IN THE SUPREME COURT OF FLORIDA

CASE NO. 3D08-3051

SUSAN COHN,

Appellant,

v.

THE GRAND CONDOMINIUM ASSOCIATION, INC., a Florida non-profit corporation, PH HOTEL, INC., and PH RETAIL, INC.,

Appellees.
_____ /

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA, CASE NO. 3D08-3051
(L.T. No.: 07-44460 CA 11)

ANSWER BRIEF OF PH HOTEL AND PH RETAIL

H. Hugh McConnell
Florida Bar No. 216828
Of counsel,
Siegfried, Rivera, Lerner,
De La Torre & Sobel, P.A.
201 Alhambra Circle, Suite 1102
Coral Gables, Florida 33134
Telephone: (305) 442-3334
Fax (305) 443-3294

Attorneys for Appellees
PH Hotel, Inc., and PH Retail, Inc.

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STATEMENT OF THE FACTS AND OF THE CASE

Appellees, PH Hotel, Inc., and PH Retail, Inc. (collectively "PH Unit Owners") adopt the Statement of the Case and Facts set forth in the Answer Brief of Appellee, The Grand Condominium Association, Inc. ("Ass'n. Brf.").

SUMMARY OF THE ARGUMENT

The PH Unit Owners adopt the arguments of The Grand Condominium Association, Inc. ("Association"). In addition, we submit the following supplementary argument:

Florida tolerates virtually no impairment of contract rights by the retroactive application of a statute or regulation. In those rare cases where impairment might be tolerated, Florida determines the permissibility *vel non* of the impairment by balancing the public purpose of statute against the severity of the harm to existing contract rights. *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774 (Fla. 1980). Where, however, contract rights have vested, as they have in this case, retroactive application is unconstitutional and there is no need for the court to apply the balancing process. Here, the voting rights of the unit owners of The Grand Condominium had already vested by the time section 718.404(2) was first enacted. Therefore, applying the *Pomponio* analysis to determine the constitutionality *vel non* of the amended section 718.404(2) was unnecessary.

Nevertheless, assuming the necessity of applying *Pomponio*, the Third District was correct in holding that the amended section 718.404(2) was unconstitutional as applied to The Grand Condominium ("The Grand"), because none of the *Pomponio* factors that would warrant retroactive application of section 718.404(2) was satisfied. In particular, the absence in the record of any showing of the "broad, generalized economic or social problem" which the amendment was intended to address, *Pomponio*, 378 So. 2d at 779, rendered evaluation under *Pomponio* impossible to conduct. Once it was shown by the appellees that the amended statute substantially impaired their rights, it was the appellant's burden, as the proponent of the amended statute, to establish the public purpose that would provide the basis to justify applying the statute retroactively.

The appellant failed to carry that burden, and, because the retroactive impairment of any contract rights is presumptively unconstitutional, the absence of a basis for the court to assess the public purpose left the Third District no choice but to declare the amended section 718.404(2) unconstitutional as applied to The Grand. Therefore, the court's ruling was correct and should be affirmed.

STANDARD OF REVIEW

Decisions resolving questions of statutory constitutionality or construction are reviewed *de novo*. *State v. Rubio*, 967 So.2d 768 (Fla. 2007).

ARGUMENT

I. THE THIRD DISTRICT DID NOT ERR IN HOLDING THAT THE RETROACTIVE APPLICATION OF SECTION 718.404(2) TO THE GRAND CONDOMINIUM WAS AN UNCONSTITUTIONAL IMPAIRMENT OF EXISTING CONTRACT RIGHTS.

A. Adoption of Arguments of The Grand Condominium Association, Inc.

The PH Unit Owners generally concur with and adopt the arguments of our co-appellee, the Association. In addition, we submit further argument with respect to the effect of the unit owners votes' being substantial vested rights, and the resulting inapplicability of the "public purpose" balancing process described in *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774 ("*Pomponio*"), to the determination of whether the retroactive application of section 718.404(2), Florida Statutes, is unconstitutional.

B. Florida Tolerates Only Slight Impairment of Contract Rights and No Impairment of Vested Rights.

Rights established by contract that have vested are entitled to specific protection by both the United States and Florida Constitutions, pursuant to Article I, Section 10, which provides that "No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed." Accordingly, this Court has recognized that "[v]irtually no degree of contract impairment has been tolerated in this state." *Yamaha Parts Distributors, Inc. v. Ehrman*, 316 So. 2d 557, 559 (Fla. 1975) ("*Yamaha*") (holding retroactive application of statute regulating franchise agreements unconstitutional); *see Department of Transportation v. Edward M.*

Chadbourne, Inc., 382 So. 2d 293, 297 (Fla. 1980) ("This Court has generally prohibited all forms of contract impairment.").

Notwithstanding the broad proscription against contract impairment, the prohibition is not absolute, and, in an extreme case, government may be allowed to affect existing contract rights through legislation. That may occur, however, only where the interests of the state sought to be advanced through the exercise of its police power are so substantial, and the effects on private contract rights so slight, that a modest infringement is tolerated. In addressing the narrow circumstances of permissible contract impairment, this Court, in *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774 ("*Pomponio*"), adopted an approach similar to that of the United States Supreme Court, which, in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 98 S. Ct. 2716 (1978) ("*Spannaus*"), articulated a balancing process to weigh the "severity" of the contract impairment against the purpose to be achieved by the state's exercise of its police power:

> In applying these principles to the present case, the first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

Pomponio, 378 So. 2d at 779, *quoting Spannaus*, 438 U.S. at 244-45, 98 S. Ct. at 2723 (footnotes omitted).

Although this Court drew on *Spannaus* for an analytical framework to address impairment issues, it was clear to point out that it construed the Florida Constitution as less forgiving of the abridgment of contractual rights than the United Stated Constitution. "Our conclusion in Yamaha that 'virtually' no impairment is tolerable necessarily implies that some impairment is tolerable, although perhaps not so much as would be acceptable under traditional federal contract clause analysis." *Pomponio*, 378 So. 2d at 780.

> To determine how much impairment is tolerable, we must weigh the degree to which a party's contract rights are statutorily impaired against both the source of the authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy. Obviously, this becomes a balancing process to determine whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the state's objective, or whether it unreasonably intrudes into the parties' bargain to a degree greater than is necessary to achieve that objective.

Id. at 780.

C. *Pomponio* Does Not Apply Where the Retroactive Application of a Statute Results in an Immediate Impairment of Vested Property Rights.

Although we agree with the result it reached by the Third District in the order under review, we contend that the Third District did not need to employ a *Pomponio* analysis to find section 718.404(2) unconstitutional in this case. Not all questions of impairment require (or permit) analysis under the formulation of *Pomponio*. Where the retroactive application of a statute would result in the immediate impairment of the value of an existing contract or the extinguishment of

a vested right, it is invalid. *Metropolitan Dade County v. Chase Fed. Housing Corp.*, 737 So. 2d 494, 503 (Fla. 1999) ("Thus, retroactive abolition of substantive vested rights is prohibited by constitutional due process considerations.").

Accordingly, a retroactive statute may be determined by the Court to be impermissible without needing to vet the law under *Pomponio*. "[T]he *Pomponio* balancing test is not applicable when the legislation results in an immediate diminishment in value of the contract that 'is repugnant to our constitution.'" *Lee County v. Brown*, 929 So. 2d 1202, 1208-09 (Fla. 2d DCA 2006), *citing Sarasota County v. Andrews*, 573 So. 2d 113 (Fla. 2d DCA 1991) (holding that ordinance created an unconstitutional impairment, without recourse to a *Pomponio* analysis); *see also In re Advisory Opinion to the Governor*, 509 So. 2d 292 (Fla. 1987) (imposition of sales and use tax on existing construction contracts); *Dewberry v. Auto-Owners Ins. Co.*, 363 So. 2d 1077 (Fla. 1978) (application of statutory prohibition against stacking to existing insurance contracts); *Department of Revenue v. Florida Home Builders Assn.*, 564 So. 2d 173 (Fla. 1st DCA 1990) (sales and use tax on existing construction contracts). As summarized by the Second District:

> Under *Andrews*, it would be proper for the trial court to rely on the per se test of *Dewberry* and *Florida Home Builders* and decline to apply the *Pomponio* balancing test if it determines that the Ordinance results in an immediate diminishment in value of the contract that "retroactively turns otherwise profitable contracts into losing propositions" and therefore "is repugnant to our constitutions."

Lee County v. Brown, 929 So. 2d at 1209.

D. Retroactive Application of Section 718.404(2) Results in an Immediate, Unconstitutional Impairment of the PH Unit Owners' Vested Contract Rights.

In this case, the retroactive application of section 718.402(2) does, in fact, cause an "immediate diminishment in the value" of the PH Unit Owners' property rights, which may not constitutionally be divested through a subsequent act of the legislature. By operation of the Condominium Act, the right to vote for the management of a condominium association is part of the "bundle" of property rights which vest in a unit owner upon the acquisition of title in the condominium unit. § 718.106(2)(d) Fla. Stat. ("There shall pass with a unit, as appurtenances thereto . . . Membership in the association designated in the declaration, with the full voting rights appertaining thereto."). The voting right appurtenant to the unit meets the definition of a "vested" right", because it not contingent, becomes operative immediately upon acquisition of title, and is unconditional.

"A vested right has been defined as 'an immediate, fixed right of present or future enjoyment' and also as 'an immediate right of present enjoyment, or a present, fixed right of future enjoyment.'" *R.A.M. of South Florida v. WCI Communities, Inc.*, 869 So. 2d 1210, 1218 (Fla. 2d DCA 2004). *quoting City of Sanford v. McClelland*, 163 So. 513, 514-15 (1935). "To be vested a right must be *more than a mere expectation based on an anticipation of an existing law*; it must have become a title, legal or equitable, to the present or future enforcement of a demand." *Clausell v. Hobart Corp.*, 515 So. 2d 1275, 1276 (Fla. 1987) (emphasis by the Court), *quoting Division of Workers' Compensation v. Brevda*, 420 So. 2d 887, 891 (Fla. 1st DCA 1982).

E. The Grand Is Not Subject to Amendments of Condominium Act.

The Grand is governed by the version of the Condominium Act that was in effect in 1986, the year of The Grand's creation. The Declaration of Condominium of The Grand[1] ("Declaration") fixes the law applicable to The Grand squarely at the moment of recording:

> 1.1 "Act" or the "Condominium Act" means and refers to the Condominium Act of the State of Florida (Florida Statute 718, et seq.) in effect *as of the date of recording* this Declaration.

Declaration § 1.1 (emphasis supplied).

Cohn misreads the Declaration as incorporating *future* amendments in the Condominium Act that might divest a unit owner of rights embodied in the Governing Documents.[2] Init. Brf. 22-23. In effect, she argues that the potential of a change in the law reduces the nature of a unit owner's vote to a mere "expectation" rather than a vested right.

Unlike some condominiums, however, the Declaration of The Grand does not contain the language recognized as necessary to incorporate future amendments in the law so as to render the legal framework of The Grand ambulatory. *See, e.g., Century Village, Inc. v. Wellington, E, F, K, L H, J, M, & G,*

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[1] The Declaration of Condominium of The Grand is contained in Appellant's Appendix to Initial Brief on the Merits ("App. Init. Brf.") at Tab 1.

[2] The "Governing Documents" of The Grand include the Declaration, App. Init. Brf. Tab 1; the Bylaws of The Grand Condominium Association, Inc. ("Association"), App. Init. Brf. Tab 2; and the Articles of Incorporation, App. Init. Brf. Tab 3.

Condominium Association, 361 So. 2d 128, 133 (Fla. 1978) ("*Century Village*") (declaration defined the "Condominium Act" as the "condominium act [as] the same may be amended from time to time" and unit owners "expressly agreed to be bound by all future amendments to the Condominium Act"); *Kaufman v. Shere*, 347 So. 2d 627, 628 (Fla. 3d DCA 1977) ("as amended from time to time" language "was the express intention of all parties . . . that the provisions of the Condominium Act were to become part of the controlling document . . . whenever they were enacted").

The absence of any reference to future amendments in the Declaration's definition of "Condominium Act" indicates that the creators of The Grand intended the 1986 version of the Act to be effective without future change. Therefore, unlike Century Village unit owners, a unit owner purchasing in The Grand did *not* "expressly agree[ ] to be bound by all future amendments to the Condominium Act. . . ." *Century Village*, 361 So. 2d at 132; *compare Fleeman v. Case*, 342 So. 2d 815 (Fla. 1977) (ruling statute prohibiting condominium recreation leases inapplicable to contracts antedating its enactment, where the declaration did not contain "as amended" language).[3]

[3] Cohn's argument in section I of her initial brief that each amendment to the Condominium Act "applied not just to condominiums that were built subsequent to its enactment, but to all condominiums in the state regardless of when they were built", Init. Brf. 50, ignores the existence *vel non* of the ambulatory, "as amended from time to time", language within the declarations of condominium under consideration. Those with the necessary language were subject to later amendments, *Century Village*, 361 So. 2d 128, and those without the "as amended" language were not. *Fleeman v. Case*, 342 So. 2d 815.

F. *Woodside* is Inapplicable to this Case.

Cohn's reliance upon *Woodside Village Condominium Ass'n, Inc. v. Jahren*, 806 So. 2d 452 (Fla. 2002) ("*Woodside*"), to support her argument that the voting rights in The Grand are not vested, Init Brf. 27-32, is misplaced. *Woodside* addresses the issue of whether unit owners are bound by amendments to the condominium documents, rather than amendments to the Condominium Act. Amendments to the condominium documents are undertaken by the unit owners pursuant to the terms of the condominium documents themselves, subject to legislatively imposed rules that may address the propriety of the amendment process. As such, the viability of amendments to condominium documents by unit owners is a matter of statutory and contract construction. This is an entirely different matter from the issue of impairment of existing contract rights by state action through legislation, which is, of course, governed by the Contract Clauses of the federal and state constitutions.[4]

While distinguishable from the case at bar, *Woodside* is analogous to *Century Village* insofar as the amendments in the *Woodside* condominium documents and the amendments in the Condominium Act as incorporated into the *Century Village* declaration of condominium were both found to be enforceable, because the operative provisions in their respective documents both contained "as amended" language that placed unit owners on prior notice that amendments in the law and in the condominium documents could affect their rights in the future.

[4] At the same time, if the Legislature were to impose rules on the amendment process that amounted to impairment, such rules would themselves be subject to Contract Clause analysis.

By comparison, the Declaration of The Grand did not contain "as amended" language in the definition of the Condominium Act, and consequently unit owners in the Grand were entitled to rely on their rights' not being affected by amendments to the Act. Accordingly, *Woodside* is inapposite to this case and does not bear on our contention that the voting rights of unit owners in The Grand have vested and are impermissibly impaired by the amended section 718.404(2).

G. The Unit Owner Vote is a Vested Right that May not be Divested or Impaired by Statute.

Because units in The Grand are legally defined by the Declaration, which incorporates the Condominium Act in effect in 1986, the voting right appurtenant to each unit in The Grand is likewise governed by the 1986 Act. Accordingly, each purchasing unit owner had "an immediate, fixed right of present or future enjoyment" of the voting arrangement established at that time. *R.A.M. of South Florida v. WCI Communities, Inc.*, 869 So. 2d at 1218. The right to vote, defined statutorily as an "appurtenance" to each unit, §718.106(2)(d), Fla. Stat., is not subject to change and is, therefore, a vested property right rather than a mere "expectation".

Nor does section 39.1 of the Declaration act to divest unit owners in The Grand of their voting rights, as argued by Cohn. Init. Brf. 23. Section 39.1 only acts to reaffirm the enforceability of all remaining provisions of the Condominium Act and The Grand's "Governing Documents" (Declaration, Bylaws, and Articles of Incorporation),[5] in the event that any single portion is held to be invalid.[6]

[5] The Bylaws of the Association and the Articles of Incorporation are contained in record at App. Init. Brf. Tab 2 and App. Init. Brf. Tab 3, respectively.

Barring a determination that the allocation of voting defined in Article VI of The Grand's Articles is itself found invalid (which no party here is suggesting should occur), section 39.1 assures that the voting arrangement will survive legal attacks on the validity of other provisions of the Governing Documents. Section 39.1 thus serves to reinforce, not detract from, the vested nature of the voting interests established in the Articles.

Because the unit owner's vote is a vested right, it may not be divested or impaired by subsequent legislative act. *Metropolitan Dade County v. Chase Fed. Housing Corp.*, 737 So. 2d 494. Upon recognizing that the impairment of the unit owner's vested right to vote is *per se* unconstitutional, the Third District could have stopped its analysis of section 718.404(2) without having to evaluate the statute under the balancing test of *Pomponio*. *Dewberry v. Auto-Owners Ins. Co.*, 363 So. 2d 1077; *Department of Revenue v. Florida Home Builders Assn.*, 564 So. 2d 173. While we do not contend that the Third District erred, we do maintain that it reached the right result using a wrong – or at least unnecessary – analysis.

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[6] Section 39.1 provides:

> If any provisions of this Declaration, the Articles, Bylaws or the Condominium Act, or any section, sentence, clause, phrase or word, or the application thereof, in any circumstance is held invalid, the validity of the remainder of this Declaration, the Articles, Bylaws, or the Condominium Act, and the application of any such invalid provision, section, sentence, clause, phrase or word in any other circumstance shall no be affected thereby.

Declaration § 39.1.

H. Even under the Requirements of *Pomponio*, the Court's Finding that Application of Section 718.404(2) is Unconstitutional in this Case was Proper, Because There Was No Showing of a Significant and Legitimate Public Purpose in Making the Statute Retroactive.

Assuming that it were necessary to reach *Pomponio* in this case, the record supports the Third District's rationale under *Pomponio* in holding that section 718.404(2) is unconstitutional as applied to the voting formula prescribed in The Grand's Articles of Incorporation. On this record, the balancing test of *Pomponio* weighs overwhelmingly in favor of finding section 718.404(2) unconstitutional. In particular, Cohn failed to carry her procedural burden of showing a legitimate public purpose that could possibly justify the impairment to the PH Unit Owners' rights that would result from making section 718.404(2) retroactive.

In order to analyze whether impairment to contract is permissible under *Pomponio*, the court must "balance the nature and extent of impairment with the importance of the state's objective." *Yellow Cab Co. of Dade County v. Dade County*, 412 So.2d 395, 396 (Fla. 3d DCA 1982) ("*Yellow Cab*"). The analysis begins with the "threshold inquiry" to determine "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship," where the "severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected." *United States Fidelity & Guar. Co. v. Department of Ins.*, 453 So. 2d 1355, 1360 (Fla. 1984) ("*United States Fidelity*") (citations and internal quotations omitted).

1. Degree of Impairment of PH Unit Owners' Rights:

The Third District found that the impact of making section 718.404(2) retroactive was a "substantial impairment" to the PH Unit Owners' voting rights under the Declaration:

> It is our view that the voting arrangements in a condominium are of great importance, and the change imposed by subsection 718.404(2) operates as a substantial impairment of the existing contractual relationship. We therefore proceed to consider the three parts of the Pomponio test.

Cohn v. The Grand Condominium Ass'n., Inc., 26 So. 3d 8, 10 (Fla. 3d DCA 2009). Cohn now contends that the degree of impairment to the PH Unit Owners' rights was so slight as not even to require further judicial scrutiny of the statute.[7] This is a reversal in position from the submission Cohn made to the Third District, where she stated:

> The appellant has never argued that Fla. Stat. § 718.404(2), as amended, does not impair contractual rights. The appellant concedes that the statute absolutely effects the rights of the Controlling Entities [PH Unit Owners].

3DCA Init. Brf. 32.[8] The Third District's finding does not reflect that it would have been any different had Cohn not conceded the impairment issue, but, based

[7] As the Association correctly points out, Cohn improperly raises this argument for the first time before this Court, Ass'n. Brf. 14-15, and, accordingly, the argument should be disregarded on that basis alone.

[8] Cohn now back-tracks from that unequivocal concession:

> Cohn argues that the law has absolutely not operated as a substantial impairment of The Grand's or the Controlling

upon the arguments she now advances before this Court, it is unlikely that the opinion would have changed.

Cohn argues that the PH Unit Owners' loss of control of The Grand's board of directors would have "minimal" impact, because a residential-unit-owner-controlled board would owe a fiduciary duty to the PH Unit Owners, and that the board could not "interfere with the operation" of their lawful businesses. Init. Brf. 43. These contentions are speculative and wishful. It is more reasonable to believe that the owner and operator of a 250-plus room luxury hotel in downtown Miami would justifiably be afraid of interference – whether intentional or inadvertent – by private homeowners endowed with the majority power to manage the entire physical plant of the hotel/apartment complex.

For example, the Declaration vests in the Association the general operation of the facility, Declaration § 10.1, as well as the maintenance of the improvements, fixtures and personal property composing the condominium, including landscaping, roadways and parking areas. Declaration § 10.3.4. In addition, the Association has the "irrevocable right of access to each Unit" (including hotel rooms), Declaration § 10.3.1; and it has the "power to adopt reasonable rules and regulations" to which all unit owners are subject. Declaration § 10.3.7. It is certainly conceivable that a careless residential-majority board might neglect the

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> Entities' [PH Unit Owners'] contractual relationship and since the alteration is minimal, at best, all further inquiry ends.

Init. Brf. 43.

proper upkeep of the facility, so as to diminish the commercial appeal of the property, or that an overly-zealous board might pass rules intended to regulate conduct of persons, including hotel guests, which could interfere with the ordinary functioning of the hotel.

The mere prospect of having the hotel property and the retail businesses subject to the consequences of such actions, without more, negatively impacts the value of the hotel and retail units. The Third District was correct in holding that the "change imposed by subsection 718.404(2) operates as a substantial impairment of the existing contractual relationship" embodied in the Declaration. *Cohn v. The Grand Condominium Ass'n., Inc*., 26 So. 3d at 10.

2. Burden of Establishing Legitimate Purpose.

The next step of the *Pomponio* analysis requires a determination of "the importance of the state's objective" in making the section 718.404(2) retroactive, so that it can be balanced against the harm to the PH Owners' rights. Since the retroactive impairment of a contract right must be presumed to be unconstitutional, *Yamaha*, 316 So. 2d at 559 (virtually no degree of contract impairment tolerated), the burden in the analytical process must necessarily be upon to the proponent of the retroactive statute to prove that the "State, in justification, [has] a significant and legitimate public purpose behind the regulation." *United States Fidelity*, 453 So. 2d at 1361.

The Third District found that the record before it was "devoid of any explanation of the problem" giving rise to the retroactivity amendment. Cohn incorrectly asserts that "it was the appellees' burden to clearly prove that the

Statute was enacted for no legitimate purpose".[9] Init. Brf. 44. To the contrary, Contract Clause analysis requires the party challenging the statute only to demonstrate substantial impairment. Thereafter, if legislative impairment is successfully shown, the burden of justifying such impairment shifts to the proponent of the suspect statute, who must explicate the nature and scope of the "evil" giving rise to the retroactive legislation and then demonstrate that the balance of interests favors upholding the legislation. *United States Fidelity.*, 453 So. 2d at 1360.[10]

Because Cohn has placed herself in the position of defending the statute, the burden naturally falls upon her to demonstrate the existence and adequacy of the public purpose behind it. Depending upon the *opponent* of legislation to justify its purpose, as Cohn urges, diminishes the adversary process necessary to reach a sensible and just evaluation of the statute. The opponent can hardly be expected to advocate vigorously in favor of a statute that he or she hopes to defeat. Nor can

[9] Cohn arrives at that conclusion by syllogistic reasoning: (1) the Legislature is presumed to enact legislation for a legitimate purpose; (2) the Legislature enacted the amended section 718.404(2); (3) therefore, amended section 718.404(2) must have a legitimate purpose. Init. Brf. 44. The flaw here is that, once a statute is found substantially to impair contracts, it is presumed to be unconstitutional, thus shifting the burden to the proponent of the legislation to justify its purpose.

[10] *See, e.g., Olson v. Cory,* 336 P.2d 532, 539 (Cal. 1980) ("Defendants, offering no reason or justification for the state action, fail even to approach their burden of demonstrating the impairment of plaintiffs' rights is warranted by an "emergency" serving to protect a 'basic interest of society.'"); *White Motor Corp. v. Malone*, 599 F.2d 283, 288 (8th Cir. 1979) ("if a State undertakes to alter substantially the terms of a contract, it must justify the alteration, and the burden that is on the State varies directly with the substantiality of the alteration").; *Andrews v. Anne Arundel County,* 931 F. Supp. 1255, 1266 (D. Md. 1996) ("the County has failed to make a sufficient showing that the means which it has adopted to address its "problem" is the least drastic available").

the opponent fairly be compelled to prove that the statute has no purpose whatsoever in order to overcome a presumption of legitimacy. As observed by the Pennsylvania Supreme Court when addressing the shifting burden in a challenge to confiscatory zoning:

> However, requiring an applicant for a building permit to establish[ ] by affirmative evidence the nonexistence of a proper zoning purpose in the total prohibition of an otherwise legitimate business activity would be to place upon him an unrealistic and insurmountable burden. It is always difficult to prove a negative — to require a party to prove a negative such as the nonexistence of a proper zoning purpose is to raise difficulty to virtual impossibility.

Beaver Gasoline Co. v. Zoning Hearing Bd., 285 A.2d 501, 504 (Pa. 1971). Having established that section 718.404(2) causes substantial impairment to the PH Unit Owners' contractual rights, the PH Unit Owners' are not now required to justify the impairment. The burden necessarily shifts to Cohn to defend the statute impairment is warranted by the evil it seeks to curtail.

3. Absence of Record Basis to Justify Impairment.

As recognized by the Third District, Cohn has failed to carry her burden of establishing public purpose. Cohn must demonstrate that "the law was enacted to deal with a broad, generalized economic or social problem". *Pomponio*, 378 So. 2d at 779. The record does not contain the legislative history that culminated in the 2007 amendment of section 718.404(2) that makes the statute retroactive. There is no pronouncement of the "public purpose" of the amendment, much less a basis for concluding that such public purpose is "significant and legitimate".

United States Fidelity, 453 So. 2d at 1361. Moreover, nothing in the record suggests the nature of the "evil" that the amendment sought to address. While Cohn refers vaguely to the power of the Legislature to correct "social abuses", Init. Brf. 34, evidence of any particular abuse is lacking in this record.

There is, for example, no showing that mixed-use condominiums created prior to 1995 (when section 718.404(2) was first enacted) have experienced widespread trampling upon the interests of residential unit owners by non-residentially controlled boards of directors.[11] In fact, there is no showing how many such condominiums were created before 1995. There is no showing that the particular voting scheme for The Grand (balancing three categories of ownership: residential, commercial and retail) has manifested any particular "evil" that would justify retroactive correction, nor any showing that The Grand's particular mix, embodying a luxury hotel, is either recurring among Florida mixed-use condominiums or especially problematic for residential co-owners. In fact there is

[11] She takes for granted that commercial control over a residential minority is abusive, drawing on the imagination, rather than record evidence, for support.

> Finally, it is not a stretch of the imagination for one to believe that the Legislature, in its wisdom and in order to protect the millions of Floridians who make condominiums their primary homes, twenty-four hours a day, seven days a week, 365 days a year, thought best that residential unit owners govern the majority of the board of directors instead of the board being dominated by the owners of the on-site grocery store or hair salon that occupy the properties solely as an income stream and only during normal business hours.

Init. Brf. 42.

no record evidence of even the existence of another condominium having a mix of uses similar to that of The Grand.[12]

4. Balancing of Interests.

Absent a statement of the public purpose and the nature of the evil being remedied, it is impossible to conduct the necessary balancing of interests called for in *Pomponio*. One cannot, of course, infer significant and legitimate purpose from the mere passage of an act. Therefore, there is no basis upon which the Court can proceed to the final step in the *Pomponio* analysis, determining "whether [section 718.404(2)] unreasonably intrudes into the parties' bargain to a degree greater than is necessary to achieve that objective". *Pomponio*, 378 So. 2d at 780; *see, e.g., Cloverdale Equipment Co. v. Manitowoc Engineering Co.*, 964 F. Supp. 1152, 1165 (E.D. Mi. 1997) ("Since this court has found no significant and legitimate public purpose, there is no need to decide if the MFUE Act's just cause provision is reasonably related to the legislature's purpose.").

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[12] Cohn tries to plug the gap in the record by pointing to The Grand itself as being proof that there is a problem that is "not illusory", but still fails to define the nature or scope of that problem:

> The fact that there are condominiums in this state where the number of residential unit owners outnumber the commercial unit owners, the boards of directors of which are dominated by the minority commercial owners is not illusory. The issue actually exists, as evidenced by the case sub judice.

Init. Brf. 40-41. Her own example alone hardly fulfills Cohn's requirement of demonstrating the existence of "a broad, generalized economic or social problem". *Pomponio*, 378 So. 2d at 779.

Accordingly, even if the vested nature of the voting rights impaired by the amended section 718.404(2) did not obviate *ab initio* the need to conduct the *Pomponio* balancing process, the failure of Cohn to carry her burden of demonstrating a "significant and legitimate" public purpose for the statute would result in the balance's tipping solidly against the amendment as an unconstitutional impairment of contract. Thus, regardless of the reasons for finding unconstitutionality set forth in the trial court's ruling, the trial court could have done nothing else on the basis of the insufficient record before it. This was recognized by the Third District when it noted that the record before is "devoid of any explanation of the problem" that would justify the impairment resulting from a retroactive section 718.404(2).

CONCLUSION

For the reasons set forth above and in the answer brief of the Association, the Third District's ruling that section 718.404(2), as applied to The Grand, effects an unconstitutional impairment of the unit owners' existing rights should be affirmed.

Respectfully submitted,

H. Hugh McConnell, FBN: 216828
Siegfried, Rivera, Lerner, De La Torre
& Sobel, P.A.
Attorneys for Appellees
PH Hotel, Inc. and PH Retail, Inc.
201 Alhambra Circle, Suite 1102
Coral Gables, Florida 33134
Tel.: (305) 442-3334; Fax.: (305) 443-3294

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was forwarded by U.S. Mail, postage prepaid, this _____ day of June, 2010, to: Eric M. Glazer, Esq. GLAZER & ASSOCIATES, P.A., counsel for appellant, One Emerald Plaza, 3113 Stirling Road, Suite 201, Hollywood, FL 33312; Daniel S. Rosenbaum, Esq., Joseph W. Janssen, III, Esq., and Richard Valuntas, Esq., ROSENBAUM MOLLENGARDEN JANSSEN & SIRACUSA, PLLLC., counsel for appellee, The Grand Condominium Association, Inc 250 Australian Ave. S., Suite 500, West Palm Beach, FL 33401.

_____

H. Hugh McConnell

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman 14-point font.

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H. Hugh McConnell