IN THE SUPREME COURT OF FLORIDA

CASE NO. 61,268

TOWER HOUSE CONDOMINIUM, INC., a non-profit Florida corporation,

Petitioner,

vs.

MERTON MILLMAN and LILLIAN ARONOFF,

Respondents.



# RESPONDENTS' ANSWER BRIEF

(On certiorari from the Third District Court of Appeal, Case No. 80-1468)

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## PREFATORY NOTES

All references to Chapter 711, Florida Statutes refer to said Act as it existed in 1973 at the time of the recordation of the Declaration of Condominium in this case.

All references to the later Condominium Law, Chapter 718, Florida Statutes refer to its provisions as included in Chapter 76-222, Laws of Florida, effective January 1, 1977, unless otherwise indicated.

"PB" refers to pages of petitioner's brief.

"A" refers to Appendix accompanying this Answer Brief.

"PX" refers to petitioner's trial court exhibits.

"DX" refers to respondents' trial court exhibits.

"T" refers to transcript of testimony.

"R" refers to Record-on-Appeal.

Petitioner will sometimes be referred to as the Association.

The decision of the Third District is included in the Appendix to this Answer Brief.

## Soliloquy By A Condominium Unit Owner

Here I am in The Supreme Court of Florida. How did I get here? I'm not a troublemaker. All I did was buy a condominium several years ago on Miami Beach.

At the time I thought that what I was buying was my unit and an undivided share of the common elements on the property described in the declaration. When I paid for my condominium parcel, I thought, "That was it."

Sure I expected to have to pay my share of the expenses for maintaining the condominium property and to fix or replace the roof if it leaked. I even expected that my monthly assessments might increase because of inflation.

But do you know what happened? All of a sudden a group of unit owners decided they wanted to protect themselves from "hostile and undesirable development" and to have "air and sunlight to feel and breathe" (DX. B).

So, they prevailed upon the other unit owners to go along wth their wishes. Then, over my objection, the condominium association bought an adjoining piece of property to the north for $400,000.00 and a parcel to the south for $800,000.00 (DX. B,C).

Now they want me to pay a proportionate share of the cost because they say the value of my condominium parcel will increase (DX. B). If I don't pay they want to foreclose on my home.

Sure, I would like the value of my condominium parcel to increase. But I think the value is increasing enough without having to make it larger in size. I am not inclined to buy more property or to pay the insurance, taxes, etc. and other necessary expenses to keep it up.

But wait -- that isn't all. They also say they bought the property to the north for more parking for their maids and guests (PX.Comp.3) and so they improved it to the tune of $100,000.00. They want me to pay for that too.

What if they decide that open air parking isn't good enough for them and then build an enclosed parking garage?

What then is to prevent them from renting out parking spaces to transients and others? After all, the Association says it has all the powers of a non-profit corporation, among which is the power to lease property. So I'll end up in a commercial venture with people that I thought that I was going to live with -- not go into business with.

What if they also decide to build a hotel on top of the garage like Omni in Miami so that their maids and guests might have a convenient place to stay?

What about the property to the south that cost $800,000.00? What are they going to do with that parcel? When can I expect the other shoe to fall?

I can go on, but I am going to stop.

I don't like thinking about how my neighbors can force me to use up my savings with their elaborate schemes.

Could anyone have believed that my buying a condominium to live in meant that I had to invest in properties and possible businesses outside the condominium development? I didn't! I don't think the thousands of other condominium owners in Florida feel any differently.

## STATEMENT OF THE CASE AND FACTS

The Association has conveniently spoken out of both sides of its mouth.

At the trial, respondents argued that Chapter 711, Florida Statutes, in effect at the time when the Declaration of Condominium was recorded should control (T. 22). The petitioner's attorneys never said otherwise. However, when they wrote their post-trial memorandum of law they relied solely on Chapter 718, Florida Statutes, enacted subsequent to the recordation of the declaration (R. 54-62). The Association's departure from its seeming acquiescence in the applicability of Chapter 711 necessitated a reply memorandum by respondents to demonstrate that even if Chapter 718 were solely applicable, the Association's acts were still illegal (R. 63-65). Likewise, in the district court, the Association relied exclusively upon Chapter 718.

Now, for the first time on certiorari it urges, contrary to its previous position, that "Chapter 711, Florida Statutes (1973) controls certain aspects of this case ...." (PB 14).

We suggest the turnaround comes about because the Association's present counsel are new to the case. They obviously would like to try some new theories in place of the

rejected ones used by former counsel* and they are doing just that. Our appendix includes the table of contents to petitioner's initial brief in the district court (A. 11). The petitioner did not include a table of citations in its district court reply brief, but it cited no new legal authority. A comparison of the table of citations of petitioner's district court brief and its table of contents here evidences that it is relying upon and advancing numerous new and different theories as to statutes and principles of law.

It is fundamental that an appellant may not urge a theory not advanced in the trial court. Carlton v. Fidelity & Deposit Co. of Maryland, 113 Fla. 63, 151 So. 291,293 (1933), petition denied 113 Fla. 63, 154 So. 317 (1934); South Puerto Rico Sugar Co. v. Tem-Cole, Inc., 403 So.2d 494, 495 (Fla.4th DCA 1981). This rule extends to certiorari proceedings in the Supreme Court from decisions of the district courts of appeal even after it takes jurisdiction on the merits. Simmons v. State, 305 So.2d 178, 180 (Fla. 1974). Its application is so well settled that the litigant seeking review is precluded from advancing a new theory even if it means he has to go to jail. Simmons, supra.

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* The Association's present counsel tried unsuccessfully to appear as amicus curiae, and to file a petition for rehearing in the district court more than fifteen days after the district court's opinion. In the course of that abortive process, petitioner's former counsel withdrew after a falling out with the Association, and supposed amicus curiae were then hired by the Association as its counsel of record (R. 142).

Consequently, it seems particularly inappropriate to tolerate a condominium association's perversion of the appellate process to suit its own purposes in a civil proceeding. Not that petitioner's new arguments are any more sound than its old ones, but its irregular presentation results in basic unfairness to the lower courts as well as to respondent. South Puerto Rico Sugar Co., supra. Accordingly, certiorari should be refused at the outset because of petitioner's departure from fundamental appellate procedure.

Furthermore, the Association has purposely distorted the facts and testimony. We do not say "purposely" lightly. However, there is just no defense to the Association's asserting that (PB 10):

> Mr. Millman* admitted that 172 [parking] spaces were necessary. (T. 46).

and not say anything further. The Association's intentional and unfair coloring of the evidence is made even more evident by its unjustified carping at the trial court because it "ignored Mr. Millman's admission that sufficient parking spaces had not been provided" (PB 11). Mr. Millman made no such admission.

What Mr. Millman testified to and what the Declaration of Condominium provided was not that there were to be

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* Although Mr. Millman purchased his unit three years after the Tower House was built (T. 62) he was personally familiar with the plans for its development. As noted in petitioner's brief Mr. Millman's company, Millman Construction Company, erected the Tower House. His company also constructed such well known local projects as Century Twenty-One, the Miami Marine Stadium and Miami-Dade Community College (T. 44).

172 parking spaces but rather that there would be facilities available to have the valets park 172 cars. In misquoting Mr. Millman,the Association completely passed over his testimony as to the purpose of Section IV(D) of the Declaration of Condominium (PX. 1) which states:

> All parking shall be Valet parking only and no Apartment Residence Owner shall have the right to park his own automobile in the Parking Area.* (Emphasis ours).

In that respect Mr. Millman testified that valet parking was always intended and was always what the building had; and that with valet parking, there were facilities for conveniently parking 172 cars (T.61, 65). He also testified that valet parking is customary to the area and is to be found at other major apartment residences and hotels on Miami Beach (T. 62). Additionally, he established that the parking facilities complied with the Miami Beach City Code requirements of one and one-half parking spaces for each apartment (T. 60).

Thus, Mr. Millman did not testify, as the Association improperly states, that 172 parking spaces were needed. The truth is that the parking facilities fully accorded with the legal requirements of the City of Miami Beach, the Declaration of Condominium and were not unlike those provided at other residential buildings in the city and were,

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* In its brief the Association also quoted from Section IV(D) but saw fit to leave out the last sentence of the section underscored above (PB 6,7).

in fact, ample.

Then why, might we ask, did the Association buy a 200-foot parcel of valuable land on Collins Avenue in Miami Beach? Why did the Association find it necessary to make a real estate purchase that would expand the condominium property by one-third its original size?*

The evidence giving the answer to those questions is also overlooked by the petitioner in its thirty-nine page brief. But the record shows that the true purpose behind the Association's acquisition was that some of the more influential unit owners wanted the adjoining property for a buffer zone, for greater exclusivity and to suit the parking convenience of their maids and guests (DX B, C; PX 3).

## Introduction To Argument

Petitioner's brief consists of numerous legal theories and concepts that have not been individually identified. We respond thereto with an attempted explicit identification of petitioner's arguments. Furthermore, we have rephrased most of petitioner's points and added others to more clearly present the issues as we see them.

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* If assessments for the acquisition of the slightly larger 208-foot south parcel had been made part of this case, an expansion of the condominium property by two-thirds its original size would be involved (DX C).

## ARGUMENT

### POINT I

THE SUPREME COURT WILL NOT ANSWER A CERTIFIED QUESTION OF GREAT PUBLIC "INTEREST" THAT IS UNSUPPORTED BY THE RECORD

Among the allegations made by the Association in its pleadings were the following:

> After all of the condominium units in the Tower House Condominium had been sold and Tower House fully occupied it became immediately apparent that there were insufficient parking spaces available on Tower House Condominium property to accommodate the need and parking requirements of the unit owners (R. 16).

Those allegations were denied (R. 26).

At the trial,respondents' counsel repeatedly asserted that additional property for parking was unnecessary and that the petitioner had to prove insufficiency of the parking facilities (as alleged in the pleadings) to sustain its case (T. 7, 9, 12, 13, 17, 24).

Indeed, the trial court expressly tried that issue (T. 25) and all of the testimony presented by the petitioner and the respondents was devoted exclusively to that factual point (T. 26-70). In furtherance of a determination of that issue the trial court noted at the closing argument that the only factual dispute "was the sufficiency of the parking" (R. 84). In fact, in connection with that issue, counsel for petitioner agreed that the trial court had the authority to oversee the Association and determine that its "power is not exercised in a form of mismanagement" (R. 86).

Recognizing that the unnecessary purchase of almost one-half million dollars of property is a palpable form of mismanagement, the trial judge observed (R. 86):

> We are here because they [the association] bought a lot, not part of the complex, for something that may or may not have been necessary, and at a substantial amount of money assessed arbitrarily against the members.

Thus, when the trial court entered judgment against the Association (A. 8-10) the judgment was clothed with a presumption of validity and sustainable upon any theory or principle of law shown by the evidence. Stuart v. State, 360 So.2d 406, 408 (Fla. 1978); Cohen v. Mohawk, Inc., 137 So.2d 222, 225 (Fla. 1962); Donner v. Donner, 313 So.2d 456, 458 (Fla.3d DCA 1975).

One theory that supports the judgment is that there was no reasonable justification for the acquisition since petitioner had not proven further property for parking was necessary, as it alleged. Therefore, even an affirmative response to the certified question of whether an association has the power to purchase property for parking and assess the unit owners for its cost would not be dispositive of these proceedings.

In sum then, there are two reasons why the record in this case does not support a response to the certified question. By changing statutes and theories upon which it previously relied the petitioner is raising issues not preserved for review. Simmons, supra. Moreover, the finding

implicit in the judgment that the association acted unreasonably in making the acquisition supports affirmance irrespective of how the certified question is answered.

Under these circumstances "the record in this case does not establish sufficient facts for [the Court] to adequately respond to the certified question." Cherin v. Southern Star Land & Cattle Co. Inc., 400 So.2d 1 (Fla. 1981).

The Court may not be called upon to give a response to an abstract legal proposition that will not advance the ultimate determination of the litigation. Evans v. Carroll, 104 So.2d 375 (Fla. 1958). It will not undertake to do so even if the question is one certified by the district court pursuant to Article V, Section 3(b)(3) of the Florida Constitution. State v. Burgess, 326 So.2d 441 (Fla. 1976).

For the foregoing reasons we suggest the Court is without jurisdiction to respond to the certified question. Nevertheless, we will go forward and deal with the issues petitioner raises from the certification.

## POINT II

WHETHER A CONDOMINIUM ASSOCIATION MAY, UPON APPROVAL BY AT LEAST TWO-THIRDS BUT LESS THAN ALL CONDOMINIUM UNIT OWNERS, PURCHASE A SUBSTANTIAL TRACT OF ADJACENT LAND FOR USE BY ALL UNIT OWNERS AS PARKING SPACE IN ADDITION TO THE PARKING SPACE DESIGNATED AS A COMMON ELEMENT BY THE DECLARATION OF CONDOMINIUM, THEN LEVY A PRO-RATA SHARE OF THE PURCHASE PRICE AGAINST THOSE UNIT OWNERS WHO WITHHELD APPROVAL, WITHOUT FIRST SUBMITTING THE PROPERTY TO CONDOMINIUM OWNERSHIP BY AMENDMENT TO THE DECLARATION OF CONDOMINIUM.

The answer to the district court's certified question based upon either the Declaration of Condominium in the case at bar or the condominium law must be "No."

### The Declaration

As we have always urged, even if increased parking were a reasonable objective, under the declaration the Association was still powerless to burden unit owners not in favor of the acquisition with its cost. Without their consent the Association simply did not have the awesome prerogative of substantially enlarging the condominium property at their expense, no matter how good the reason for the expansion.

Notwithstanding all of the winding and twisting the Association performs in its tortuous path through this statute and that statute, and the provisions of the declaration and by-laws, the power to make the acquisition is not there. Not only is the power not there, but it is expressly

prohibited by Article VII of the declaration.

That provision is prominent in the result reached by the district court. Therefore, very early in its opinion, the district court sets it out verbatim (A. 2):

> "No Amendment shall change any Condominium Parcel* nor a Condominium Apartment Residence's proportionate share of the common expenses or common surplus ... unless all record Owner[s] ... shall join in the execution of the Amendment.

The provision clearly preserves to the respondents the right to decide for themselves how much property they will own and where.

## Section 617.021

But, contends the Association, what it has done has nothing to do with the Declaration of Condominium. According to petitioner it is imbued with all of the powers of a corporation not for profit detailed in Section 617.021(9), Florida Statutes (1979), and therefore, it can go out and buy the world and make respondents pay for it.

In the first place, although Section 711.12(1),

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* "Condominium Parcel means an Apartment Residence together with the undivided share in the Common Elements which is appurtenant to the Apartment Residence." Declaration of Condominium, Article I(B)(vii). Also see §711.03(9), Florida Statutes (1973) and §718.103(10), Florida Statutes (1977).

Florida Statutes (1973) and Section 718.104(4)(h), Florida Statutes (1977) provide that the Association may be a corporation not for profit, those sections do not endow the Association with the unfettered right to exercise the powers of a not-for-profit corporation listed in Section 617.021. If those sections did grant such right, there would be no reason for the enumeration of association powers in the condominium law. §§718.111, 718.14, Fla.Stat. (1979). Such selective specification presumes the legislature intended that an association have only those powers mentioned and not others.

> It is, of course, the general principle of statutory construction that the mention of one thing implies the exclusion of another; expressio unius est excluso alterius. Hence, where a statute enumerates the things on which it is to operate ... it is ordinarily to be construed as excluding from its operation all those not expressly mentioned.

Thayer v. State, 335 So.2d 815, 817 (Fla. 1976).

The corporate charter can confer no greater power than the law directs. Marion Mortgage Co. v. State, 107 Fla. 472, 145 So. 222 (1932). Thus, if the Association can exercise the powers set forth in Section 617.021 as the Association ridiculously urges, minority unit owners face a very disturbing future. For if that is the case, then they are subject to assessments voted by the majority so that the Association might, inter alia:

A. "acquire, enjoy, utilize and dispose of patents, copyrights and trademarks and any license and other rights or interests thereunder or therein." Section 617.021 (10).

B. "dispose of all or any part of its property and assets." Section 617.021(11).

C. "[make] public welfare or other religious, charitable, scientific, educational or other similar purposes." Section 617.021(14).

It is evident that the Association can enjoy no comfort from Section 617.021. The powers set forth in said section are inconsistent with those enumerated in the condominium statutes, none of which includes the right to enlarge the condominium boundaries without unanimous consent.

Finally, even if the Association can reasonably be construed to have the powers recited in Section 617.021, those powers may be exercised only to fulfill the Association's purpose of operating

> .... a Condominium known as Tower House ... upon real property ... described in Exhibit "A" (Article Fourth, Articles of Incorporation [PX. 2]).

The property described in Exhibit "A" to the incorporation articles is the same as that referred to in the definition of Condominium Property found in Article I(B)(a) of the Declaration of Condominium. And the Association's power to assess is limited to

> .... the power to fix and determine from time to time the sum or sums of money necessary and adequate to provide for the common expenses for the

> Condominium Property. (Article XI(A), Declaration of Condominium).

Thus, since all unit owners have not approved the purchase of the portions of Collins Avenue that the Association has bought to date, that alien real estate is not part of the Condominium Property. Until it becomes such, the Association may not make any assessments for either its acquisition or otherwise.

Whatever power the Association has it

> .... must enjoy it subject to the conditions prescribed by the law under which it is created, or not enjoy it at all. ... It has been held, and properly so, that powers given to corporations which cannot be exercised without disregard of restrictions with which they are coupled cannot be exercised at all.

759 Riverside Ave. v. Marvin, 109 Fla. 473, 147 So. 848, 849 (1933).

§718.111(12), Fla.Stat. (Supp. 1978)

Petitioner also intimates that it had the power to do what it did based upon Section 718.111(12) (PB. 19). However, Section 718.111(12) is inapposite to this proceeding for two reasons.

Initially, we note that paragraph (12) of Section 718.111 was not in effect at the time of the Association's acquisition of the property in question. The deed from the original owners of the extraneous parcel to the Association is dated June 8, 1978 (PX. 13).

Paragraph (12) of Section 718.111 did not become law until after June 8, 1978 when enacted as part of Chapter 78-340, Laws of Florida. The latter legislation in turn amended various provisions of Chapter 76-222, Laws of Florida that had been in effect since January 1, 1977, as Chapter 718, Florida Statutes.

The amendments of Chapter 78-340, Laws of Florida were made applicable only to contracts in existence on its effective date and to all contracts entered into after that date. §718.26, Fla.Stat. (Supp. 1978).*

Consequently, petitioner's parenthetical statement as to Section 718.111(12) being in effect at the time of the purchase (PB. 19) is inaccurate. The purchase was completed more than one week before the effective date of the statute.

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* Chapter 78-340 took effect on becoming law. It was approved by the Governor on June 19, 1978 and filed in the office of the Secretary of State on June 20, 1978. See Section 14, Chapter 78-340, Laws of Florida.

Secondly, even if in effect at the time of the purchase, Section 718.111(12) would not have authorized the acquisition. Petitioner's reliance upon said section is based upon its misreading of the language of paragraph (12). Its conclusion that said paragraph (which petitioner fails to directly quote) "specifically granted an Association the power to purchase land" without consent of all unit owners (PB. 19) is an incorrect paraphrase of the paragraph's meaning.

Its reluctance to quote directly from the section is understandable since petitioner's interpretation will not stand the test of an examination of the actual language involved. What Section 718.111(12) does provide is that:

> "The Association has the power to purchase any land or recreation lease upon approval of two-thirds of the unit owners . . ." (Emphasis ours).

Obviously, the Association in arriving at its interpretation has seen fit to ignore a basic rule of grammar concerning the grammatical qualities of the word "or."* By doing so, the Association thus enables itself, although erroneously, to use the word "land" appearing in the quoted language as a noun.

However, coordinating conjunctions ("or", and "and", etc.) join units of the same rank -- that is, they join nouns with nouns, verbs with verbs, and adjectives with adjectives. William F. Irmscher, The Holt Guide To English, Holt, Rinehart

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* "[T]he Legislature is presumed to know the . . . rules of grammar . . ." Allstate Mortgage Corp. of Florida v. Strasser, 277 So.2d 843, 845 (Fla.3d DCA 1973).

and Winston, Inc. (1972), p. 484. The word "land" is grammatically joined by the coordinate conjunction "or" to the adjective "recreation" which word, in turn, modifies the word "lease". Accordingly, both words are adjectives modifying the word "lease". Therefore, §718.111(12) is to be read as follows:

> "The Association has the power to purchase any land [lease] or recreation lease . . ."

Thus, the Association's contention that §718.111(12) authorized the Association's purchase of parcels of real estate outside the condominium property by less than unanimous consent of the unit owners is unsound.

If the Association's contention were adopted then we would have the ludicrous circumstance of the Association being restricted as to the kind of lease it might purchase (i.e., only a "recreation" lease), while at the same time having carte blanche authority to purchase an excavation ditch ("any land").

With the recent attacks on developer-retained interests in condominium property the purpose of §718.111(12) is clear. The legislature in 1978 enacted that provision (Ch. 78-340, Laws of Florida) in order to authorize an association's purchase from the project developer of any long term land or recreation lease which he submitted as part of the condominium property. It was a power not held by condominium associations previously. It was granted so that they might get the developers out of their hair once and for all if two-thirds of the

unit owners agreed. The granting of that power was obviously not intended to vest the Association with unrestricted authority to purchase "any land" by a similar vote.

## Waterford

Petitioner primarily relies upon the case of Waterford Point Condo. Apartments v. Fass, 402 So.2d 1327 (Fla.4th DCA 1981). But Waterford is not in point with this case as even the Waterford court notes. In Waterford the approval the court gave to the Association's exercise of an option to purchase a recreation lease without consent of all unit owners came about because:

1. The original condominium documents specifically contemplated the acquisition of the recreation lease.

2. Section 718.401(6)(c), Florida Statutes (1979) specifically empowered the Association's acquisition of the lease by less than the unanimous consent of the unit owners.

Judge Letts, the writer of the Waterford opinion, noted the clear difference between the circumstances leading to the opinion below and those that existed in Waterford. He was aware of the critical distinction that unlike the property involved in Waterford, the property acquired by the Association in the case at bar was not specifically contemplated in the condominium documents.

Furthermore, in Waterford the purchase was of an interest in leased land which already formed part of the condominium property and not of an interest in land beyond the condominium boundaries as in this case.

Thus "under the particular facts" of Waterford, the Fourth District ruled as it did. 402 So.2d at 1329.

Thus, Waterford is inapposite.

## "Unless Otherwise Provided In The Declaration . . . ."

The Association has seized upon the prefatory language of Section 718.110(4) to also justify its unprecedented action. It contends that the phrase, "[u]nless otherwise provided in the declaration" preceding the language forbidding material changes in the size of a condominium parcel without consent of its owner, permits other unit owners to command such change over the besieged unit owner's objection.

There are numerous reasons why the Association's interpretation is specious.

First, the declaration in this case, as already noted, expressly prohibits such change without consent of the unit owner. Consequently, even if the Association's interpretation of the prefatory language "unless otherwise specifically provided in the declaration" were correct, that language would have no application in the case at bar.

However, even if there were no such prohibition in the declaration in this case, the final result could nevertheless have not been legally different from that reached by the district court and the trial court. Basic statutory interpretation and simple common sense dictate this conclusion.

By virtue of Sections 718.110(5) and 718.304 even the correction of a scrivener's or other error in the documents creating the condominium property may not be made without the consent of a unit owner materially affected by the change.

Thus, is it not incredible for the Association to urge that without his consent, a unit owner's condominium parcel may be materially enlarged through the Association's purchase of a tract of land, whatever its price or size, or wherever located, that was never part of the condominium property in the first place?

Moreover, if leased land that is already part of the condominium property requires a minimum seventy-five (75%) vote before it can be purchased by the Association [§718.401(6)(c) Fla. Stat. (1979)], is it not reasonable to conclude that the purchase of an alien parcel of real estate should require a greater percentage.

And, indeed, such purchase does. That is why the legislature included the "no change" language in Section 711.10(3), Florida Statutes (1973) and the no "material modification, etc." language in Section 718.110(4), Florida Statutes (1977) without the express approval of the owner of any condominium parcel affected.

The prefatory language "unless otherwise provided in the declaration" cannot rationally be interpreted to bring about a different meaning to the aforesaid sections. If the Association's analysis of the prefatory language is correct then a condominium declaration or by-laws might provide that a majority of unit owners may vote to drastically change the size of the condominium units of the

minority, or the share of the common elements of the minority, or proportionate share of the common expenses that the minority must pay. In fact, the Association's argument is so absurd that if followed to its logical conclusion as applied to this case, a majority of the unit owners could vote to eliminate the units of the respondents and the latter would be powerless to object.

What then is the meaning of "unless otherwise provided in the declaration"? The answer is clear. A condominium parcel is comprised primarily if not completely, of real estate. A change in title to real estate requires some written acknowledgment by the owner. Thus, the statutes require changes in configurations and size of condominium parcels to be accomplished by an amendment executed by the unit owners affected. Nevertheless, it is apparent that the legislature did not intend to make such method the exclusive one for effecting such changes. It therefore,with the use of the language, "unless otherwise provided in the declaration", allowed a condominum developer the option of providing some other mechanical method for the ultimate unit owners to accomplish changes. Thus, a developer might decide that deeds from unit owners, their affidavits or some other kind of instrument or instruments might be a more feasible method to evidence the modifications.

Moreover, even the grant of additional property to a unit owner requires his acceptance in some form. This is especially true when the grant is not free of burdens. Smith v. Owens, 91 Fla. 995, 108 So. 891, 893 (1926); 19 Fla.Jur.2d Deeds §§57,78 (1980).

Here, of course, acceptance of an undivided interest in the extraneous parcel would carry with it several burdens: payment of a share of its purchase price; payment for its improvements; payment for its continued maintenance; payment of recurring insurance and taxes; and who knows what else. Furthermore, requiring a unit owner to pay for the upkeep of property not originally part of the common elements is a change of his share of the expenses which also requires the unit owner's specific assent. §718.110(4) Fla.Stat., Article VII, Declaration of Condominium; Pepe v. Whispering Sands Condominium Ass'n., 351 So.2d 755, 757 (Fla. 2d DCA 1977).

Thus, the unit owner's affirmation of any change in his parcel or in his share of the common expenses is mandated to be indicated in some written form that may be provided for by either statute or in the declaration.

Respondents' conclusion as to the purpose of the prefatory language under discussion is supported by the comments in the law review article referred to by petitioner: McCaughan, "The Florida Condominium Act Applied" 17 U.Fla.Law

Rev. 1. In discussing Section 711.10(3), the predecessor to Section 718.110(4), Mr. McCaughan writes at page 38:

> The declaration should make no change in this limitation. A condominium parcel is real property, and it should not be changed without joinder of all record owners of the title and of liens thereon. A change in the appurtenances to a unit, which includes the share in the common elements, would be a change in a condominium parcel. A change in the share of common expenses might be a change in a condominium parcel since there would be a change in the obligation of the owners.*

Consequently, it is clear that the "unless otherwise provided in the declaration" language that the Association has embraced was never intended to and does not destroy the substantive legal right of a unit owner to maintain the original integrity of his condominium parcel.

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* Conversely, a change in condominium parcel as in this case, will result in a change in the share of common expenses. See Pepe, supra.

## Absurd Result

Petitioner asserts "no portion of the Condominium Act should be construed so as to bring about an absurd result." (PB 14).

We agree! Therefore, in the face of specific powers granted to the Association by the legislature, the language of the Condominium Acts and the declaration prohibiting changes or material alterations or modifications to condominium parcels without consent of their owners, it is absurd for the Association to urge as it does, that it is a law unto itself. And because it is, that it may gobble up expensive, huge chunks of Miami Beach real estate beyond the condominium boundaries and levy assessments therefor against unit owners having no desire of investing in alien real estate.

Even if the declaration and condominium laws did not clearly restrict such Association activity without consent of all unit owners, to imply such Association power, as the Association urges the Court to do, is contrary to sound statutory construction. Such an interpretation would lead to oppressive and confiscatory consequences to unit owners that are in the minority. The courts will not imply that the legislature ever intended such result. Realty Bond & Share Co. v. Englar, 104 Fla. 329, 143 So. 152, 156 (1932).

## By-Laws

The Association also contends that because its by-laws (Article VII.3.D., By-Laws) permit additions or capital improvements exceeding $20,000 by a vote of three-quarters of a properly convened quorum of unit owners, substantial enlargement of the common elements may be accomplished by a similar vote. However, there is nothing profound about the quantitative vote required by Article VII.3.D. of the By-Laws. Section 6 of Article V of the By-Laws permits any question coming before a meeting of the unit owners to be decided by a similar vote. But it also provides that if "by express provision of the statutes . . . a different vote is required . . . such express provision shall govern and control the decision of such question." Since the express provisions of the Condominium Act require unanimous consent to an enlargement of the common elements (§711.10(3), Fla.Stat; §718.110(4), Fla.Stat.) the very by-laws relied upon by petitioner makes its action illegal.

Moreover, corporate by-laws are to be construed reasonably and in harmony with the statutes regulating the corporation. 18 Am.Jur. 2d Corporations §168 (1965). By-laws should not only be reasonable in themselves but reasonable in their application. Conlee Construction Co. v. Cay Construction Co., 221 So.2d 792 (Fla.4th DCA 1969). Furthermore, both Sections711.11(3)(c), and 718.12(3)(c)

prohibit by-laws that are inconsistent with either the general condominium law or declaration.

It is unreasonable to construe the by-law allowing additions and capital improvements in excess of $20,000.00 upon a 75% vote of a quorum to include uncontrolled enlargement of common elements by a like vote. The only reasonable construction of that by-law is to relate such authority to the addition of personal property, fixtures or amenities to the condominium property but within the confines thereof, or the making of capital improvements such as replacing the roof or a damaged wall, etc. It can hardly be rationally interpreted to provide a basis for the purchase by the Association, by a vote of less than all unit owners, of various parts of Miami Beach.

Moreover, even if we were to afford the by-laws the unreasonable construction petitioner suggests, the by-laws would then be in direct conflict with the declaration. Under these circumstances, considering the statutes involved and the object of the condominium documents, it is not unreasonable to permit the provisions of the declaration to control.

Both the trial court and the district court have construed the declaration and by-laws, in light of the statutes involved, contrary to petitioner's assertions.

It is well settled that a contract will be given a reasonable interpretation and not one which places one party

at the mercy of the other "unless it is clear that such was the intention . . ." James v. Gulf Life Ins. Co., 66 So.2d 62, 63 (Fla. 1953).

Without a doubt, the interpretation proposed by petitioner places respondents and their financial resources at the mercy of the majority who evidently believe that bigger is better. Such a construction is unreasonable.

On the other hand, the construction placed on the Declaration of Condominium and its by-laws by the trial court and the Third District is reasonable and logical. Neither the majority nor the minority is placed at the mercy of the other. Neither may be subjected to the unforeseen and oppressive financial burden for expansion unless all consent.

Even if petitioner's construction had merit, it still must yield to the determination made by the lower courts that is at least equally as reasonable, if not much more so. Food Fair Stores, Inc. v. Harte-Pen-Teq Enterprises, Ltd., 275 So.2d 281 (Fla. 1st DCA 1973). Such judicial construction will be upheld in the absence of a clear conviction that it is erroneous.* Clark v. Clark, 79 So.2d 426 (Fla. 1955); Helie v. Wickersham, 103 Fla. 254, 137 So.226 (1931); Taylor Creek Village Ass'n.Inc. v. Houghton,349 So.2d 1219 (Fla.3d DCA 1977).

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* After considering the Declaration of Condominium, the by-laws and statutes as a whole, the District Court agreed that the trial judge acted properly in rejecting petitioner's arguments (A. 4,5).

## POINT III

THE PURCHASE OF LAND THAT EXPANDS CONDOMINIUM PROPERTY BY ONE-THIRD ITS ORIGINAL SIZE MATERIALLY MODIFIES THE APPURTENANCES TO A UNIT, THEREBY REQUIRING AN AMENDMENT TO THE DECLARATION OF CONDOMINIUM WHICH MUST BE APPROVED BY ALL UNIT OWNERS.

The petitioner makes the further argument that the District Court was wrong in treating the supplemental property as a common element. Therefore, it urges, since it was not a common element, the newly acquired parcel is not condominium property and since it is not condominium property how could the District Court treat it as such?

Well, then, if it is not condominium property, the respondents, in turn, ask:

"Why are you assessing us for its cost?"

As support for its argument, the Association refers to paragraph (6) of Section 718.110 (PB. 26, 28). That paragraph provides that the common elements may be enlarged by an amendment to the declaration "approved and executed as provided in this section." The paragraph then goes on to provide that the amendment divests the Association of title to the land and vests title in the unit owners without further conveyance.

According to the Association, because the language of paragraph (6) appears to presuppose the Association's acquisition of title prior to an amendment, that means the

Association may acquire title to real estate, forever keep the title in its hip pocket, never amend the declaration or otherwise effect its conveyance to the unit owners, all the time assessing the unit owners for the cost of the property, its improvement and maintenance.

But paragraph (6) invites no such unrealistic interpretation. The more logical and practical construction is that the section presupposes that an amendment or other written instrument acknowledging approval of all unit owners to the enlargement be made before the Association enters into any contract of purchase. Or, the contract of purchase may be subject to the execution of an amendment or other written instrument of all unit owners evidencing their willingness to the acquisition. In either case, since the amendment or other written acknowledgment of approval by all unit owners under Section 6, acts as a deed, the doctrine of after-acquired title would apply. Therefore, at the time the Association takes title it is automatically vested in the unit owners even if the written approval of all unit owners predates the conveyance to the Association. Daniell v. Sherrill, 48 So.2d 736, 740 (Fla. 1950).

The approach of the Association makes plain that it is seeking to do indirectly what it cannot do directly. See Prudence Mutual Casualty Company v. Humphreys, 220 So.2d 381 (Fla. 3d DCA 1969). That is, it is trying to substantially and materially modify the undivided share of the common elements appurtenant to respondents' units without obedience to the statutory and declaration requirements of some form

of amendment to the declaration to do so.* In that way the Association hopes to make an end run around the respondents whose written consent to such amendment is not forthcoming but at the same time assess them for the attempted modification.

Moreover, there is no merit to petitioner's assertion that its stratagem should be legally sanctioned because the decisions it cites make clear that property serving or benefiting unit owners need not be a part of the common elements (PB. 31).

To the contrary, in Ackerman v. Spring Lake of Broward, Inc., 260 So.2d 264 (Fla.4th DCA 1972) and in Gundlach v. Marine Tower Condominium, Inc., 338 So.2d 1099 (Fla. 4th DCA 1976), the Fourth District held that the leases from the developers to the Association were, indeed, common elements.**

Neither does Goodner v. Daytona Beach Ocean Towers, Inc., 389 So.2d 230 (Fla.5th DCA 1980), which involved the removal of leased personal property, support petitioner's assertion. Goodner is an affirmance without opinion and the conclusion of petitioner as to what Goodner stands for is

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* Initially, the Association recognized that to lawfully effect the acquisition the condominium documents had to be amended, and so announced in its Special Meeting Notice of March 30, 1978 (PX. Comp. 3).

** "A condominium . . . may include . . . common elements or commonly used facilities on a leasehold. . . ." §718.49, Fla.Stat. (1977).

derived from a dissent. The dissent does not hold or suggest that an association has either the right to undertake a major real estate purchase or the right to assess the unit owners therefor without their unanimous consent.

Next petitioner argues (PB. 32) that expanding the common elements parking area by one-third the size of the original condominium property is not a "modification" or "alteration". The Association argues it is instead an "addition" which means something different and that the dictionary bears out its contention. Yet, the Association does not furnish us with any dictionary definition of "modification" or "alteration".

We will! Webster's Third New International Dictionary of the English Language, Unabridged, G&C Merriam Company (1969) defines "alteration": "1a: The act or action of altering." "Alter" is defined as: "1: To cause to become different in some particular particular characteristic (as measure, dimension ...).

Webster's also designates the word "change" as a synonym for "alter" and "modify". Accordingly:

> The word modify is commonly understood to mean alteration or change. Thus, alteration or change is not restrictive. It may be characterized in a quantitive sense, as either an increase or decrease.

Johnson v. Three Bays Properties #2, Inc., 159 So.2d 924, 926 (Fla.3d DCA 1964).

Moreover, even if the dictionary definitions were not as precisely dispositive of the meaning of "modification"

or "alteration", would any unsuspecting layman ever conclude that if the declaration states no change may be made in his condominium parcel without his consent, that after he objects to a change one can still be made?

As its peroration to its Point 2 the Association proclaims that because it is so difficult to get 100% of the unit owners in a condominium to agree to anything, that is reason enough to permit the Association to run roughshod over the rights of objecting unit owners (PB. 34). But all unit owners, not just the majority, have the protection of the declaration. "The declaration is in the nature of a constitution . . ." McCaughan, "The Florida Condominium Act Applied" 17 U.Fla.Law Rev. 1, 39.

Furthermore, a declaration of condominium

> "assumes some of the attributes of a covenant running with the land, circumscribing the extent and limits of the enjoyment and use of real property. Stated otherwise, it spells out the true extent of the purchased, and thus granted, use interest therein."

Pepe v. Whispering Sands Condominium Ass'n., 351 So.2d 755, 757 (Fla.2d DCA 1977).*

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* "Subject to a manifest intention to the contrary, general covenants will be construed as limited to the premises purported and intended to be conveyed." 21 CJS Covenants §30 (1940). Also see Volunteer Security Co. v. Dowl, 159 Fla. 767, 33 So.2d 150, 151 (1948) in which the court held that covenants in deeds were referable only to the lots conveyed.

The condominium property described in the declaration as "Exhibit A" with parking facilities for 172 cars through valet parking is what the other unit owners as well as the respondents saw when they purchased their condominiums. "[W]hat the buyer sees the buyer gets." Sterling Village Condominium, Inc. v. Breitenbach, 251 So.2d 685, 688 (Fla. 4th DCA 1971).

If the other unit owners of the Tower House now want individual parking spaces for their maids and guests and for themselves, that's all well and good. However, they should not be permitted to cater to their caprices at the expense of respondents.

The respondents, under the Declaration, and the laws of Florida have the right, whether it be by reason of shortage of funds or unwillingness to make further investment or for whatever other reason, to refuse to contribute to the expansion of the condominium property beyond its original boundaries.

Even if there were a reasonable doubt as to the Association's right to do what it is doing, the issue should be resolved in respondents' favor. If the Association is permitted to get away with its present illegal action who knows what other grandiose schemes the respondents will be assessed for next.

## POINT IV

### A CONDOMINIUM UNIT OWNER IS NOT LIABLE FOR AN ILLEGAL ASSESSMENT MADE BY THE ASSOCIATION

The trial court expressly found that the assessments made by the Association in the case at bar were illegal. (R.132). Thus, we do not see how petitioner's Point III dealing with the general power of an association to levy assessments contributes to a proper disposition of the issues in the case at bar. Nor would we like to think that petitioner's out of context reference to Section 718.116 (Fla. Statutes (1977) and its predecessor, Section 711.15(1) Fla.Statutes (1973), viz:

> "A unit owner, regardless of how title is acquired, ... shall be liable for all assessments coming due while he is owner of the unit" (PB 36).

is designed to lead the Court to believe that a unit owner is liable for an assessment for the cost of property illegally purchased by the association. The words "regardless of how title is acquired" in the foregoing sections has reference to the unit owner's initial acquisition of his condominium parcel, either through judicial sale or otherwise, not to an association's illegal acquisition of title.

Furthermore, petitioner's reference to Section 718.15(1), Fla.Statutes (1977) is likewise inapposite. True, it defines "common expenses" for which a unit owner is liable as, inter alia, "costs of carrying out the powers and duties of the Association". Nevertheless, it is unreasonable to

include in such costs, the $500,000 cost of acquisition and improvement of a parcel of real estate beyond the original condominium boundaries. Rather, it is more proper to include in the context of the aforesaid power the Association's right to purchase the typewriter for its office, that petitioner at page 28 of its brief argues the decision below allegedly prevents it from doing. Of course, said decision could not rationally be interpreted in the sense suggested by petitioner.

In fact, the unreasonableness of petitioner's entire position is made even more glaring by its having to resort to comparing the land acquisition in the case at bar to the Association's purchase of an ordinary typewriter.

The petitioner's fears that if courts are permitted to decide what alterations or modifications to common elements are material or substantial, condominium associations will be seriously hamstrung in their operation of condominium properties are completely unfounded. A unit owner is hardly going to run the risk of contesting an insubstantial expenditure for the sake of being difficult considering the fact that he exposes himself to attorney's fees and costs if he loses. Moreover, for hundreds of years the courts of this country have decided questions of materiality and substantiality between litigants in numerous legal contexts, both civil and criminal. There is simply no reason to permit condominium associations to be any the less subject to established legal processes than anyone else. Condominium associations are not above the law as petitioner would have the Court conclude.

## POINT V

### THE PETITIONER'S BRIEF DOES NOT SUPPORT CONFLICT JURISDICTION UNDER ARTICLE V, §3(b)(3) OF THE FLORIDA CONSTITUTION

Petitioner's Notice to Invoke Discretionary Jurisdiction also seeks Supreme Court review on alleged conflict grounds.

However, the petitioner has presented no point on its assertion of conflict jurisdiction. Petitioner's initial brief is required to have a table of contents listing the issues presented and argument with respect to each issue. Fla.R.App.P. 9.210(b). But, no issue on conflict jurisdiction is stated.

If it wished to invoke the Court's conflict jurisdiction and was serious about doing so, it had the duty of establishing the basis therefor. Since there is no point in its brief on this issue, it should be deemed abandoned. Stewart v. Mack, 86 So.2d 143 (Fla. 1956).

Furthermore, there are just two places in petitioner's brief which even hint at conflict. At page 31, petitioner states the Tower House decision is "in conflict with a long line of decisions" on whether property serving a condominium need be part of the common elements. No argument is made with respect to the cases cited, and their inapplicability to the case at bar has already been shown under our other Points. At page 32 the petitioner also seems to hint at conflict when it states that the Third District

"expressly disagreed with the Fourth District's suggestion" in Juno By the Sea North Condominium v. Manfredonia, 397 So.2d 297 (Fla. 4th DCA 1981) that common elements do not pass as appurtenances.* We fail to find any such "disagreement" in the opinion below or the "suggestion" in the Fourth District's opinion that petitioner alludes to. No pages of either opinion are cited to guide the reader.

In short, the petitioner has not presented any proper basis for invoking the Court's conflict jurisdiction. Certainly, the respondents should not be required to respond to an issue that is not presented foursquare if it can even be considered as having been presented at all. Stewart, supra; also see Mangum v. Board of County Com'rs. of Brevard County, 202 So.2d 207, 209 (Fla.4th DCA 1967). Nevertheless, without waiving our objection to the legal insufficiency of petitioner's seeming conflict assertions we will respond thereto briefly.

The issue before the Court is whether a condominium association has the power to make a real estate investment without the consent of all unit owners and without amending the declaration of condominium and to then assess the unit owners for the cost of the land and improvements made thereon.

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* Again, the petitioner is taking license with the record. The Third District did not disagree, expressly or otherwise, with Juno. In fact, its Note 6 observes that the case is distinguishable on the facts and further observes that, if anything, Juno's Note 6 (397 So.2d at 305) buttresses the result reached sub judice.

All cases that the petitioner relies upon for whatever position it is taking are factually and legally different from the case at bar. No case cited by petitioner involves an acquisition of property that was not already included in the declaration by way of lease or other specific reference. No case cited by petitioner involves the question of whether or not unanimous consent of all unit owners is required for the purchase of such property by the Association. No case of petitioner's involves a condominium declaration that expressly prohibits any change in a condominium parcel without the unit owner's consent.

Thus, the controlling facts in all of the cases cited by petitioner are far removed from those in this case. Under these circumstances conflict jurisdiction would have failed even prior to the 1980 constitutional amendment to Article V, Section 3, requiring express and direct conflict. Corn v. Dept. of Legal Affairs, 368 So.2d 591,593 (Fla. 1979); City of Jacksonville v. Fla. First Nat. Bk., Etc., 339 So.2d 632 (Fla. 1976) (concurring opinion of Justice England.) As a consequence any argument that conflict jurisdiction exists under the currently more restrictive Article V must necessarily fail as well.

## CONCLUSION

We think it appropriate to conclude with some comments on an observation that petitioner makes very early in its brief. At page 3, petitioner asserts that one of the unchallenged issues is "the Respondent Unit Owner's ability to pay the assessment."

And that is in effect the entire substance of petitioner's position. If respondents can afford to, why shouldn't they be made to pay.

But, what if they can't afford the expense. And, what about all the individuals living off their Social Security checks in more modest condominium developments? No one would ever suggest that they be subjected to the perverse exercise of power exhibited by the Association in this case. Yet, if the petitioner succeeds, unit owners in all condominiums will find themselves under the same gun of the majority as the respondents in the case at bar.

Moreover, it is bizarre for petitioner to suggest that the power of the Association to act as it did depended upon whether or not respondents proved their inability to pay the assessment. Are unit owners unwilling to acquiesce in the land investment whims of the majority required to undergo a "means" test before their rights will be protected?

In fact, petitioner's having dealt with the solvency of respondents, underscores the untenability of its legal position. If it had the power to do what it is trying to do, the solvency or insolvency of objecting unit owners is irrelevant. But, because it cannot find any legal basis to sustain its position, it is trying to gain a foothold by implying the pertinency of a factor completely unrelated to its wrongful conduct.

We have no difficulty with the concept that the majority may dictate to a substantial extent, a unit owner's expenditures for management of the property described in the declaration. But petitioner's suggestion that such power includes the authority to command expenditures for the purchase of property outside the condominium limits is alarming. If true, it means an individual buying a condominium sacrifices to the majority his legal right to decide how much property he should own. If true, it means that no unit owner can ever arrange his financial affairs with any degree of certainty.

Furthermore, the additional consequences of the erroneous legal concepts advocated by petitioner are self-evident. The financial pressure of assessments accompanying the purchase and improvement of substantial chunks of real estate outside the condominium property can be disastrous to unit owners either unwilling or sincerely unable to financially participate. They will be forced to either sell their homes or lose them through foreclosure. We think it

improbable that any plausible construction of the declaration and the condominium laws allows the property rights of minority unit owners to be so unfairly jeopardized.

For the foregoing reasons, we feel that the Association's position is fundamentally unreasonable. Therefore should the Court accept jurisdiction we respectfully urge that certiorari should be summarily denied and the decision of the Third District Court of Appeal approved.

Respectfully submitted,

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By _____
ROBERT GOLDEN

By _____
DANIEL NEAL HELLER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Respondents' Answer Brief, together with Appendix accompanying Answer Brief, was mailed this 25th day of November, 1981, to MARK B. SCHORR, Esq., Becker, Poliakoff & Streitfeld, P.A., attorneys for petitioner, 6520 North Andrews Avenue, Post Office Box 9057, Fort Lauderdale, Florida, 33310.

ROBERT GOLDEN