]

As of 2022, Florida's population was increasing faster than any other state in the country.[109] Between 2021 and 2022, "Florida's population increased by 1.9% to 22,244,823," making it the fastest-growing state.[110] As

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100. *Id.* at 1, 3; *Avatar Props., Inc.*, slip op. at 1–2.

101. Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 1, 6; *Avatar Props., Inc.*, slip op. at 2.

102. Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 6–7; *Avatar Props., Inc.*, slip op. at 2.

103. *See* Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 28.

104. *See id.*

105. CMTY. ASSOCS. INST., 2017 NATIONAL AND STATE STATISTICAL REVIEW FOR COMMUNITY ASSOCIATION DATA (2018).

106. *HOA Statistics*, IPROPERTYMANAGEMENT, http://ipropertymanagement.com/research/hoa-statistics#florida (Oct. 9, 2022).

107. *Id.*

108. *Compare QuickFacts: Florida*, U.S. CENSUS BUREAU, http://www.census.gov/quickfacts/FL (last visited Dec. 22, 2023), *with HOA Statistics*, *supra* note 106.

109. Marc Perry et al., *Florida Fastest Growing State for First Time Since 1957: New Florida Estimates Show Nation's Third-Largest State Reaching Historic Milestone*, U.S. CENSUS BUREAU (Dec. 22, 2022), http://www.census.gov/library/stories/2022/12/florida-fastest-growing-state.html.

110. *Id.*

of 2023, Florida's population has grown by 706,597 people since the Census in 2020.[111] Currently, the inventory of homes available for sale in Florida is lower than before the pandemic.[112] As the population of Florida continues to grow, more communities and homeowners' associations will be needed.[113] In fact, in 2021, builders in Florida received the top five highest number of single-family permits in the country.[114] By September 2023, sales of single-family homes in Florida had increased by 6.1% from 2022.[115]

Many of these new homes will have homeowners' associations that may offer services like those offered by Avatar at Solivita.[116] In fact, this approach is common.[117] The Florida Bar describes it as a typical approach.[118]

> Another approach for ownership and use of shared areas is the mandatory membership club. Under this approach, the club owner is often the master developer or an entity affiliated with it. This approach is typically used when the master developer intends to build extensive recreational facilities and offer them for use not only by the homeowners in the community, but also by other nonowner members. The terms of club membership and use of the club facilities are spelled out in a club plan and the declaration of covenants and restrictions requiring the owners and tenants of dwelling units in the community to become members of the club and pay club dues. The financial obligations of the resident club

111. Mark Lane, *Mo People, Mo Problems and We're No. 1!*, DAYTONA BEACH NEWS-J. (Jan. 1, 2023, 5:00 AM), http://www.news-journalonline.com/story/opinion/columns/2023/01/01/florida-fastest-growing-state-problem-mark-lane/69766600007/.

112. Mihaela Lica Butler, *Florida Housing Market Update: Single-Family Sales Rise by 6.1%*, REALTY BIZ NEWS (Oct. 31, 2023), http://realtybiznews.com/florida-housing-market-update-single-family-sales-rise-by-6-1/98780079/.

113. Brief of Amicus Curiae Florida Home Builders Ass'n in Support of Appellant at 6, Avatar Props., Inc. v. Gundel, No. 2D21-3823, 2022 WL 2823582, at *6 (Fla. 2d Dist. Ct. App. June 24, 2022).

114. Danushka Nanayakkara-Skillington, *Texas and Florida Issued the Most Single-Family Permits in 2021*, NAT'L ASS'N HOME BUILDERS (May 12, 2022), http://www.nahb.org/blog/2022/05/building-permits. Builders in Florida received 148,735 single-family permits. *Id.* Idaho was the state in which builders received the highest single-family permits. *Id.* The total number of permits issued in 2021 was approximately 1.1 million. *Id.*

115. Butler, *supra* note 112. The number of single-family homes sales reached 21,335 by September 2023. *Id.*

116. Brief of Amicus Curiae Florida Home Builders Ass'n in Support of Appellant, *supra* note 113, at 6.

117. *Id.*

118. Charles D. Brecker & Margaret A. Rolando, *Planning and Structuring of Real Estate Developments Using Condominium and Community Associations*, *in* FLORIDA CONDOMINIUM AND COMMUNITY ASSOCIATION LAW 3-26–3-27 (4th ed., 2018).

> members are secured by a lien on the members' dwelling. The mandatory membership club structure allows the club owner to open the facilities to others and to improve, modify, reduce, or expand the facilities unilaterally, without the consent of the members. Typically, the club plan does not grant any ownership rights in the club to any community association or any owner. Rather, the club members receive a nonexclusive license to use portions of the club facilities available to members. Some club plans are designed to give the club owner an exit strategy by giving the association either an option to purchase the club facilities or a right of first refusal.[119]

If developers are unable to operate these private facilities for a profit, they will be discouraged from developing residential communities with commercial parcels with extensive facilities often sought after by those seeking a home.[120] This, in turn, will negatively impact property values.[121] In addition, it may hinder Florida's ability to meet the rapidly growing demand for housing.[122] The Court's ruling that Avatar cannot operate its private facilities for a profit creates a ruling that will have daunting implications for Florida and its growing population.[123]

For developers who operate club facilities at a cost, to avoid a finding that their conduct violates Chapter 720, they should keep their affairs separate from a homeowners' association.[124] In *Avatar*, the management company sent each member an invoice, including both HOA assessments and Club dues.[125] The management company called the Club dues "assessments," and the court relied on this label to find the profit that Avatar was generating to be illegal.[126] Thus, in the future, developers looking to own and operate Club facilities in residential communities should ensure that they keep the Club facilities and the invoicing for Club facilities separate, in every way, from the homeowners' associations.[127] Clubs should bill their fees separately and independently of HOA assessments. And, in place of membership fees, which are profit to the

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119. *Id.*
120. *See* Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 33.
121. *See HOA Statistics*, *supra* note 106.
122. *See generally* Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 22.
123. *See id.*; Brief of Amicus Curiae Florida Home Builders Ass'n in Support of Appellant, *supra* note 113, at 3.
124. Avatar Props., Inc. v. Gundel, No. 6D23-170, slip op. at 11 (Fla. 6th Dist. Ct. App. June 22, 2023).
125. *Id.* at 4.
126. *Id.* at 11.
127. *Id.* at 29.

club owners, club owners should have the club documents provide that it is entitled to a management fee for their labor overseeing club operations.

V. SUPREME COURT DENIES REVIEW

"This case is one of first impression, and its outcome will be of statewide importance."[128] In fact, the parties agreed that this was a first-of-its-kind challenge under Chapter 720.[129] On November 2, 2023, the Supreme Court of Florida denied reviewing the certified question presented by *Avatar Properties, Inc. v. Gundel*.[130] The issues presented in this case impact developers and builders involved in developing residential communities containing commercial parcels across Florida.[131] Because the appellate court upheld the trial court's decision and the Supreme Court of Florida denied hearing the case, developers across Florida will be deprived of the opportunity to recover their costs in developing communities enriched with amenities at the developers' upfront expense.[132] Additionally, this will significantly raise the initial costs of buying a home in community developments in Florida containing club facilities.[133] The Court's decision will increase the upfront costs of developing planned residential communities across Florida and deter commercial ownership and maintenance of recreational amenities enriching neighborhoods.[134] This will lead to a decrease in home values and homeowners' satisfaction.[135]

Before the appellate court's decision, the Florida Home Builders Association ("FHBA") feared that the judgment would negatively impact the large number of communities wherein commercial entities have required mandatory membership fees by interfering with existing relationships and punishing current owners of commercial facilities for engaging in acts that have never been prohibited before.[136] Notably,

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128. Brief of Amicus Curiae Florida Home Builders Ass'n in Support of Appellant, *supra* note 113, at 2.

129. *Id.*

130. Avatar Props., Inc. v. Gundel, No. SC2023-0946, 2023 Fla. LEXIS 1674 at *1 (Fla. 2023).

131. Brief of Amicus Curiae Florida Home Builders Ass'n in Support of Appellant, *supra* note 113, at 1.

132. *Id.*

133. *Id.*

134. *Id.* at 3.

135. *Id.*

136. Brief of Amicus Curiae Florida Home Builders Ass'n in Support of Appellant, *supra* note 113, at 7.

> [t]he [Florida Homeowners' Association] Act does not prohibit a developer from collecting and keeping revenue generated by the assessment that exceeds the actual costs of maintenance and operations of the recreational amenities. To find otherwise would eliminate any incentive for a developer to construct and operate any recreational amenities in their developments.[137]

Without the Supreme Court's review, developers remain unincentivized to develop and operate commercial properties in residential developments.[138] Further, the entire state of Florida remains uncertain as to "[w]hether an assessment or amenity fee, pursuant to section 720.301(1), which if not paid can result in a lien against a residential owner's parcel of land, can include charges for fees to the developer or others in excess of the actual expenses for the amenities."[139]

VI. IMPLICATIONS

The Sixth District Court of Appeal presented the Supreme Court of Florida with a certified question.[140] The court asked: "Whether an assessment or amenity fee, pursuant to section 720.301(1), which if not paid can result in a lien against a residential owner's parcel of land, can include charges for fees to the developer or others in excess of the actual expenses for the amenities?"[141] Though the Supreme Court of Florida had discretionary jurisdiction over this case, they denied certiorari.[142] The Court's decision not to hear the case on appeal means that the certified question of great importance remains unanswered.[143]

Nevertheless, this Case Comment suggests that the Sixth District Court of Appeal erred for three reasons: (1) Chapter 720 does not apply to the portion of Solivita owned by Avatar because it is commercial property,[144] (2) even if the statute applies, the limitation on expenses does not apply to the profit and expenses of a for-profit developer concerning commercial

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137. *Id.* at 12–13.
138. *See id.*
139. Avatar Props., Inc. v. Gundel, No. 6D23-170, slip op. at 18 (Fla. 6th Dist. Ct. App. June 22, 2023).
140. *Id.*
141. *Id.*
142. Avatar Props., Inc. v. Gundel, No. SC2023-0946, 2023 Fla. LEXIS 1674 at *1 (Fla. 2023).
143. *Id.*; *Avatar Props., Inc.*, slip op. at 18.
144. *See* discussion *supra* Section IV.A.

properties that the developer owns,[145] and (3) the decision will have far-reaching and harmful implications for Florida and its well-being.[146]

Avatar developed Solivita, and it owns and operates recreational facilities within Solivita.[147] These facilities were built on land that Avatar owns and not on land designated as common areas.[148] To purchase a home within Solivita, the buyer must become a permanent member of the Club and pay a membership fee.[149] Further, the Club facilities are commercial properties and are not common areas.[150] While the HOA operated the community property, Avatar operated the Club Facilities as commercial property.[151] The fees charged to the homeowners were used to cover the costs of operating the Club Facilities and to generate some profit for offering private facilities.[152]

Chapter 720 does not apply to Avatar as the Club Owner because Chapter 720 does not apply to commercial or industrial parcels in a community that contains both residential parcels and parcels intended for commercial or industrial use.[153] Because the Club facilities are commercial properties, they are exempt from Chapter 720 of the Florida Statutes.[154] Likewise, the limitation on expenses does not apply to the profit and expenses of a for-profit developer.[155] The court's holding limits a developer's ability to operate a commercial enterprise for profit, which is made available to homeowners within a community governed by Chapter 720.[156]

Further, Florida's population is growing fast, and Florida needs a greater inventory of homes to accommodate its growing population.[157] The Sixth District Court of Appeal's decision disincentivizes developers from helping Florida meet the growing demand for housing.[158]

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145. *See* discussion *supra* Section IV.B.
146. *See* discussion *supra* Section IV.C.
147. *Avatar Props., Inc.*, slip op. at 1.
148. *Id.* at 1–2.
149. *Id.* at 2.
150. *Id.* at 1–2.
151. *Id.* at 1, 3.
152. *Avatar Props., Inc.*, slip op. at 2.
153. *Id.* at 7.
154. *Id.* at 7–8.
155. *Id.* at 7.
156. *See* Valencia Rsrv. Homeowners Ass'n v. Boynton Beach Assocs., XIX, LLLP, 278 So. 3d 714, 719 (Fla. 4th Dist. Ct. App. 2019).
157. Brief of Amicus Curiae Florida Home Builders Ass'n in Support of Appellant, *supra* note 113, at 6.
158. *Id.* at 3.

In rendering its decision, the court relied on the word "assessment" to declare the profit in violation of Chapter 720.[159] This presents a daunting lesson to all developers of residential communities in Florida.[160] Clubs that are owned and operated by developers should be kept entirely separate from homeowners' associations to help ensure that dues are not labeled as "assessments."[161] Rather than charging members a fee that is profitable to a club owner, the members should be charged a Club owner management fee for overseeing the club operations. This would allow developers to operate club facilities for a charge—as they always have—without fear of having their conduct deemed illegal.

159. Avatar Props., Inc. v. Gundel, No. 6D23-170, slip op. at 6–7, 7 n.6 (Fla. 6th Dist. Ct. App. June 22, 2023).

160. *See generally id.*

161. *See generally id.*