0/a 5-10-85

IN THE SUPREME COURT OF FLORIDA

DIVISION OF FLORIDA LAND SALES AND CONDOMINIUMS, DEPARTMENT OF BUSINESS REGULATION; and THE TOWERS OF QUAYSIDE HOMEOWNERS' ASSOCIATION, INC.,	:	CASE NO. 65,814
Petitioners,	:	
v.	:	
HERMAN E. SIEGEL, on behalf of himself and other unit owners of THE TOWERS OF QUAYSIDE NO. 2 CONDOMINIUM,	:	
Respondent.	:	

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DIVISION OF FLORIDA LAND SALES AND CONDOMINIUMS, DEPARTMENT OF BUSINESS REGULATION; and THE TOWERS OF QUAYSIDE HOMEOWNERS' ASSOCIATION, INC.,	:	CASE NO. 65,834
Petitioners,	:	
v.	:	
HERMAN E. SIEGEL, etc.,	:	
Respondent.	:	

On Discretionary Review from the District Court of Appeal, Third District of Florida, Case No. 83-2113

RESPONDENT'S ANSWER BRIEF

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INTRODUCTION

Respondent herein files this consolidated Answer Brief in Case Nos. 65,814 and 65,834.

Petitioner in Case No. 65,814, DEPARTMENT OF BUSINESS REGULATION, DIVISION OF FLORIDA LAND SALES AND CONDOMINIUMS, will be referred to herein as "DIVISION".

Petitioner in Case NO. 65,834, THE TOWERS OF QUAYSIDE HOMEOWNERS' ASSOCIATION, INC., will be referred to herein as "HOMEOWNERS' ASSOCIATION".

References in this Brief to "Petitioners" will refer to arguments and positions advanced by both DIVISION and HOMEOWNERS' ASSOCIATION.

Amici Curiae BUILDERS ASSOCIATION OF SOUTH FLORIDA and THE GARDENS OF KENDALL PROPERTY OWNERS ASSOCIATION, INC. (who have, strangely, filed one brief) will be referred to herein as "BUILDERS ASSOCIATION" and "THE GARDENS". Amicus Curiae FLORIDA HOME BUILDERS ASSOCIATION will be referred to herein as "FHBA".

References to the exhaustive Appendix filed by Petitioner HOMEOWNERS' ASSOCIATION will be preceded by the symbol "App.", the "exhibit reference" used in the Appendix, and where appropriate, by the page number at the bottom of a particular page in that exhibit. For example, references to page 6 of the Declaration of Covenants, Restrictions and Easements will be in the form "App.B.6".

References to the record on appeal will be preceded by the symbol "R".

All references to sections of the Condominium Act are to Chapter 718, Florida Statutes (1984 Supp.), except as otherwise noted.

MOTION TO STRIKE

Respondent moves to strike from the Appendix of HOMEOWNERS' ASSOCIATION Exhibit "O". This document was not part of the record on appeal.

STATEMENT OF THE CASE

Petitioners' Statements of the Case are accurate, with one crucial exception.

Respondent did not argue below, and the Third District did not hold, that HOMEOWNERS' ASSOCIATION is a "condominium association". Instead, Respondent argued, and the District Court held, that HOMEOWNERS' ASSOCIATION is an "association".

This distinction is crucial, for the Condominium Act does not speak in terms of a "condominium association". It refers only to the "association". For example, §718.103(2) defines "association"; the Act contains no definition of "condominium association". Similarly, the portion of the Act at issue, governing turnover of control of the board of directors, §718.301(1), speaks only of the "association", without any qualification.

Since this appeal revolves around the construction of the condominium documents, it is best to set forth the relevant provisions of all of the documents at issue.

1. The Declaration of Covenants, Restrictions, and Easements ("Declaration of Covenants"). (App.B).

The entire Quayside community, including the condominiums, is encumbered by a Declaration of Covenants, Restrictions and Easements (herein "Declaration of Covenants"). The Declarant, Quayside Associates, Ltd., is also the Developer of the subject condominiums (App.B.1, App.N.1). The Declaration of Covenants expressly contemplates the encumbered property being divided into condominiums and Common Properties, with various amenities construc-

ted and enjoyed exclusively by the owners of units in the several condominiums.

The first recital in the Declaration of Covenants is that:

> Declarant owns, or has owned, certain property in the County of Dade, State of Florida, all of which units are specifically in THE TOWERS OF QUAYSIDE NO. 1 CONDOMINIUM and THE TOWERS OF QUAYSIDE NO. 2 CONDOMINIUM, and have been deeded out to individual owners who in turn took subject to the Declaration of Condominium to which the within Agreement was attached as an exhibit, all of which property is in the County of Dade, State of Florida, and all of which is more particularly described in Exhibit 1 attached hereto. (App.B.1) (emphasis added).

Article I of the Declaration of Covenants, the Definitions section, in Section 10 declares as "Common Properties" the lands set forth in Exhibit A to the Declaration of Covenants, and states that they "shall be for the common use and enjoyment of the Owners" subject to the Declaration of Covenants (App.B.3).

Article II, Section 1 defines those unit owners' right to enjoy the Common Properties, which right "shall be appurtenant to and shall pass with title to every Dwelling Unit" (App.B.5).

Exhibit 1 to the Declaration of Covenants sets forth the description of the property referred to throughout the Declaration as "The Towers of Quayside": all of Tract A of a certain plat. (App.B.31). Two pages later begins a legal description of the Common Properties: all of Tract A, less seven parcels of land. Parcel 1 is described as a "Road Dedication"; Parcels 2 through 7 are described as "Towers of Quayside Number 1 Condominium", "Towers of Quayside Number 2 Condominium", etc. Finally, a portion

of Towers of Quayside Number 4 Condominium is culled out and described as a Restaurant, which is also part of the Common Properties (App.B).

Thus, all of The Towers of Quayside is expressly intended to be either condominium property, or Common Properties.

Petitioners and Amici do not make clear at all that Respondent is a member of both the HOMEOWNERS' ASSOCIATION and his Condominium Association, subject to assessment by both associations, and subject to foreclosure by both associations in the event he does not pay his assessments.

Article III, Section 1 of the Declaration of Covenants (App.B.8) states the requirement of membership in the Association.

Article III, Section 8 (App.B.12) gives the HOMEOWNERS' ASSOCIATION the right to require the Condominium Association to collect these assessments.

Article VI of the Declaration of Covenants, in Section 1 creates the HOMEOWNERS' ASSOCIATION's lien on Respondent's unit to secure the payment of assessments for "Common Expenses" and other special assessments levied by HOMEOWNERS' ASSOCIATION. Article III, Section 6 (App.B.11-12) sets forth the formula for determining assessments. In short, the total amount of assessments is apportioned first on a condominium-by-condominium basis, and then assessed against Respondent based on Respondent's "percentage share of the Common Expenses of its Condominium".

Finally, Article VII of the Declaration of Condominium grants to the HOMEOWNERS' ASSOCIATION the right to lien and foreclose Respondent's unit in the event he does not pay his assessments.

(App.B.13-15).

2. The Declaration of Condominium.

The Declaration of Covenants recites that it was attached as an exhibit to the Declaration of Condominium for the TOWERS OF QUAYSIDE NO. 2 CONDOMINIUM (App.B.1). Article 1.1 of the Declaration of Condominium (App.N), entitled "Submission Statement" recites:

> The Developer hereby submits the Land and Building (each as hereinafter defined), all other improvements erected thereon, and all other property, real, personal or mixed, intended for use in connection therewith (collectively called the "Property") to condominium ownership pursuant to the Condominium Act of the State of Florida ... (App.N.1). (emphasis supplied).

Article 21 of the Declaration of Condominium of Respondent's condominium provides that each unit owner shall be a member of the HOMEOWNERS' ASSOCIATION, and that all unit owners shall have a non-exclusive right to use the Common Properties, and shall be required to contribute to the costs and expenses of operating and maintaining them. Article 21 further provides:

> All rights, privileges, benefits, liabilities and obligations set forth in said Declaration of Covenants, Restrictions and Easements are incorporated herein by reference and each Unit Owner shall be bound thereby in all respects. The (condominium) Association shall perform or cause to be performed all duties and obligations imposed upon it in the Declaration of Covenants, Restrictions and Easements (App.N.31).

3. The Homeowners' Association.

The Articles of Incorporation of the HOMEOWNERS' ASSOCIATION (R.Exh.B) provide that it is empowered to "promote the common

good, health, safety and general welfare of all of the residents within the Towers of Quayside". In addition, the HOMEOWNERS' ASSOCIATION has the authority to require architectural conformity throughout the Quayside community. Article IX, Section 1 of the Declaration of Covenants provides that it is the duty of each separate Condominium Association to maintain and repair their condominium properties at their expense, subject to the architectural conformity provisions of the Declaration of Covenants. In the event any condominium permits an improvement under its jurisdiction to fall into disrepair, or to be maintained in a dangerous, unsafe, unsightly or unattractive condition, the HOMEOWNERS' ASSOCIATION has the right to correct these conditions and enter upon the condominium property to make repairs or to perform maintenance (App.B.17-18). Finally, Article V(g) of the Declaration of Covenants gives HOMEOWNERS' ASSOCIATION the power to install, maintain and employ security devices or firms both for the Common Properties and the condominiums in the Towers of Quayside (App.B.10).

4. The Controversy.

Neither of the Petitioners nor BUILDERS ASSOCIATION make clear what prompted the Petition for Declaratory Statement. The issue was, and remains, the question of unit owner representation on (and eventual control of) the Board of Directors of the HOMEOWNERS' ASSOCIATION, which levies the assessments for Common Expenses against Respondent's unit.

Article VI of the Articles of Incorporation of HOMEOWNERS' ASSOCIATION states that its Board of Directors shall consist of

three members until the time of the first annual meeting. Article III of the By-Laws provides that the first annual meeting need not be held until 36 months after the closing of the first unit in the community (R.Exh.C).

In checking the number of units which are subject to assessment and owned by persons other than the Developer, Respondent determined that more than 148 of the 984 planned units have been so transferred and sold. This is in excess of 15% of the planned units within the community (App.C.3).

Under the Condominium Act, the unit owners would be entitled to elect no less than one-third of the members of the Board at this time. §718.301(1), Fla. Stat.

Under the Declaration of Covenants, Article IV (App.B.8) and the By-Laws, Article II (R.Exh.C), the voting rights of the members are heavily weighted in favor of the Developer. Owners of units "subject to assessment"[1], other than the Declarant/Developer, gets one vote per unit. The Developer gets six votes per unit "subject to assessment", plus six votes per unbuilt, but planned,

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[1]"Subject to assessment", by the way, does not mean that the unit has been "declared", as under the Condominium Act. The Declaration of Covenants provides that the liability to pay assessments to the HOMEOWNERS' ASSOCIATION rests only with owners of dwelling units, and not with the Developer as the owner of undeveloped portions of the community. Article VI, §9 (App.B.13). Even then, Article VI, §1 of the Declaration of Covenants provides that no assessments are due from the units in any condominium until the month following the month during which title to the first unit is conveyed (App.B.10). All of this would be illegal under the Condominium Act. Palm Bay Towers Corp. v. Brooks, ____ So.2d ____ (10 FLW 514) (Fla. 3d DCA, Feb. 26, 1985); Brooks v. Palm Bay Towers Condominium Assn. Inc., 375 So.2d 348 (Fla. 3d DCA 1979), cert. denied, 386 So.2d 640 (Fla. 1980).

unit, based on 984 planned units.

Thus, consistent with the provisions of §718.301, Florida Statutes, Respondent has demanded of HOMEOWNERS' ASSOCIATION that an election be held to allow unit owners other than the Developer to elect at least one-third of the members of the Board. That demand was denied (App.D), which gave rise to the Petition for Declaratory Statement.

SUMMARY OF ARGUMENT

The Third District Court of Appeal correctly held that Petitioner HOMEOWNERS' ASSOCIATION is an "association" within the meaning of §718.103(2), Fla. Stat.

The HOMEOWNERS' ASSOCIATION meets the Third District's "function" test, as it operates "condominium property". The Common Properties are "condominium property" as defined by §718.103(11), Fla. Stat., since Respondent's rights therein are an appurtenance to his unit, as established by both the Declaration of Covenants and his Declaration of Condominium. Indeed, when the conveyance by the developer to HOMEOWNERS' ASSOCIATION as contemplated by the Declaration of Covenants occurs, the Common Properties will become "association property", as defined by §718.103(3), Fla. Stat.

HOMEOWNERS' ASSOCIATION operates condominium property. It has powers and duties with respect to both Respondent's condominium, and the Common Properties.

HOMEOWNERS' ASSOCIATION clearly meets the constituency test, as defined by the Third District. Its membership is comprised of only condominium unit owners, and only condominium unit owners have rights in the property administered by the Association.

The constituency test is the test as defined by the Fourth District Court of Appeal in Palm Beach Leisureville Community Association, Inc. v. Raines, 398 So.2d 471 (Fla. 4th DCA 1981), and Raines v. Palm Beach Leisureville Community Association, Inc., 413 So.2d 30 (Fla. 1982).

The District Court properly declined to deal with future situations which may or may not occur, which may or may not affect the HOMEOWNERS' ASSOCIATION's status as an "association" within the scope of Chapter 718. Instead, it correctly dealt with the present situation, and the developer's expressed intent to in the future build only condominiums.

The "function test" is unworkable and unnecessary. It is also not called for by the precedent. The membership in such associations, and condominium unit owners' rights in the property administered by such associations, will always be set forth in their declaration of condominium, making same an appurtenance to their unit. Thus, the only meaningful inquiry will be into the association's constituency.

Finally, the Third District's holding does not create unsolvable problems, nor unreasonably tie the hands of the development industry. Instead, it carries out the spirit and intent of the Legislature, which the developer of The Towers of Quayside has attempted to evade through the way he has structured the community.

ARGUMENT

POINT I

THIS COURT SHOULD DISCHARGE ITS JURISDICTION

This Court has improvidently accepted jurisdiction based on conflict of decisions. Its writ should be discharged, as no conflict exists.

As will be shown herein, the rule of law announced by the Third District in the instant case, and the result reached, are completely harmonious with the decisions of this Court in Raines, supra, and the Fourth District in Palm Beach Leisureville, supra.

POINT II

WHETHER THE OPERATIONS OF AN ASSOCIATION WHOSE SOLE FUNCTION IS TO ADMINISTER PROPERTY WHICH SERVES ONLY CONDOMINIUM UNIT OWNERS, AND WHOSE ONLY MEMBERS ARE CONDOMINIUM UNIT OWNERS, ARE GOVERNED BY THE CONDOMINIUM ACT.

A. INTRODUCTION.

Respondent has above stated the issue as presented to the District Court of Appeal. With slight changes in wording, this is the issue as stated by Petitioner DIVISION.

At its heart, this appeal presents the question of whether the developer of a condominium community can evade the Condominium Act merely by the way he legally structures the community. There are two competing sets of interests involved. On one side are the Respondent unit owners; on the other is the developer-controlled HOMEOWNERS' ASSOCIATION. At stake is representation on, and eventual control of, the Board of Directors of the HOMEOWNERS' ASSOCIATION.

This Court must understand that HOMEOWNERS' ASSOCIATION is not an independent entity, and speaks not for itself, but rather for the developer, who is not before this Court.

Petitioner DIVISION's position, as reflected in its Declaratory Statement (App.F) has been, and continues to be, that since HOMEOWNERS' ASSOCIATION is not responsible for the operation of any "condominium property", it is not an "association" within the meaning of the Condominium Act.

The interests, and positions, of Amici Curiae are in some cases clear, while in other cases they are very puzzling.

The interest of Amici FHBA and BUILDERS ASSOCIATION is evident and straight forward: they represent the development industry, which is interested in as little regulation as possible of its activities, notwithstanding the Legislature's determination to exhaustively and comprehensively regulate condominium development and operation.

But what is the interest of Amicus THE GARDENS? It never tells us exactly who or what it is. Further, it never tells us who controls this Association. Is it an association comprised solely of the owners of condominium units, like HOMEOWNERS' ASSOCIATION? Or, is it an association comprised of, in whole or in part, single-family homeowners, making it thereby not affected by the decision of the Third District, or the issues before this Court?

Further, who controls THE GARDENS? THE GARDENS never tells us whether or not it is under developer control, thereby making it merely another voice of the development industry.

B. WHETHER THE DISTRICT COURT PROPERTY APPLIED THE PRECEDENT OF PALM BEACH LEISUREVILLE AND RAINES.

Throughout their Briefs, Petitioners constantly misstate the holdings of the Fourth District Court of Appeal in Palm Beach Leisureville Community Association, Inc. v. Raines, 398 So.2d 471 (Fla. 4th DCA 1981), and this Court's holding in Raines v. Palm Beach Leisureville Community Association, Inc., 413 So.2d 30 (Fla. 1982). The issue before the Fourth District in Palm Beach Leisureville, supra, was whether that community association was

an "association" governed by and subject to Chapter 718, Florida Statutes. The underlying suit was one brought by condominium unit owner members of the association (Mrs. Raines, et al.) alleging that the community association was overassessing the condo owners so as to benefit the single-family homeowner (improved lot owner) members. The condo owners sued the community association and eight improved lot owners as representatives of a class comprised of all of the single-family homeowners. After the condo owners prevailed on the merits, the trial judge awarded attorneys' fees against the community association and the single-family homeowners, to be assessed against the single-family owners, pursuant to §718.303(1), Fla. Stat.

The Fourth District made many findings regarding the documentation of the Palm Beach Leisureville community and the powers and duties of the respective associations, but its holding was one which focused on the members of the community association and the status of the property owned by the members. It noted that the declarations of restrictions which encumbered the condominium areas expressed an intent that the developer subject those lots to the condominium form of ownership, while the declarations of restrictions applicable to the improved lot owners did not express a similar intent to subject the improved lots to a condominium form of ownership. Thus, although the declarations of restrictions apply equally to the condo owners and improved lot owners, "only the former group was subject to formalized declarations of condominium".

> Under such circumstances, it would be absurd and patently unfair to require the improved lot owners to pay a pro rata share of the attorneys fees, which were assessed under the authority of a condominium statute, when those owners did not contemplated participation in the condominium way of life when they purchased their homes. We therefore hold that the improved lot owners did not take title to their property as 'condominium' unit owners, and thus, the appellant Association was not an 'association' within the meaning of Section 718.103(2) and Section 718.303(1).

398 So.2d at 474 (emphasis supplied). In other words, the Fourth District's holding in Palm Beach Leisureville was based on the status of the membership, and on the status of the property owned by the membership; i.e., the "constituency" test.

Interestingly, in the Fourth District's discussion of the relevant documents, there is no indication that, as in the instant case, the declarations of restrictions (here the Declaration of Covenants) were attached to, referred to, or in any way incorporated into, the declarations of condominium.

Further, unlike the instant case, "(n)o declaration of condominium was filed to specify the powers of the (community association) thereunder". Id. at 473.

This Court, which initially accepted jurisdiction to review a broad certified question posed by the Fourth District, declined to answer the question, and affirmed and approved the Fourth District's opinion. Raines, supra. This Court also found a complete separation between the Condominium Associations and the Community Association, finding that the documents from which they derived their powers were separate. From this it might be argued that a "source of

powers" test was announced.

While declining to answer the broad certified question, dealing with associations which administer mixed communities (i.e., condominiums and other forms of ownership), this Court did state:

> It might well be that other associations similar to this one would be associations as defined by the statute.

Id. at 32.

Nowhere in either decision was the so-called "function" test announced. Still, in the instant case the Third District found and applied such a test, based on its otherwise correct interpretation of Palm Beach Leisureville, supra, and Raines, supra.

Petitioner HOMEOWNERS' ASSOCIATION's Brief, in accusing the Third District of failing to follow Palm Beach Leisureville and Raines, makes the mistake of quoting from various findings made by the Fourth District regarding which Chapter 718 powers are and are not exercised by the Palm Beach Leisureville Community Association. The problem with this argument is that the powers to be exercised by an association have never been held to be the test for determining Chapter 718 "association" status.

Petitioner HOMEOWNERS' ASSOCIATION, on pages 3 and 4 of its Brief, notes this Court and the Fourth District's findings that the Palm Beach Leisureville Community Association derived its powers from sources independent of any condominium declaration, and then goes on to state incorrectly that the instant case is similar. On page 4, it attempts to argue that the Declaration of Covenants has a "separate and independent existence".

In another context, this argument has been raised and rejected by both this Court and the Fourth District, in Angora Enterprises, Inc. v. Cole, 439 So.2d 832 (Fla. 1983) and Cole v. Angora Enterprises, Inc., 403 So.2d 1010 (Fla. 4th DCA 1981). In that case, the developer attempted to argue that his recreation lease was separate and apart from the declaration of condominium. As the Fourth District noted, the declaration made at least three patent references to the lease, which was annexed to the declaration as an exhibit.

> As such, it was obviously intended to be an integral part of the whole. One cannot issue forth with language in the submission statement such as: 'which long term lease is attached to this Declaration and made a part hereof' and then argue that the same lease is not a part thereof pursuant to the condominium act.

Cole, supra, 403 So.2d at 1012.

On discretionary review, this Court agreed, noting that the lease also referred back to the declaration of condominium.

> The lessor argues that these are separate documents, each standing alone, but to adopt that rationale is to ignore the realities of the situation. And to say that the lessor who in his corporate capacity was both the developer and the management firm, did not agree to the terms of declaration is to refuse to see what is plainly written in black and white.

Angora Enterprises, supra, 432 So.2d at 834.

In the instant case, as the Third District correctly noted, the Declaration of Condominium expressly incorporates the Declaration of Covenants by reference, while the Declaration of Covenants states that it is attached to the Declaration of Condominium as an exhibit. An exhibit to a document, of course, is a part of

the document. "Surely the very purpose of attaching the (document) to the declaration is to obviate laborious repetition of all its terms and conditions in the declaration." Waterford Point Condominium Apartments, Inc. v. Fass, 402 So.2d 1327 (Fla. 4th DCA 1981), rev. denied, 412 So.2d 465 (Fla. 1982).

Accordingly, the Third District did not err in failing to correctly apply the "source of powers" test, if such test is deemed to exist.

On page 5 of its Brief, Petitioner HOMEOWNERS' ASSOCIATION argues that it could not have received its powers from the Declaration of Condominium since it was not a party to the instrument. This argument is fallacious, as no Chapter 718 "association" is required to be a party to a declaration of condominium.

C. WHETHER THE COMMON PROPERTIES ARE "CONDOMINIUM PROPERTY": THE FUNCTION TEST.

As will be shown in the discussion of this point and the following point, the so-called "function" test is confusing and unnecessary. It also begs the question. Instead, it is really but one prong of the "constituency" test: does the Association administer property which serves only condominium unit owners?

As the Third District correctly held, the Common Properties at The Towers of Quayside are "condominium property" as defined by the Condominium Act. Section 718.103(11), Fla. Stat., defines "condominium property" as:

> The lands, leaseholds, and personal property that subjected to condominium ownership, whether or not contiguous, and all improvements thereon

> and all easements and rights appurtenant thereto intended for use in connection with the condominium.

Thus, this statutory definition clearly contemplates that property need not be subject to the condominium form of ownership to be "condominium property". The Common Properties at The Towers of Quayside fall squarely within §718.103(11), Fla. Stat.

First, the Declaration of Condominium submits to the condominium form of ownership not just the land on which the condominium is located, but "all other property ... intended for use in connection therewith". (App.N.1). Not only that, but they are submitted "pursuant to the Condominium Act"! (App.N.1). Not only are the Common Properties intended for use in connection with Respondent's condominium, they are intended only for use in connection with condominiums in The Towers of Quayside (App.B.1-2).

Finally, Respondent and the other unit owners' rights in the Common Properties are "appurtenant to and shall pass with title to every Dwelling Unit" (App.B.5), just like the undivided shares of the common elements of the condominiums themselves, and membership in HOMEOWNERS' ASSOCIATION. §718.106(2), Fla. Stat.

Thus, the Common Properties, operated and to be owned by the HOMEOWNERS' ASSOCIATION, fall within the definition of "condominium property" as contained in §718.103(11), Fla. Stat. Unlike Palm Beach Leisureville, Quayside is a community of all condominiums. Membership in the HOMEOWNERS' ASSOCIATION is limited to condominium unit owners.

Thus, in its Point II, Petitioner HOMEOWNERS' ASSOCIATION misreads the definition of condominium property. Petitioner HOMEOWNERS' ASSOCIATION also misreads the precedent when it argues on pages 7-9 that no Declaration of Condominium has ever been recorded with respect to the Common Properties. Neither Raines nor Palm Beach Leisureville ever held that the property to be administered by the association had to be "condominiumized". Instead, what was found that the single-family members of the association did not own property which had been subject to a declaration of condominium.

Petitioner DIVISION is more candid, in admitting that the Condominium Act is not precise in limiting or equating "condominium property" with "common elements". To be more accurate, the Act does not equate the two terms. There is a very good reason for that, as there are a number of accepted situations in which "condominium property" is neither a unit nor part of the common elements.

For example, assume that a condominium association is subject to a recreation lease. It is the tenant under the lease. Does it, nonetheless, have the power to operate and maintain the leased premises, as the tenant thereof? Of course it does. In the exercise of its functions, is the association governed by Chapter 718? Of course it is, and no one would ever argue to the contrary.

Now let us assume that the condominium association "buys out" its recreation lease, and takes title to the property in its own name. Does this mean that the association is no longer governed by Chapter 718, as it operates non-condominium property?

Under the Petitioner's arguments, this is the result.

A final example: what if the condominium association purchases adjacent land for use as a parking area for the use and benefit of its unit owners? The parking area is not added to the common elements of the condominium. Instead, the association retains title to the property in its own name. Do the Petitioners mean to argue that this parking lot is not condominium property? Of course not.

The Common Properties of The Towers of Quayside are intended to be conveyed to the HOMEOWNERS' ASSOCIATION, pursuant to the terms of the Declaration of Covenants. (App.B.1,3,7-8,29). At that time, the Common Properties will become "association property", as defined by §718.103(3), Fla. Stat. Are these Common Properties any less "condominium property" merely because title to them has not yet vested in the HOMEOWNERS' ASSOCIATION? Of course not, just as a leased recreation area is not any less "condominium property" just because the developer/lessor still owns the property.

Yes, the definition of "condominium property" does include what Petitioner DIVISION correctly calls "use rights"; i.e., something less than fee simple title. But nothing in the Condominium Act requires that the unit owners have <u>title</u> to "condominium property". Accordingly, conferring "association" status on the entity which operates property which exists for the use and benefit of the unit owners (subject to the constituency test) is not contrary to the spirit or letter of Chapter 718.

Neither the Third District nor Respondent has ever attempted to alter anyone's ownership rights. What is at issue in this case is not "title", but rather the status of the association charged with the operation and administration of a particular piece of property, regardless of in whom title is vested.

Petitioners accuse the Third District of choosing form over substance, but it is really the other way around, as will be discussed in conjunction with the "constituency" test.

Petitioner DIVISION analogizes to a shopping center, and asks the rhetorical question of whether that shopping center would be "condominium property", if the Declaration had provided for an easement across the property of the shopping center. The answer depends on the facts. If all the Declaration provides for is a non-exclusive access easement, then the answer would probably be yes, but the "constituency" test would still defeat the conferring of "association" status on the mall authorities. If, however, the easement was <u>exclusive</u>, and the mall authority otherwise met both prongs of the constituency test, then the mall authority would be an "association" under Chapter 718. The analogy is absurd, however. It is obvious that the "mall authority" would have "members" who were not condominium unit owners, and would operate other property which serves these non-condominium unit owners (the shopping center tenants).

Petitioner DIVISION argues that only the unit owners' use rights in the Common Properties were declared to be a part of the condominium. This, however, merely leads back to the irrelevant

question of title, and to the impracticality and futility of the "function" test.

The Petitioners completely, and the Third District to an extent, ignore the first prong of the "constituency" test: Does the association administer property which serves only condominium unit owners? If it does, then the function test is unnecessary. This is illustrated by the facts of the Palm Beach Leisureville cases.

The leased recreation areas at Palm Beach Leisureville were, as here, not owned by any of the members of the community association, nor by the community association itself. Yet, the impediment to "association" status in that case was not title to the recreation areas, but the existence of single-family homeowners with use rights in the property, and with membership in the community association; in other words, the "constituency" test.

Petitioners and Amici sound false alarms about "problems" of "ownership" of the Common Properties. The Declaration of Covenants says clearly that title to the Common Properties will be conveyed to the HOMEOWNERS' ASSOCIATION. The Common Properties will then become "association property". The unit owners own a "share" of this not-for-profit corporation, which along with their use rights in the Common Properties is an appurtenance to their unit. §718.106(2)(d), Fla. Stat. What "share" does Respondent own? A formula is set forth in the Declaration of Covenants: his percentage of the common elements of his condominium multiplied by the number of units in his condominium, divided by the number

of units "subject to assessment". (App.B.11).

D. THE "CONSTITUENCY" TEST.

As discussed earlier in this Brief, all of the precedent supports application of only the two-pronged constituency test urged by Respondent. While the District Court did not reach an erroneous result in applying the "function test" also, this Court may properly give consideration to declining to apply the function test, as it is unnecessary and confusing. Indeed, the function test results in the ultimate glorification of form over substance.

Petitioner DIVISION has, until this case, always followed the constituency test when dealing with "master" associations.

A "master" association, sometimes also referred to as an "umbrella" association, is one which has under its jurisdiction other associations, be they condominium associations or common law homeowners associations. Amici BUILDERS ASSOCIATION and THE GARDENS' Brief discusses "master property associations" without defining the term. Such a term is certainly vague. We do not know if they mean a "master" association as defined in this Brief, or an association comprised of single-family homeowners in a sub-division, or an association in a mixed community like Palm Beach Leisureville.

In its Declaratory Statement, the DIVISION's position was that since the HOMEOWNERS' ASSOCIATION is not responsible for the operation of any "condominium property", it is not an association within the meaning of the Condominium Act.

The DIVISION's analysis focused on the legal status of, and title to, the property administered by the HOMEOWNERS' ASSOCIATION. The DIVISION's error was in ignoring the proper focus of the analysis: who are the Association's members, and for whom does its property exist?

The cases, and other declaratory statements issued by the DIVISION, clearly lead to the conclusion that whether any association is governed by the Condominium Act is determined by examining the Association's constituency. Since the instant Association's membership is comprised of only condominium unit owners, and only condominium unit owners have property rights in the property administered by the Association, the only logical answer is that this Association is governed by the Condominium Act, Chapter 718, Florida Statutes.

Any other conclusion is "absurd and patently unfair", and contrary to the spirit and intent of the Condominium Act. Palm Beach Leisureville, supra, 398 So.2d at 474.

In May, 1980, the DIVISION was requested to issue an opinion as to whether a "master" association, created pursuant to the several declarations of condominium in a community comprised solely of condominiums, to operate and eventually take title to certain recreation lands and facilities in the community, was an association as defined by §718.103(2), Fla. Stat. (1979). At issue was the right of the developer-controlled board of directors of the "master" association to increase the operational budget greater than 115% in violation of §718.112(2)(f), Fla. Stat. (1979), and failing

to allow the unit owners to inspect the books and records of the master association in violation of §718.111(7), Fla. Stat. (1979).

The Declaratory Statement issued by the DIVISION notes that the Declaration of Condominium(s) provided for the existence of both sub-associations and a "Master Association." After analyzing the facts and applicable law, the DIVISION concluded:

> Having applied the provisions of the Condominium Act, Chapter 718, Florida Statutes, regulating "association" to the provisions regarding the "Master Association" in the Declarations of Condominium creating Palm Greens at Villa del Ray, Phase I, it is the opinion of the Division that the "Master Association" is an "association" within the meaning of Chapter 718, Florida Statutes, the Condominium Act.

Number One Condominium Association-Palm Greens at Villa del Ray, Inc. v. Division of Florida Land Sales, etc. (Declaratory Statement issued June 25, 1980) (App.Q). The DIVISION's opinion was subsequently affirmed without opinion by the First District Court of Appeal. Palm Greens Limited v. Division of Florida Land Sales and Condominiums, 402 So.2d 618 (Fla. 1st DCA 1981).

Nowhere in the opinion did the DIVISION conclude that there was only one Association permitted to operate the condominiums, nor restrict the applicability of Chapter 718, Florida Statutes to either the Sub-Associations or Master Association.

Concurrently with the First District's per curiam affirmance of the Declaratory Statement in Palm Greens, the Fourth District issued its opinion in Palm Beach Leisureville Community Association, Inc. v. Raines, supra.

As the Fourth District Court of Appeal noted, "the improved lot owners were not subject to condominium ownership, and therefore, the association was not 'responsible for the operation of a condominium', at least as concerned those owners". Palm Beach Leisureville, supra, 398 So.2d at 473 (emphasis added).

The Fourth District's holding was that the community association was not an "association" within the meaning of §718.103(2), Fla. Stat. (1979) was based on an analysis of the constituents of the association:

> We therefore hold that the improved lot owners did not take title to their property as "condominium" unit owners, and thus, the appellant Association was not an "association" within the meaning of section 718.103(2) and Section 718.303 (1).

398 So.2d at 474.

On review of the Fourth District's certified question, this Court limited its opinion to a finding that there was "no legislative intent to cover the instant management association." Raines, supra, at 32 (emphasis added). However, as the Court stated,

> It might well be that other associations similar to this one would be associations as defined by the statute.

Id.

As the DIVISION knows, from its participation before this Court in Raines as amicus curiae, the Palm Greens decision was argued to this Court in the unsuccessful attempt to have the Palm Beach Leisureville Community Association held subject to Chapter 718. Perhaps, this Court's dicta that "it might well be that other associations similar to this one would be associations as defined by (§718.102)" was meant to tell the DIVISION something;

namely, that in situtations like Palm Greens and the instant case, where all property rights concerned affected only condominiums, Chapter 718 would apply.

Shortly before this Court's decision in Raines was issued, the DIVISION was again requested to determine the applicability of Chapter 718 to a master association at the Kings Point community. While finding that the "only recognized condominium association in the Kings Point community as defined under §718.103(2), Florida Statutes, are the eight (8) individual area associations", the DIVISION concluded that "the master association's authority, when exercised, must be exercised pursuant to the constraints and requirements of Chapter 718, and in accordance with all the prerequisites and safeguards that the area association would exercise in carrying out their duties". S. Mortimer Hirshorn v. Division of Florida Land Sales and Condominiums, (opinion filed October 29, 1981) (App.P). Again, the opinion expressly contemplates more than one association in a community being considered subject to Chapter 718.

As the Third District accurately found, the instant case is similar to the facts in Palm Greens. Nothing in the Palm Beach Leisureville opinions suggests a result to the contrary. Indeed, this Court's dicta suggests that the instant HOMEOWNERS' ASSOCIATION is governed by the Condominium Act.

In their Briefs to the Third District, both Petitioners spent considerable time distinguishing the facts of the instant case from Palm Greens, supra, and Hirshorn, supra. Before this Court

they virtually ignore these decisions, even though the Third District found them to have been correctly decided in light of Palm Beach Leisureville and Raines. After all, is there really a difference between the fact that the membership of one master association is comrpised of condominium associations, while the other's membership is comprised of the unit owners themselves? It is also noteworthy that the Palm Greens condominiums were bound by a recreation lease. No one maintains that title to the leased property rested in the unit owners; it rested in the developer/lessor. Yet, the recreation lease property is clearly "condominium property", intended for the use of the unit owners.

One can spend pages and pages distinguishing and reconciling the facts of Palm Greens and the instant set-up. As the District Court correctly found, however, the result is the same: all of the people entitled to enjoy the Common Properties at both developments were unit owners, and the Common Properties existed for the use and benefit of only condominium unit owners.

E. WHETHER MORE THAN ONE ASSOCIATION MAY BE REGULATED BY CHAPTER 718?

The answer, of course, is "yes". Hirshorn, supra; Palm Greens, supra.

Petitioners claim this will lead to "confusion". This argument was raised for the first time on Petitioners' Motion for Rehearing before the Third District.

The argument ignores the fact that two organizations in fact exist right now at The Towers of Quayside.

Further, no confusion, or overlap, need exist if only a little common sense is used. There are, as a result of the Third District's opinion, two Chapter 718 "associations" at the Towers of Quayside, each clearly responsible for separate condominium property. No "confusion" need exist if each association merely deals with its condominium property.

Admittedly, there is one exception to this "separate property" concept: the two associations have overlapping powers with respect to Respondent's condominium, as HOMEOWNERS' ASSOCIATION has "back-up" power to repair the common elements of the condominiums in the complex. See, Art. IX of Declaration of Covenants (App.B.17-18). This overlap, however, exists regardless of the Third District's decision, and would exist regardless of whether or not the HOMEOWNERS' ASSOCIATION is a Chapter 718 "association". Indeed, all the Third District's opinion has affirmed is the concept that when an association (which passes the constituency test) deals with condominium property, it is governed by the Condominium Act. No confusion could be created thereby.

Petitioners' argument can also be turned around to destroy the validity of the HOMEOWNERS' ASSOCIATION. Since the Common Properties are "condominium property", as defined by §718.103(11), Fla. Stat., if there can only be one association, then HOMEOWNERS' ASSOCIATION is illegal!! In that event, however, the problem would arise as to who would operate the Common Properties. Does condo association no. 2 operate them, or does condo association no. 1 operate them? That situation would create confusion and

overlap under Petitioners' "only one association" argument. After all, as Petitioners incorrectly argue, only one association can operate condominium property!

Finally, it is Petitioners who have overlooked the fact that not every provision of the Condominium Act is necessarily applicable to every association. For example, §718.111(11)(b), Fla. Stat., deals with hazard policies for "condominium buildings". §718.111(3), Fla. Stat., and Rule 1.221, Fla.R.Civ.P., give an association standing to bring a class action concerning matters of common interest, including "the roof and structural components of a building" and "commonly used facilities". Yet, there are mobile home park condominiums which have no buildings, consisting instead of only land on which unit owners place their privately-owned mobile homes. See, Hidden Harbour Estates, Inc. v. Basso, 393 So.2d 637 (Fla. 4th DCA 1981). As another example, §718.111(8), Fla. Stat., gives an association the power to purchase any land or recreation lease. Not every condominium is bound to such a lease, however. Respondent's condominium is bound to no such lease.

Accordingly, the Petitioners' "overlap" issue is not an issue. Instead, the Third District's opinion leaves matters as they are, with separate associations responsible for separate condominium property. The issue on this appeal has been whether HOMEOWNERS' ASSOCIATION, in that role, is governed by Chapter 718, and not whether there can be more than one association at The Towers of Quayside community.

Therefore, the "one association per condominium" argument is illogical and contrary to both the case law, Raines, supra, and to the position the Petitioner DIVISION has taken in the past. Palm Greens, supra; Hirshorn, supra.

F. A POSSIBLE "SOURCE" TEST.

This Court may, however, decide that its brief opinion in Raines also requires that a Chapter 718 association's enabling documents include the declaration of condominium and its exhibits. In that event, as discussed supra, this would more properly be called a "source" test. Such a test, however, is irrelevant. Under the present Condominium Act, every association must be a corporation, and thus ultimately draw its existence from separately filed articles of incorporation. This includes undisputed Chapter 718 associations, which are required by §718.111(1)(a) to be corporations subject to Chapters 607 and/or 617, Florida Statutes, depending on their for-profit or not-for-profit status, so long as the provisions of those Chapters are not inconsistent with the Condominium Act. §718.111(2), Fla. Stat.

Further, this "source" test will be satisfied, as a matter of law, as any agreement entered into by an association for use rights in recreation facilities, regardless of whether or not contiguous to the lands of the condominium, must be stated and fully described in the declaration of condominium, or its exhibits. §718.114, Fla. Stat.; Waterford Point v. Fass, supra. Similarly, any use rights or obligations which run with the land of a condo-

minium unit, to be binding upon the unit owner, must be set forth in the declaration, as well. §§718.104(4)(1), 718.104(5), 718.106(2), Fla. Stat.

Therefore, under the Condominium Act as it has existed in recent times, the Palm Beach Leisureville community association would have to have been created in a manner which would satisfy the "source" test, once again leaving only the constituency test for consideration.

G. WHETHER THE THIRD DISTRICT ERRED IN DEALING WITH FACTS AND CIRCUMSTANCES AS THEY PRESENTLY EXIST, RATHER THAN WITH SPECULATION AS TO THE FUTURE.

Petitioners and Amici complain of the Third District's failure to take into account the developer's retained right to build something other than condominiums on the two undeveloped parcels (the ones identified in the legal description exhibit to the Declaration of Covenants as "Towers of Quayside No. 5 Condominium" and "Towers of Quayside No. 6 Condominium").

The Third District properly declined to deal with this speculative issue.

First, it is necessary to clarify the facts and positions taken below. The Condominium No. 5 and Condominium No. 6 parcels are not directly encumbered by the Declaration of Covenants at the present time. Instead, these proposed condominium parcels are intended to be encumbered in the future, by the developer executing Supplemental Declarations of Covenants. (App.B.1-2).

Next, this argument was not raised in Petitioners' Briefs to the Third District; rather, it was raised for the first time at oral argument, and then again on the Motions for Rehearing. Respondent's response was simply that if and when non-condominium properties are added to the HOMEOWNERS' ASSOCIATION's jurisdiction, then the HOMEOWNERS' ASSOCIATION may cease to be governed by Chapter 718.

Accordingly, the Third District properly declined to deal with this question. There is nothing in the record to suggest that the developer intends to build anything other than condominiums on the last two parcels. Presently, if the developer follows its expressed intent to develop these parcels as condominiums, the question will never arise.

Contrary to Amici THE GARDENS and BUILDERS ASSOCIATION's assertions on pages 17 and 18 of their Brief, the Third District's opinion does not vitiate the right of a developer to alter the nature of his project.

Indeed, there is just as much of a possibility that the undeveloped parcels (and part of the Common Properties) will be separated from the existing Towers of Quayside community.

Further, there is no documentation in the record to suggest the developer of a project similar to this one has ever changed plans in mid-stream in a way such as Petitioners and Amici suggest.

Therefore, the Third District was eminently correct in refusing to rule on a purely speculative question. The issue is not justiciable, not ripe for determination, and should be left for another

day, when and if such a case or controversy arises.

It is also argued that one of the condominiums in The Towers of Quayside was created by conversion of an existing rental building, while the other buildings were condominiums from their inception. This fact is not established by the record. It is raised in a letter written by Petitioner HOMEOWNERS' ASSOCIATION's attorney but was not supported anywhere in the record before the Third District. There is no document in the record indicating such a conversion. Instead, the record reflects only the existence of condominiums, and a development scheme contemplating solely condominiums in the future.

But what if one of the condominiums at The Towers of Quayside was created by conversion of an existing rental building to the condominium form of ownership, pursuant to §718.402, Fla. Stat.? If an owner of a building converts it to the condominium form of ownership, he does so subject to Chapter 718. If, in fact, the conversion of the former rental building is what turned HOMEOWNERS' ASSOCIATION into a Chapter 718 association, that is an interesting historical fact, and nothing more.

The development industry interests on this appeal (Petitioner HOMEOWNERS' ASSOCIATION and Amici) claim they need the freedom to change plans in mid-stream, and turn a condominium community into a mixed community.

The development industry has that freedom. The decision of the Third District does not take it away.

For instance, at The Towers of Quayside, the Declaration of Covenants retains to the developer the right to not add future condominiums to the encumbrance of the covenants, to not build all of the intented Common Properties facilities, and to not convey to HOMEOWNERS' ASSOCIATION all of the Common Properties' land. In other words, the developer retains the right to do other things with the undeveloped land. The developer's hands are not tied.

Indeed, if the mysterious, undefined "market forces" referred to by Petitioners and Amici (which are neither documented nor referred to in the record) slow down the market for luxury condominiums, won't these so-called "market forces" have the same effect on all luxury residential housing? Further, absolutely nothing prevents a developer of a condominium from renting unsold units should the market slow down.

Amici Curiae from the development industry are quite candid in their Complaint about the effect of the Third District's opinion: it requires them to turn over control of associations to the unit owners who are assessed by those associations at a point in time dictated by the Legislature, as opposed to when the developers want to turn over control. This battle, however, was fought and decided over ten years ago when the Legislature enacted the first "transfer of association control" statute, §711.66, Fla. Stat. (1974 Supp.).

H. POLICY CONSIDERATIONS SUPPORT THE DISTRICT COURT'S DECISION.

As stated at the outset of this Brief, the real issue on this appeal is whether the developer of a condominium community

can evade the Condominium Act merely by the way he structures the community.

The Developer did not have to structure the community in the way it did. For example, it could have:

a) Made the entire community a single condominium. In that case, there is no question but that the Common Properties would have been common elements of the single condominium.

b) Made The Towers of Quayside a phase condominium. See, §718.403, Fla. Stat. Under this scenario, the Developer could avoid having to pay assessments on unbuilt units, yet still physically develop the condominium in stages. The Developer would not be forced to add all proposed phases to the condominium. Again, the Common Properties would have been common elements.

c) Made each building a separate condominium, as was done, but provide for their operation by a single association. The Common Properties would thus be either part of the common elements of each of the condominiums (in undivided shares), or title to them would rest in the Association as "association property", §718.103(3), in which case the Association would, even under the DIVISION's incorrect interpretation, be the entity responsible for the operation of "condominium property", and would be the only "association" extant in the community.

d) Created a Palm Greens structure, with the Master Association as the technical condominium association, with individual "sub-associations".

Instead, the Developer structured the community in the way it did, creating separate associations to operate each condominium and the Common Properties.

The interpretation of the Condominium Act urged by Petitioners is both contrary to legislative intent, and the realities of condominium development. Any association which is responsible for the operation of "condominium property" should be governed by the Condominium Act, unless, like Palm Beach Leisureville, it has non-condominium homeowners among its members. Only then will condominium unit owners be afforded the rights, privileges, and protections under which they purchased. To conclude otherwise would be to permit wholesale circumvention of the consumer protection afforded to Respondent and every other condominium unit owner in the State by the provisions of Chapter 718.

A purchaser of a condominium unit should be able to be assured that what he sees is what he gets, and that there is no sleight of hand operating behind the scenes.

What does Respondent see at The Towers of Quayside? A community comprised of only condominiums, in which his unit is controlled and assessed by, and subject to lien and foreclosure by, two associations. Both associations are funded by, and comprised of, condominium unit owners. In the process of making his way between his front door and Biscayne Boulevard, he probably needs a surveyor to tell him where one association's jurisdiction ends and the other's begins. When using the recreation facilities in the community, he probably needs to carry a checklist to make sure who is

responsible for their operation. The swimming pool? That's the Condominium Association. The tennis courts? That's the HOMEOWNERS' ASSOCIATION. The restaurant? Well, he approaches it on property operated by condominium No. 4's association, but HOMEOWNERS' ASSOCIATION actually runs the restaurant.

In the facilities on the Common Properties, who does Respondent meet? Other condominium unit owners. Does he share the facilities with single-family homeowners, or have not been "condominiumized"? No.

Under these facts, it is absurd to suggest that if Respondent turns one way, he is protected by the Condominium Act, while a wrong turn leaves him without those protections.

Petitioners and Amici raise the Legislature's creation of a "residential planned development study commission" in Chapter 84-368, §26, Laws of Florida.

First, it is not clear that the Study Commission is empowered to report on communities such as The Towers of Quayside, as opposed to single-family home communities with mandatory membership associations, or mixed communities like Palm Beach Leisureville.

Second, the Study Commission is not empowered to construe the existing Condominium Act. That is solely the province of the courts.

The Study Commission is directed to recommend "proposed legislation". It may well decide and recommend that no legislation is necessary for communities such as The Towers of Quayside, as the existing Condominium Act already applies. Indeed, it would

be bound to come up with such a recommendation, based on the decision of the Third District.

The Legislature, in creating the Study Commission, may well have been reacting to this Court's opinion in Raines, supra, dealing with master associations which operate both condominium and non-condominium properties. Nothing in the Legislature's enactment of Chapter 84-368, §26, Laws of Florida, indicates an intent by the Legislature that HOMEOWNERS' ASSOCIATION not be within the scope of Chapter 718.

Amici Curiae BUILDERS ASSOCIATION and THE GARDENS, on pages 21-23 of their Brief, raise some supposedly "unsolvable issues" created by the Third District's decision. For those issues which are clearly stated (all of which assume HOMEOWNERS' ASSOCIATION already has title to the Common Properties), there are very clear answers. There is one caveat: the Third District has not held that an association in a mixed community, such as Palm Beach Leisureville, is governed by Chapter 718.

Is all property owned by HOMEOWNERS' ASSOCIATION automatically converted into condominium property? Within the definition of "condominium property" as contained in §718.103(11), Fla. Stat., the answer is yes. As discussed earlier, however, the Third District's decision does not deal with "title" to property. The Legislature recognizes that condominium property may be titled in the associations themselves, §718.103(3), Fla. Stat., or in third parties. §718.114, Fla. Stat.

Is this kind of condominium property a common element? No. As discussed earlier, "condominium property" encompasses more than units and common elements.

How will property ownership be determined? Assuming that title to the property rests in the association, it will stay there. Further, this question incorrectly assumes that condominium property is necessarily part of the common elements, and ignores an association's right to acquire title to property in its own name. See, §§718.114, 718.111(7-9), Fla. Stat.

How will ownership of the property be reflected in the public records? Assuming that title to the property vests in the association, it will be reflected as such.

How will the unit owners be taxed, given that the Association is currently taxed itself, as the owner of the Common Properties? Section 718.120(1), Fla. Stat., provides that no ad valorem taxes shall be separately assessed against rec facilities if they are owned by the association. Instead, they shall be assessed against the condominium parcels, and not upon the condominium property as a whole. In other words, association property is to be treated for ad valorem tax purposes the same as common elements.

Section 193.023(5), Fla. Stat., describes how the property appraiser is to accomplish this. If there are problems with the property appraiser's office in this regard, they can be worked out, either amicably or through litigation. Indeed, there is nothing to suggest that such problems exist at the present time, with respect to other association properties at other condominium

developments.

Are individual unit owners now personally liable for acts or omissions of the HOMEOWNERS' ASSOCIATION, as without the Third District's decision HOMEOWNERS' ASSOCIATION was basically independent and had its separate property with which to respond in damages? This question incorrectly assumes that any condominium unit owner is personally liable for acts or omissions of his association beyond his share of common expenses. §718.119, Fla. Stat. Further, the question incorrectly assumes that if the HOMEOWNERS' ASSOCIATION suffered an adverse judgment, it would not turn around and assess its members for the funds necessary to satisfy the judgment. The question also improperly assumes that somehow the unit owner's condominium parcel might now be subject to execution as a result of a judgment against the Association. This is not the case. §718.119, Fla. Stat.

Are unpaid mechanics' lienors now barred from filing liens on the Common Properties? No, as such lienors are not barred from placing liens on any association property. Section 718.121, Fla. Stat., only prohibits the filing of liens on "common elements", and not on association property.

Are contracts entered into by a developer-controlled board of directors now voidable upon turnover of control of the association, pursuant to Section 718.302, Fla. Stat.? Yes. This right of cancellation, incidentally, has also existed for over ten years. §711.13, Fla. Stat. (1973); §711.66(5), Fla. Stat. (1974 Supp.).

Finally, on page 23, Amici BUILDERS ASSOCIATION and THE GARDENS note some other features of the Condominium Act which HOMEOWNERS' ASSOCIATION must now comply with, all of which were enacted for the protection of condominium unit owners. HOMEOWNERS' ASSOCIATION must now obtain the consent of a majority of the unit owners in order to increase its annual budget for common expenses by more than 15%. §718.112(2)(e), Fla. Stat. In litigation between a unit owner and his association concerning the Condominium Act or the condominium documents, the prevailing party is entitled to recover attorney's fees. Finally, HOMEOWNERS' ASSOCIATION will now be required to pay to DIVISION an annual fee of $.50 per residential unit operated by the Association, for deposit in the Florida Condominium's Trust Fund.

Each of these provisions is fair, reasonable, and enacted for the benefit and protection of condominium unit owners.

CONCLUSION

Based on the foregoing:

1. This Court has improvidently accepted jurisdiction based on non-existent conflict of decision, and its "Writ of Certiorari" should be discharged.

In the alternative,

2. The decision of the Third District Court of Appeal should be affirmed, as reaching the correct result.

3. In addition, the opinion of the Third District Court of Appeal should be modified, and the test for determining whether an association is subject to the provisions of Chapter 718 should be clarified, to create a two-pronged constituency test, as follows: does the association administer property which serves only condominium unit owners, and is its membership comprised of only condominium unit owners.

Respectfully submitted,

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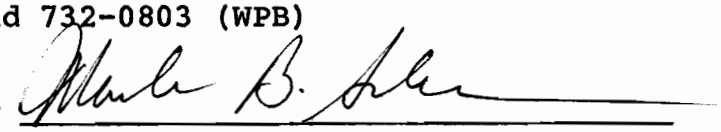
By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing Respondent's Answer Brief were furnished by mail this 29th day of March, 1985, to each of the following: THOMAS A. BELL, ESQ. and KARL M. SCHEUERMAN, ESQ., Attorneys for Petitioner DEPARTMENT OF BUSINESS REGULATION, 725 South Bronough Street, Tallahassee, FL 32301; DAVID W. TRENCH, ESQ. and MARTIN A. SCHWARTZ, ESQ., Rubin Baum Levin Constant Friedman & Bilzin, Attorneys for Petitioner THE TOWERS OF QUAYSIDE HOMEOWNERS' ASSOCIATION, INC., 1201 Brickell Avenue, Suite 314, Miami, FL 33131; ROBERT E. DADY, ESQ. and RAUL A. ARENCIBIA, ESQ., Dady, Siegfried & Kipnis, P.A., Attorneys for Amici Curiae, BUILDERS ASSOCIATION OF SOUTH FLORIDA and THE GARDENS OF KENDALL PROPERTY OWNERS ASSOCIATION, INC., 1570 Madruga Avenue, Suite 300, Coral Gables, FL 33146; and RICHARD E. GENTRY, General Counsel for Amicus Curiae FLORIDA HOME BUILDERS ASSOCIATION, Post Office Box 1259, Tallahassee, FL 32302.

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