SUPREME COURT OF FLORIDA

CASE NO.: SC10-430

SUSAN COHN, an individual,

Appellant/Defendant/Counter-Plaintiff,

vs.

THE GRAND CONDOMINIUM ASSOCIATION, INC., a Florida non-profit corporation,

Appellee/Plaintiff/Counter-Defendant

LOWER TRIBUNAL CASE NOS.:
3D08-3051
07-44460

APPELLANT'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE FACTS AND THE CASE

The Grand Condominium (the "Condominium")[1] was created in 1986. The Condominium consists of 1,211 separate units, 810 of which are residential units (owned individually), 141 retail units (owned by the appellee PH Retail, Inc.), 259 commercial units (owned by the appellee PH Hotel, Inc.), and one (1) parking unit (See App. "1"). The appellant, Susan Cohn ("Cohn") owns two (2) residential units (that comprise one (1) apartment) within the Condominium. The commercial units are a DoubleTree Hotel and the retail units are shops and office space on the first two (2) floors of the Condominium (See App. "1" at § 36). Pursuant to § 718.111 Fla. Stat., as well as its Declaration of Condominium (the "Declaration"), the appellee, The Grand Condominium Association, Inc. ("The Grand"), is the corporate entity responsible for managing the affairs of the Condominium (See App. "1").

The underlying dispute relates to how members of The Grand's board of directors are elected. According to The Grand's by-laws and articles of incorporation, the board of administration is to consist of seven (7) members. Two (2) members are elected by the residential unit owners, two (2) are elected by the appellee, PH Retail, Inc., as the owner of the retail units, two (2) are elected by the appellee, PH Hotel, Inc., as the owner of the commercial units, and the seventh

[1] Formerly known as the Venetia Condominium

director is elected by the Condominium's entire membership. In sum, the 810 residential unit owners only participate in electing three (3) of The Grand's seven (7) directors, while the appellees, PH Hotel, Inc. and PH Retail, Inc. (collectively the "Controlling Entities") who together only own 400 units, participate in electing five (5) of The Grand's seven (7) directors (See App. "2" and "3")

In 1995, the Legislature enacted § 718.404 (2) Fla. Stat., which provided:

> "Subject to s. 718.301, where the number of residential units in the condominium equals or exceeds 50 percent of the total units operated by the association, owners of the residential units shall be entitled to vote for a majority of the seats on the board of administration."

Originally, The Grand contended that it did not have to comply with the provisions of § 718.404(2) Fla. Stat. (1995) insomuch as the statute was enacted after the Condominium was created in 1986. It was The Grand's position that statutes can only apply prospectively unless the Legislature expresses a retorative application. On July 1, 2007 the Legislature did just that however, and amended § 718.404(2) Fla. Stat. (2007) to now include the following sentence:

> "**This subsection shall apply retroactively as a remedial measure.**"

Faced with the fact that the Legislature expressed its intention that § 718.404(2) Fla. Stat. (2007) (the "Statute") apply retroactively, The Grand now complains that the retroactive application of the Statute constitutes an

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impermissible impairment of the obligation of contracts pursuant to the contracts clauses of both the State and federal constitutions (See App. "4"). The Grand raises this argument even though it is clear that that the provisions of the Statute do not impact The Grand at all. The amendment to the Statute does not take away or give any new rights to The Grand, nor does it impose any new obligations on The Grand. The Statute simply affects The Grand in a procedural manner regarding how it will count votes cast by unit owners when its directors are elected.

When Cohn inquired as to whether The Grand intended on complying with the Statute, The Grand responded by filing an action for declaratory relief in the trial court to declare the Statute unconstitutional (See App. "4"). Insomuch as the Statute has no direct impact on The Grand, Cohn moved to dismiss The Grand's case (See App. "5"), which was denied (See App. "6"). Cohn file a Counterclaim to seek an injunction to force The Grand to comply with the Statute (See App. "7"), and shortly thereafter The Grand filed a motion for summary judgment (See App. "8"), as did Cohn (See App. "9").

The trial court granted The Grand's motion for summary judgment (See App. "10") and stated that its reason for doing so was, "[h]ere, the 2007 amendment applying retroactivity to Fla. Stat. § 718.404, arguably, may not be unconstitutional as to all mixed-use condominium agreements. However, in a situation such as here where for **21 years** the parties proceeded under existing Articles of Incorporation

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that applies equal voting rights to all owners, the retroactivity is deemed unconstitutional." (No emphasis added).

Cohn primarily disagreed with two (2) aspects of the trial court's decision. First, the trial court was incorrect in stating that The Grand's by-laws and articles of incorporation apply equal voting rights. They **do not** (See App. "1," "2," and "3"). The 810 residential unit owners only vote for three (3) of the seven (7) members of The Grand's board of directors, while the Controlling Entities, which only own 400 units, vote for five (5) of the seven (7) members. There is nothing equal about that.

Moreover, the trial court apparently applied a twenty-one (21) year rule to the Statute to determine its constitutionality, which Cohn believed was erroneous and an insufficient basis to declare the Statute unconstitutional. (See App. "10") Accordingly, Cohn appealed the trial court's order to the Third District Court of Appeal.

On February 5, 2010, the Third District Court of Appeals issued a Corrected Opinion (See App. "11"), which affirmed the trial court's declaration, but failed to adopt its reasoning. Instead, the Third District Court of Appeals based its conclusion that the Statute is unconstitutional on the three (3) prong test established by this Honorable Court in *Pomponio v. Claridge of Pompano Condo., Inc.*, 378 So.2d 774 (Fla. 1979).

In order to declare a statute unconstitutional under the *Pomponio* test, the court must first hold that there was a substantial impairment in the parties' contract. If the impairment is not substantial the inquiry ends and the retroactive application of the statute is constitutional. If, however, the court finds that the impairment is substantial, in order to declare the retroactivity of the statute unconstitutional the court must conclude that (a) the law was not enacted to deal with a broad, generalized economic or social problem; (b) the law does not operate in an area which was already subject to state regulation at the time the parties' contract was made; and (c) the law creates a severe, permanent and immediate change to the contractual relationship that cannot be outweighed by the State's authority and need to enact the legislation.

The Third District Court of Appeals concluded that the Statute fails to pass the *Pomponio* test, and therefore, declared it unconstitutional (See App. "11"). For the reasons set forth below, Cohn disagrees with the conclusion reached by the Third District Court of Appeals, and believes that the retroactive application of the Statute passes muster under the *Pomponio* test. Moreover, due to the uniqueness of the role that the Legislature plays regarding the affairs of condominiums in Florida, the Statute is constitutional even if it does not pass the *Pomponio* test. As such, it is Cohn's position that the Statute is constitutional.

SUMMARY OF THE ARGUMENT

A legislative enactment comes to the reviewing court with a presumption of constitutionality and should be construed in a manner resulting in a constitutional outcome. The appellees claim that they do not know why the Statute was enacted, and therefore, it fails to pass the *Pomponio* test. Their lack of knowledge (or even that of the Third District Court of Appeals') regarding why the Statute was amended cannot form the proper basis for declaring it unconstitutional. The burden of definitively proving that a statute is unconstitutional lies squarely on the shoulders of the party challenging it. This, combined with: (a) the appellees failed to demonstrate that the Statute is unconstitutional; and (b) it is presumed that legislation is enacted for a reason, prohibited the Third District Court of Appeals from declaring the Statute unconstitutional.

The judicial branch of this State gives deference to the legislative branch by avoiding determinations regarding the constitutionality of enactments based on non-constitutional issues. The appellees claim that their contractual rights must be free of legislative impairment pursuant to the contracts clauses of the State and federal constitutions. Meanwhile, the terms of the very contract at issue in this case (the Declaration) not only contemplate such impairment, but set forth how such impairment will affect the remaining provisions of the Declaration. In that the Declaration itself contemplates and addresses legislative impairment, the appellees

cannot claim that the Declaration must remain free of such impairment. Therefore, the question regarding the Statute's constitutionality need not even be addressed.

Moreover, as creatures of statute, condominiums are subject to the Legislature's regulation and control. The rights and obligations associated with condominiums do not emanate from the organic law, but are instead conferred upon associations and unit owners alike by the Legislature. As such, the Legislature is within its power to enact laws that relate to the governance of condominiums without concern that such laws will impair existing declarations of condominium, or the rights that associations or unit owners had pursuant to a declaration of condominium.

After all, the operation of condominiums affects the public interest and bears a substantial relation to the public health, safety, morals and general welfare of the State's citizenry. As such, and pursuant to its broad police powers, the Legislature is authorized to impose reasonable regulations on condominiums without concerns that doing so will affect the rights of condominium associations and unit owners, which rights are (a) creatures of statute; and (b) subject to the Legislature's regulation and control.

The Grand and the Controlling Entities argue that the retroactive application of the Statute is unconstitutional. However, in *United Grand Owners, Inc. v. The Grand Condominium Ass'n, Inc.*, 929 So.2d 24 (Fla. 3d DCA 2006), The Grand

demanded that § 718.404 Fla. Stat. (1995) be applied to the Condominium and successfully convinced the Third District Court of Appeals that it is a "mixed-use" condominium pursuant to § 718.404 Fla. Stat. (1995), and therefore, was not required to comply with the pre-suit arbitration requirements of § 718.1255 Fla. Stat. The appellees raised this argument despite the fact that the statute was enacted nine (9) years after The Grand was created. Those who control The Grand want to be permitted to simply pick and choose between pre-existing and newly enacted statutes to determine how The Grand will be governed, so the association can be positioned in a posture of essential lawlessness for the sole purpose of benefiting those who control The Grand. This position is clearly untenable.

Despite the Third District Court of Appeals' ruling, *Pomponio* is not the leading case in Florida regarding the governance of condominiums. To the contrary, *Woodside v Jahren*, 806 So.2d 452 (Fla. 2002), *Hidden Harbour Estates, Inc. v. Norman*, 309 So.2d 180 (Fla. 4th DCA 1975) and *Seagate Condominium Association, Inc. v. Duffy*, 330 So.2d 484 (Fla. 4th DCA 1976) are the leading cases in Florida regarding the governance of condominiums. *Woodside* dealt with the elimination of rights set forth in a declaration of condominium promulgated by the condominium's unit owners via the amendment provisions set forth in that declaration. Most of the issues presented in *Woodside* are applicable to the instant action and support the Statute's constitutionality. Likewise, *Hidden Harbour*

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establishes that condominium unit owners must give up certain freedoms in order to promote the health, happiness and peace of mind of the majority of unit owners. This ruling goes to the very heart of the amended statute at issue before this Honorable Court, which was enacted to promote and protect the majority of condominiums' unit owners. Meanwhile, *Pomponio* has absolutely nothing to do with the governance of condominiums. While *Pomponio* does deal with a condominium association, the contract at issue in that action is between an association and a lessor, and does not deal with a declaration of condominium and the relationship between an association and its members. It is that latter relationship, not the former, that is subject to the State's regulation and control and its fair exercise of the police powers.

Moreover, the Statute passes the *Pomponio* test even if that decision is the standard by which its constitutionality is measured. It is incontrovertible that the Controlling Entities are still able to elect members to The Grand's board of directors, still get to vote their units on issues requiring unit owner vote, and are still owed the same fiduciary duty by The Grand's directors, regardless of who elects them. And most notably, regardless of how the board of administration is elected, under no circumstances can the Controlling Entities' businesses be adversely affected. As such, the Statute's impairment of the Declaration, as it relates to the Controlling Entities, is minimal. Therefore, this Honorable Court

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need not even address the remaining portions of the *Pomponio* test in determining the Statute's constitutionality. Additionally, and given the Declaration's own terms regarding legislative impairment, the Controlling Entities' "rights" were not vested, but instead based on a mere expectation that the law allowing them to elect a majority of the members to the board of directors would remain permanently unchanged. Therefore, their rights were not vested and clearly subject to change.

If a condominium is not subject to legislative regulation and control, and is instead forevermore governed only by those set of statutes that were in effect when the condominium was created, the corollary is an extremely absurd result. Virtually every condominium in this State would be governed not only by a different declaration of condominium, but a different set of laws as well. It cannot be the policy of this State that when the Legislature determines that laws need to be passed in order to protect those who live in condominiums that such laws will only inure to the benefit of future citizens who will one day reside in condominiums that have not even been created yet, and will simply ignore the millions of families living in condominiums that already exist. By far, that is the most untenable position of all.

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ARGUMENT

A. Standard of Review

Determinations concerning the constitutionality of statutes are pure questions of law subject to the de novo standard of review. See *City of Miami v McGrath*, 824 So.2d 143, 146 (Fla. 2002)

B. Presumption of Constitutionality

Upon review, a legislative enactment comes to the reviewing court with a presumption of constitutionality, and the reviewing court should, if possible, construe a statute in a manner resulting in a constitutional outcome. See *Fla. Dep't of Revenue v. City of Gainesville*, 918 So.2d 250, 256 (Fla. 2005) The extremely heavy burden of proving that a statute is unconstitutional, and thereby overcoming that presumption, lies squarely on the shoulders of the statute's challenger. See *Chicago Title Ins. Co. v. Butler*, 770 So.2d 1210, 1214 (Fla. 2000)

The appellees contend that the Statute is unconstitutional because they do not know why it was enacted. More specifically, the appellees claim that because the Legislature did not state what broad social or economic problem existed that the Statute was designed to remedy, the Statute fails to pass the first prong of the *Pomponio* test. It is with this issue that there is a clear distinction between the legislation addressed by the *Pomponio* Court and that which forms the subject of this cause. In *Pomponio* there was an express finding that the evils the legislation

was designed to remedy were largely illusory. In addressing the issue, this Honorable Court stated:

> "… the litigants have suggested that the legislature's concern was the protection of unit owners from the lessor's foreclosure for non-payment of rent during the pendency of the litigation. To this assertion we have two answers. There is to our knowledge neither a documented threat of massive condominium foreclosures in Florida nor any documentation of the underlying premise that unit owners would withhold rents from landlords pending litigation with them." *Id.* at 781

In the case sub judice, The Third District Court of Appeals stated in its Corrected Opinion that the record in the case is completely devoid of any explanation as to why the Statute was amended. As such, it declared the Statute unconstitutional. A challenger's, or even a reviewing court's, lack of knowledge as to why a statute was enacted cannot form the grounds for declaring it unconstitutional. As this Honorable Court stated in *Hamilton v State*, 366 So.2d 8, 10 (Fla. 1978), "[t]he Legislature has a great deal of discretion in determining what measures are necessary for the public's protection, and this Court will not, and may not, substitute its judgment for that of the Legislature…."

Moreover, in determining the legislative intent of a statute, the courts must primarily look to the language of the statute. See *Deason v. Florida Dept. of Corrections*, 705 So.2d 1374 (Fla. 1998) Here, the Legislature's intent is established by the Statute's own terms. The Statute was clearly amended to apply

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retroactively as a remedial measure. The courts of this state are required to presume that the Legislature enacts a law for a purpose. See *Pezzi v Brown*, 697 So.2d 883 (Fla. 4th DCA 1997) It should never be presumed that the Legislature intended to enact purposeless, and therefore useless, legislation. See *Sharer v. Hotel Corp. of America*, 144 So.2d 813, 817 (Fla. 1962) Inasmuch as it must be presumed that the Legislature had a purpose in enacting the Statute, it was the appellees' burden to clearly prove that the Statute was enacted for no reason, and therefore unconstitutional. Without question, the appellees failed to do so at every stage of this litigation.

Finally, it is not a stretch of the imagination for one to believe that the Legislature, realizing that millions of Floridians live in condominiums as their primary homes twenty-four hours a day, perhaps thought best that the board of directors of associations should be controlled by those residential unit owners, rather than dominated by the owner of the on-site grocery store or hair salon that occupy the properties solely as an income stream and only during normal business hours.

For these reasons, the Statute is constitutional.

C. The Constitutionality of the Statute Need Not Be Questioned.

It is the policy in Florida that courts should not pass upon the constitutionality of statutes if the case in which the question arises may be

effectively disposed of on other grounds. See *B.C. v. Fla. Dep't of Children & Families*, 887 So.2d 1046, 1055 (Fla. 2004) (quoting *Singletary v. State*, 322 So.2d 551, 552 (Fla. 1975)) In the case sub judice, the appellees claim that the Declaration must be free from legislative impairment based upon the contracts clauses of the State and federal constitutions. Meanwhile, the very contract at issue in this case (the Declaration) not only contemplates impairment with respect to The Grand's governing documents and amendments to the Condominium Act, but addresses how such changes will affect the remaining provisions of the Declaration (See App. "1" at § 39.1)

In *Century Village, Inc. v. Wellington, E, F, K, L, H, J, M and G, Condominium Association,* 361 So.2d 128 (Fla. 1978) this Honorable Court was faced with a somewhat similar situation to that which is presented in the instant action. More specifically, this Honorable Court was asked whether § 711.63(4) Fla. Stat. (1974) could be applied retroactively to a condominium association (although such legislation did not relate to the governance of condominiums as does the legislation that forms the subject of this cause). This Honorable Court held that insomuch as the subject declaration of condominium defined the "Condominium Act" as "… the condominium act of the State of Florida (Florida Statute 711, et seq.) As the same may be amended from time to time," that the condominium

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association knew changes to the law would affect the declaration of condominium. *Id.* at 133

The same situation exists in this case. The Declaration, at § 39.1, not only contemplates its provisions being declared invalid, such as the effect the Statute has on the provisions regarding how directors are elected, but addresses how such changes will impact the remaining portions of the Declaration. Therefore, the Controlling Entities cannot contend that they had a "vested right" to elect a majority of the members to The Grand's board of directors. The Declaration clearly put the Controlling Entities on notice before they acquired a single unit in the Condominium that the provisions of the Declaration could be declared invalid at any time.

To be vested, a right must be more than a mere expectation based on an anticipation of the continuance of an existing law; it must have become a title, legal or equitable, to the present or future enforcement of a demand. See *Florida Hosp. Waterman, Inc. v. Buster*, 984 So.2d 478 (Fla. 2008) (quoting *Division of Workers' Compensation v. Brevada*, 420 So.2d 887, 891 (Fla. 1st DCA 1982) (internal citations omitted) In the instant action, and given the provisions of the Declaration, together with the State's inherent police powers and the fact that condominiums are creatures of statute, the Controlling Entities' only reliance on their right to elect a majority of the members to The Grand's board of directors was

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an anticipation that the Condominium Act would not change. As such, their "rights" in this regard were not vested. In order for a right to be vested, it must be a 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. See *R.A.M. of South Florida, Inc. v WCI Communities, Inc.*, 869 So.2d 1210, 1218 (Fla. 2nd DCA 2004) (quoting *City of Sanford v. McClelland*, 121 Fla. 253, 163 So. 513, 514-15 (1935)) (internal citations omitted) Again, based upon the provisions of the Declaration, together with the State's inherent police powers and the fact that condominiums are creatures of statute, the Controlling Entities had no fixed right to forever control The Grand by electing a majority of the members to its board of directors. As such, the Statute has not impaired any vested rights and the dispute between the parties can be resolved on this basis alone. Therefore, there is no need to address the constitutionality of the Statute, and the Corrected Opinion should be quashed.

D. The Appellees Cannot Have It Both Ways

Condominiums and their associations are strictly creatures of statute, and in 1986 when the Condominium was created, the legislature only recognized two (2) forms of condominiums: residential and commercial. Pursuant to § 718.103 Fla. Stat. (1985), any condominium with four (4) or more residential units was deemed a residential condominium, even if it had both residential and commercial units. As

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such, the Condominium has always been a residential condominium even though it has both residential and commercial units, if the argument espoused by the appellees can be considered valid, that statutes can only apply prospectively.

In 1995, nine (9) years after the Condominium was created, the Legislature enacted § 718.404 Fla. Stat. (1995), which defined condominiums with both residential and commercial units as "mixed-use" condominiums, and imposed various restrictions and obligations on them. The Grand takes the position that it is not a residential condominium, as defined by § 718.103 Fla. Stat. (1985), but is instead a mixed-use condominium pursuant § 718.404 Fla. Stat. (1995) (See App. "4"). Even though the statute was enacted nine (9) years after The Grand was created, it never argued that the retroactive application of its provisions was unconstitutional. On the contrary, The Grand relied upon this statute in order to avoid the requirements imposed on residential condominiums that are not imposed on mixed-use condominiums. By way of example, The Grand contends that it is not required to comply with the pre-suit arbitration requirements imposed on residential condominiums, as set forth in § 718.1255 Fla. Stat. Indeed, in *United Grand Owners, Inc. v. The Grand Condominium Ass'n, Inc.*, 929 So.2d 24 (Fla. 3d DCA 2006), The Grand successfully convinced the Third District Court of Appeals that it is a mixed-use condominium, and therefore, not required to comply with the

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pre-suit arbitration requirements of § 718.1255 Fla. Stat. Again, this is despite the fact that the statute was enacted nine (9) years after The Grand was created.

While taking the position that it is a mixed-use, rather than a residential condominium on one hand, on the other hand The Grand contends that it is not required to comply with any of the obligations associated with mixed-use condominiums (See App. "4"). What is worse is that The Grand also contends, quite duplicitously, that it does not have to comply with the requirements imposed on residential condominiums either (See *United Grand* supra.). Historically, The Grand has picked and chosen, quite conveniently, which provisions of the Condominium Act it wants to comply with and those it does not.

Quite simply, The Grand has consistently wanted to have it both ways. Those who control The Grand have utilized and enjoyed the protections of being a residential condominium (such as not having to comply with § 718.404(2) Fla. Stat. (2007)) when doing so best serves their interests (See App. "4"). And at the same time, those who control The Grand have utilized and enjoyed the protections of being a mixed-use condominium (such as not having to comply with § 718.1255 Fla. Stat.) when doing so best serves their interests. (See *United Grand* supra). It is Cohn's position that The Grand cannot position itself in a place of lawlessness so it can simply pick and choose those provisions of the Condominium Act it is willing to be controlled by, and those it wishes to simply ignore.

E. Regulation of Condominiums

In 2002, this Honorable Court decided the landmark case of *Woodside v Jahren*, 806 So.2d 452 (Fla. 2002). In *Woodside*, unit owners who had the contractual right, pursuant to their declaration of condominium, to lease their units freely when they bought them were basically stripped of that ability when the declaration of condominium was amended to restrict leasing to nine months in any twelve month period. The trial court and the Second District Court of Appeals invalidated the amendments and held that, *inter alia*, the amendments could not be applied retroactively to unit owners who purchased their units when the right to freely lease previously existed. This Honorable Court disagreed and held that the existing right to lease could be stripped away even from a unit owner who had been leasing his unit for eighteen (18) years, through an amendment to the declaration of condominium.

In reaching the decision, this Honorable Court analyzed virtually every meaningful case decided in this state that related to condominiums, as well as some insightful cases decided in other jurisdictions. While *Woodside* pertained to the amendment of a declaration of condominium by unit owners through the amendment process prescribed by their declaration, principles espoused in *Woodside* and the cases discussed therein are applicable to the case sub judice and support the Statute's constitutionality.

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First, this Honorable Court discussed *Hidden Harbour Estates, Inc. v. Norman*, 309 So.2d 180 (Fla. 4th DCA 1975) to explain the restrictive nature of condominium ownership and living. The *Hidden Harbour* Court elucidated that "inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind **of the majority of unit owners** … each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization." (Emphasis added) *Id.* at 181-82.

In the case sub judice, the Controlling Entities who comprise less than one-third of all units must give up their ability to dominate and control the board of directors in order that the health, safety, morals and general welfare of the two-thirds residential unit owner majority are promoted.

Next, this Honorable Court discussed *Aquarian Foundation, Inc. v. Sholom House, Inc.*, 448 So.2d 1166 (Fla. 3d DCA 1984), which established that "…increased controls and limitations upon the rights of unit owners to transfer their property are necessary concomitants of condominium living." *Id.* at 1167 The *Aquarian* Court further held that, "…restrictions on a unit owner's right to transfer his property are recognized as valid means of insuring the association's ability to

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control the composition of the condominium as a whole." *Id.* at 1167 Virtually the same position was taken by the Fourth District Court of Appeals in *Seagate Condominium Association, Inc. v. Duffy*, 330 So.2d 484, 486 (Fla. 4th DCA 1976), which acknowledged not only the uniqueness of the problems of condominium living, but the resulting need for a greater degree of control over and limitation upon the rights of individual owners.

This Honorable Court looked outside the State of Florida for guidance as well. First, this Honorable Court cited to the Illinois case of *Crest Builders, Inc. v. Willow Falls Improvement Association* (1979), 74 Ill.App.3d 420, 30 Ill. Dec. 452, 393 N.E.2d 107 for the proposition that condominium unit owners do not have vested rights in the status quo ante, and that unit owners have no vested interest in the declaration as originally written.

Secondly, this Honorable Court agreed with the holding in *Apple II Condominium Ass'n*, 213 Ill. Dec. 463, 659 N.E.2d at 97 for the proposition that the right to amend a declaration of condominium is not limited beyond those limitations imposed by the Legislature, and that if it were, the courts would "…be faced with the difficult task of deciding what subjects could be addressed by the amendment process, **a task much better suited for the Legislature**…." (Emphasis added) *Woodside*, 806 So.2d 452, 460

Next, the *Woodside* Court addressed the question of how far a majority, or even a supremajority of unit owners could go in amending a declaration in order to impair previously existing property rights. While the Court acknowledged that such concerns were not without merit, it was "…constrained to the view that **[such questions] are better addressed by the Legislature.**" *Id.* at 464 (Emphasis added)

While each of these issues related to amendments to a declaration of condominium promulgated by a condominium's membership, they have an important bearing on the instant action. More specifically, *Hidden Harbour* establishes that unit owners must give up rights in order to promote the welfare of **the majority** of unit owners, which is completely consistent with the natural intent of § 718.404(2) Fla. Stat. (2007). The *Aquarian* Court acknowledged that increased controls are required in condominiums so that an association can manage the composition of the condominium. While the appellees argue that their vested rights cannot be impaired, as set forth in *Crest Builders*, which was supported by this Honorable Court via *Woodside*, condominium unit owners do not have a vested interest in the status quo ante or their declaration, as originally written. If a majority of a condominium's membership has the ability to impair vested contractual rights simply because they want to, the Legislature surely has that same authority in order to protect the millions of condominium unit owners in Florida.

Based upon the decision in *Apple II*, this Honorable Court acknowledged that questions regarding what can and cannot be amended in a declaration is best left to the Legislature. In the case at bar, the Legislature answered that question by amending the Statute to apply retroactively as a remedial measure, with the understanding that doing so would necessarily impair existing contracts.

Lastly, now Chief Justice Quince specially concurred with the *Woodside* majority and wrote to "…urge the Legislature to seriously consider placing some restrictions on present and/or future condominium owners' ability to alter the rights of existing condominium unit owners." *Id.* at 465 The Legislature heeded Chief Justice Quince's behest and amended § 718.110(13) Fla. Stat. to hold that any amendment to a declaration of condominium that restricts leasing is only applicable to those unit owners who consent to it, or who purchase their units after the amendment is recorded. Prior to the enactment of that statute, and as espoused in *Woodside*, unit owners had the right to freely amend their declarations pursuant to the contracts' terms, including the right to completely prohibit the leasing of units, and said amendments would be applicable to all owners. When that statute was amended, however, at this very court's request, the contractual rights of every condominium unit owner in this state were retroactively impaired as each unit owner no longer has the right to freely amend their contractual declarations to restrict leasing in their community to include all current owners. And the reason

they no longer have that right, despite their previously existing contractual rights, is that condominiums are creatures of statute and are at all times subject to the Legislature's regulation and control. That statute, as requested by this Honorable Court, is constitutional for the very same reason as the amendment to § 718.404(2) Fla. Stat. (2007) is constitutional in the case sub judice. Surely, Chief Justice Quince's plea to the Legislature was not intended to apply only to those citizens who will live in condominiums yet to be created, but to protect the millions of families living in existing condominiums as well.

F. CONDOMINIUMS ARE SUBJECT TO THE LEGISLATURE'S REGULATION AND CONTROL

It is well settled law in Florida that condominiums are creatures of statute. See *Woodside at* 455. The contractual and property rights associated with the condominium form of ownership do not emanate from the organic law, but instead are derived from the statutes that create them. In Florida, this form of property ownership has been expressly recognized by the Legislature and is subject to its regulation and control. See *Rogers & Ford Construction Corp. v. Carlandia Corp.*, 626 So.2d 1350, 1352 (Fla. 1993); see also *Turnberry Court Corp. v. Bellini,* 962 So.2d 1006, 1008 (Fla. 3rd DCA 2007)

The operation of condominiums affects the public interest and bears a substantial relation to the public health, safety, morals and general welfare. As

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such, and pursuant to its broad police powers, the Legislature is authorized to impose reasonable regulations on condominiums. And whether a business demands regulation under the police power is primarily for the Legislature to determine, and unless it is determined to be palpably wrong, it will not be disturbed. See *Florida Dry Cleaning and Laundry Board v. Everglades Laundry, Inc.*, 188 So. 380, 381 (Fla. 1939) When the Legislature imposes such regulations, as it did in amending, *inter* alia, § 718.110(13) Fla. Stat., declarations of condominium are naturally affected. While the contracts clauses of the State and federal constitutions prohibit the Legislature from enacting laws that impair the obligation of contracts, the contracts clauses do not have the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community. See *Atlantic Coast Line Railroad Company v. City of Goldsboro, North Carolina*, 232 U.S. 548, 558 (1914) All property rights are held subject to the fair exercise of the State's inherent police powers. *Id.* see also *Golden v. McCarty*, 337 So.2d 388, 390 (Fla. 1976)

The exercise of the police power, from its very nature, clashes with the full enjoyment of property by an owner, and it is only because the welfare of the whole people so far outweighs the importance of the individual that such interference with constitutional grantees can be justified. See *Town of Bay Harbor Islands v.*

Schlapik, 57 So.2d 855, 857 (Fla. 1952) The crux of the appellees' claim has been that their individual rights somehow outweigh the importance of the millions of families residing in condominiums of this State, and that as such, the Statute cannot be applied to them. Through their interpretation of the contracts clauses of the State and federal constitutions, the appellees necessarily contend that the Legislature is powerless to correct social abuses because of constitutional barriers. This interpretation is devoid of basis for support and converts the instruments into hurdles and obstructions rather than a shield of defense. See *Florida Dry Cleaning* 188 So. 383

The appellees contend that the contracts clauses of the State and federal constitutions prohibited the Legislature from amending the Statute to apply retroactively insomuch as same impaired the contractual rights of the Controlling Entities. The appellees' interpretation of the contracts clauses is further misguided. In *Southern Utilities Co. v. City of Palatka*, 86 Fla. 583, 99 So. 236, 240 (Fla. 1924), which was affirmed by the United States Supreme Court in *Southern Utilities Co. v. City of Palatka*, 268 U.S. 232, 45 S.Ct. 488 (1925), this Honorable Court held that there is no absolute authority to contract as one chooses, as the guaranty of liberty does not withdraw the making of contracts from legislative supervision, or deny the government the power to provide legislative safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable

regulations and prohibitions imposed in the interest of the community (internal citations omitted).

It is simply the appellees' contention that the contracts clauses of the State and federal constitutions are absolute, which they clearly are not. As was poignantly stated in *Myers v. Irwin,* 2 S. & R. (Pa.) 367, 372 (1816), "Let us suppose, that in one of the states there is no law against gaming, cock-fighting, horse-racing, or public masquerades, and that companies should be formed for the purpose of carrying on these practices. And suppose, that the legislature of that state, being seriously convinced of the pernicious effect of these institutions, should venture to interdict them: will it be seriously contended, that the Constitution of the United States has been violated?" If the view espoused by the appellees is accepted, the State is simply powerless to do anything necessary to protect the citizenry based simply on the contracts clauses.

It is well settled law that the prohibition against impairing the obligations of contracts **is not** to be read literally, and its primary focus was on legislation that was designed to repudiate or adjust pre-existing debtor-creditor relationships that obligors were unable to satisfy. See *Keystone Bituminous Coal Association v. DeBenedictis*, 107 S.Ct. 1232, 480 U.S. 470, 502 (1986) (quoting *W.B. Worthen Co. v. Thomas*, 292 U.S. 426, 433 (1934)) As such, utilizing the contracts clauses

in the manner which is supported by the appellees actually distorts their intent all together.

It has long been held that all contracts are inherently subject to the paramount powers of the sovereign and the exercise of such power is never understood to involve their violation. See *McConville v. Ft. Pierce Bank & Trust Co.*, 135 So. 392, 395 (Fla. 1931) The police power is the exercise of the sovereign right of a state to enact laws for the protection of lives, health, morals, comfort and general welfare. A state's economic interests may justify the exercise of police powers for the promotion of the general welfare, notwithstanding interference with lawful callings or even contracts. See *State ex rel. Municipal Bond and Investment Co., Inc. v. Knott*, 114 Fla. 120, 123 (Fla. 1934) The legislative exercise of police powers cannot constitute the impairment of a contract, reasonably or unreasonably. See *Springer v. Colburn,*162 So.2d 513, 514 (Fla. 1964)

Insomuch as the contractual and property rights of the Controlling Entities were only conferred upon them by the Legislature through the Condominium Act, such rights are at all time subject to the State's inherent police powers. This has always been the intent of the Legislature, as set forth in § 718.102 Fla. Stat., which expressly states that **<u>all condominiums created and existing</u>** in this state are subject to the Condominium Act. To hold otherwise would necessarily establish that when the Legislature amends the Condominium Act, such amendments only

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apply to condominiums yet to be built, and are to be ignored by the millions of people living in existing condominiums. This notion is simply untenable. Therefore, the Statute is constitutional.

G. Pomponio is Distinguishable and Inapplicable to this Case

The Third District Court of Appeal simply erred in holding that *Pomponio* was the leading case involving regulation of condominium associations. Indeed, *Pomponio* had absolutely nothing to do with the statutory and contractual relationship by and between unit owners and their condominium association. On the contrary, that case governed the relationship between a condominium association and its landlord. It is the former relationship that is strictly governed in all respects by the Legislature and it is the former relationship that this Honorable Court has repeatedly held must be protected for the majority of unit owners in order to promote the public health, safety, morals and general welfare.

In *Pomponio*, this Honorable Court was faced with the question of whether an amendment to § 718.401 (4) Fla. Stat. (1977) was constitutional. The amended statute required rents due to a lessor pursuant to a recreational lease with a condominium association to be paid in to the Court Registry during litigation between the association and lessor, despite the provisions of the subject lease. The lessor in that action claimed that the statute prevented him from withdrawing amounts from the registry that were needed to prevent the lessor from experiencing

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financial hardship, and that as such, the statute was an impermissible impairment of his contractual rights.

The *Pomponio* court held that where a state statute is enacted under the state's police power, "we must weigh the degree to which a party's contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy." *Pomponio* at 780

The Court then applied a test to determine if retroactivity of a statute was constitutionally permissible and opined that 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 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 legislation.

If the impairment is more than minimal, the court must then decide several factors including:

(a) Was the law enacted to deal with a broad, generalized economic or social problem?

(b) Does the law operate in an area which was already subject to state regulation at the time the parties' contractual obligations were

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originally undertaken, or does it invade an area never before subject to regulation by the state?

(c) Does the law effect a temporary alteration of the contractual relationships of those within its coverage, or does it work a severe, permanent, and immediate change in those relationships irrevocably and retroactively?

After applying the foregoing test, the amended statute discussed in *Pomponio* was ruled unconstitutional for two reasons. First, this Honorable Court held that the statute was not the least restrictive manner in which the Legislature could meet its goals. As such, the subject legislation failed to pass the third prong of the *Pomponio* test, as the subject statute created a permanent change to the contract at issue, the purpose of which did not outweigh the right of the lessor to have his recreational lease left undisturbed. Additionally, there was a finding by this Honorable Court that the evils the legislation was designed to remedy were largely illusory. As such, the statute failed to pass the first and third prongs of the *Pomponio* test. Based upon this finding, the law was not designed to deal with a broad, generalized economic or social problem (thus failing the 1st prong) and the problems the law was supposed to correct did not actually exist (thus failing the 3rd prong).

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Noteworthy is the fact that after § 718.401(4) Fla. Stat. (1977) was ruled unconstitutional by the *Pomponio* Court, the very same statute was amended again by the Legislature. The statute still requires rents to be deposited into the court registry, despite the rental provisions of the recreational leases, while litigation between the lessor and the association is ongoing, thereby impairing the contractual rights of recreation leases' lessors. The latest amendment to the statute does, however, allow the lessor to retrieve funds, including profits, from the court registry, but only if necessary. Since the newer version of the statute became the least intrusive means of accomplishing the Legislature's goals, the statute was ruled constitutional by the Fourth District Court of Appeals, this Honorable Court and the Supreme Court of the United States in *Cenvill Investors, Inc. v. Condominium Owners Organization of Century Village East, Inc.*, 556 So.2d 1197, 1201 (Fla. 4th DCA 1990) review denied by *Cenvill Investors, Inc. v. Condominium Owners Organization of Century Village East, Inc.*, 570 So.2d 1303 (Fla. 1990) certiorari denied by *Cenvill Investors, Inc. v. Condominium Owners Organization of Century Village East, Inc.*, 499 U.S. 919, 111 S. Ct. 1308 (1991), even though the statute still impairs lessors' contractual rights.

The reasons behind why § 718.401 (4) Fla. Stat. (1977) was deemed unconstitutional in *Pomponio* are not present in the instant action, making *Pomponio* clearly distinguishable from the present controversy. The fact that there

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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. Furthermore, the Legislature amended § 718.404(2) Fla. Stat. (2007) in the least restrictive manner possible. Indeed, as argued earlier, the Controlling Entities are still guaranteed representation on the board of directors, are still owed a fiduciary duty even from a residential unit owner controlled board, and cannot under, any stretch of the imagination, have their commercial and retail business interests otherwise interfered with by a board of directors comprised primarily of residential unit owners.

Finally, as argued above, *Pomponio* dealt with a statute that affected the contractual rights of a third party landlord that entered into an agreement with a condominium association, not a statute that related to the regulation and governance of condominiums and their owners as is the statute that forms the subject of this appeal. The association's declaration of condominium was not even at issue in the case.

Accordingly, applying either the *Pomponio* test, or this Honorable Court's rationale in *U.S. Fidelity and Guar. Co. v. Department of Ins.*, 453 So.2d 1355 (Fla. 1984) was a proper way to determine the constitutionality of that statute, as it related to **<u>the contractual rights of the lessor based upon the recreational lease</u>**.

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The issues presented in *Pomponio* did not pertain to the governance of condominiums, while those presented in *Woodside*, *Hidden Harbour* and the case at bar are specifically limited to the regulation and governance of condominiums.

The logic employed by both the *Woodside* and *Hidden Harbor* Courts defy that which was applied by the *Pomponio* Court for one simple reason: *Woodisde* and *Hidden Harbor* related to the governance of condominiums, which is regulated by the Legislature, and the State is well within its rights, pursuant to its police powers to enact legislation that is designed to secure the health, safety, good order, comfort, or general welfare of the community. Thus, not only is *Pomponio* clearly distinguishable from the instant action, but is simply inapplicable.

As this Honorable Court held in *Rogers & Ford* supra. and *Turnberry Court* supra., condominiums are completely subject to the Legislature's regulation and control. Therefore, the Controlling Entities' contractual rights were not unconstitutionally impaired by the retroactive application of the Statute. Thus, The Grand and its membership are required to comply with the Statute.

H. The Statute is Constitutional Even Under a Pomponio Analysis

In *Pomponio,* quoting *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 244-45, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978), the Court said that the first inquiry into whether or not a statute can be applied retroactively must be whether the law has, in fact, operated as a substantial impairment of a contractual relationship. The

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severity of the impairment measures the height of the hurdle the 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 legislation.

Cohn argues that the law has absolutely not operated as a substantial impairment of The Grand's or the Controlling Entities' contractual relationship and since the alteration is minimal, at best, all further inquiry ends.

When §718.404 (2) Fla. Stat. (2007) is applied to The Grand and the new board of directors is comprised primarily of residential unit owners, the reality is that the new board of directors, under both the Condominium Act and The Grand's governing documents, cannot prevent the Controlling Entities from operating their commercial or retail establishments or otherwise interfere with the operation of their lawful businesses. Moreover, even a residential unit owner controlled board of directors will still owe the Controlling Entities a fiduciary duty pursuant to § 718.111 Fla. Stat., and all of their rights, as provided in the governing documents would remain undisturbed. Finally, the Controlling Entities would still be guaranteed representation on the association's board of directors; they simply are no longer entitled to majority representation. Again, the harm as espoused by the appellees simply does not exist. Accordingly, the impairment of the Declaration is minimal, at best, and the Statute is unconstitutional.

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Regardless, even applying the *Pomponio* test demonstrates that the Statute is constitutional. The first prong of the test is "Was the law enacted to deal with a broad, generalized economic or social problem?" The Third District Court of Appeal held that because the record below was devoid of any evidence as to why the Legislature amended the Statute, it failed this part of the test. The courts of this state, however, are required to presume that the Legislature enacts a law for a purpose. See *Pezzi supra*. It should never be presumed that the Legislature intended to enact purposeless, and therefore useless, legislation. See *Sharer supra.* Insomuch as it must be presumed that the Legislature had a purpose for enacting the Statute, it was the appellees' burden to clearly prove that the Statute was enacted for no legitimate purpose, and therefore unconstitutional. The appellees failed to do so at every stage of this litigation. The Third District Court of Appeal incorrectly placed the burden on the appellant to establish why the Statute was amended, when it should have required the appellees to prove that the Statute, as amended, had no legitimate purpose.

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. As such, the Statute passes the first prong of the *Pomponio* test.

The second part of the *Pomponio* test is "Does the law operate in an area which was already subject to state regulation at the time the parties' contractual obligations were originally undertaken, or does it invade an area never before subject to regulation by the state?" *Pomponio,* 378 So.2d at 779. As stated in the Corrected Opinion written by the Third District Court of Appeal, at the time The Grand was organized in 1986, condominiums were subject to significant regulation under the Condominium Act. Respectfully, the court erred, however, in holding that since the statutory term "mixed-use condominiums" did not come into existence until 1995, associations such as The Grand, which govern condominiums comprised of both residential and commercial units were not subject to regulation. That premise is simply incorrect.

Condominiums and their associations are strictly creatures of statute, and in 1986 when the Condominium was created, the legislature only recognized two (2) forms of condominiums: residential and commercial. Pursuant to § 718.103 Fla. Stat. (1985), any condominium with four (4) or more residential units was deemed a residential condominium, even if it had both residential and commercial units like the Condominium. As such, The Condominium has always been a residential

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condominium even though it has both residential and commercial units and has always been heavily regulated. The fact that in 1995, the Legislature gave a new name to the type of condominium that the Grand actually governs, does not change the fact that at all times since it was created, The Grand has been heavily regulated and subject to the Condominium Act. As such, the Statute passes the second prong of the *Pomponio* test.

Continuing with the *Pomponio* test, the third question is, "Does the law effect a temporary alteration of the contractual relationships of those within its coverage, or does it work a severe, permanent, and immediate change in those relationships irrevocably and retroactively?" *Pomponio,* 378 So.2d at 779. The Third District Court of Appeal held that in this case applying the Statute retroactively would result in a severe change in the relationship between the parties. That finding was simply incorrect.

Again, even if §718.404 (2) Fla. Stat. (2007) is applied to The Grand and the new board of directors is comprised primarily of residential unit owners, the reality is that the new board of directors, under the Declaration of Condominium and The Grand's governing documents, cannot prevent the Controlling Entities' units from operating as commercial or retail establishments or otherwise interfere with the operation of their lawful businesses. Moreover, even a residential unit owner board would still owe the Controlling Entities a fiduciary duty pursuant to § 718.111 Fla.

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Stat. and the Controlling Entities would still be entitled to all of the protections already given to them under the governing documents. Finally, the Controlling Entities would still be guaranteed representation on the association's board of directors; they simply would not be entitled to majority representation. Again, the harm as espoused by the appellees is simply illusory and does not exist.

In light of the foregoing, the retroactive application § 718.404(2) Fla. Stat. (2007) passes constitutional muster even under a *Pomponio* analysis.

I. Contractual Rights are Permissibly Affected by Changes to the Condominium Act Quite Often

Very few chapters of the Florida Statutes have been amended more over the years than the Condominium Act. Most of those changes have not only altered the unit owners' rights and obligations, as set forth in their governing documents, but directly impact the manner in which directors are elected and serve on association's boards of administration.

When a party owns a unit in a condominium, the party is a member of the association and has the rights and obligations set forth in the condominium's governing documents and the Condominium Act. The right to run for a position on an association's board of directors is set forth in every declaration of condominium and is deemed a contractual right pursuant thereto. Despite the tens of thousands of existing declarations of condominiums in Florida, the Condominium Act has been

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amended several times, and each change has not only affected every condominium in this state, but every pre-existing written declaration of condominium as well. Each provision of the Condominium Act listed below, when enacted, as late as October of 2008, has impaired the declarations of condominiums recorded in this State, and has had the corresponding impact:

Provision	**Impact**
§ 718.112	Directors can no longer run for terms of two (2) years or more, despite no such provision existing in the governing documents;
§ 718.112	Directors can no longer be elected for staggered terms, and must now run for re-election each year, despite the association's governing documents requiring staggered terms and allowing owners to serve for more than one year;
§ 718.112	Co-owners can no longer serve on the board of administration together, despite the fact that the governing documents contain no such prohibition and co-owners have routinely served simultaneously;
§ 718.112	Association Boards cannot vote the units the association owns, despite the fact that every declaration of condominium sets forth the membership's voting rights and does not prohibit association owned units from voting on condominium matters by and through their Board of Directors;
§ 718.112	Convicted felons cannot serve on the board of directors even though as an owner of a unit, they had the contractual right to do so through their declaration of condominium;
§ 718.112	Directors who are now merely charged with a felony are deemed removed from the board of directors, even though they had a

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contractual right to run for, be elected to and remain on the board of directors despite any arrest

§ 718.112 Unit Owners who are now more than 3 months delinquent in the payment of assessments are prevented from running for a position on the association’s board of directors even though they have a contractual right to run for the Board under their governing documents, whether delinquent or not;

§ 718.112 Directors who become delinquent while members of the board of administration are deemed to have abandoned their seats, even though no such provision exists in the governing documents;

§ 718.112 Tens of thousands of declarations recorded in this state prevent unit owners from changing the appearance of the common elements. However, the statute has now been amended to allow unit owners to affix religious symbols to their doors, despite the express provisions to the contrary found in the governing documents;

§ 718.110 This statute allows for amendments to the governing documents, even if the governing documents themselves say that they are not subject to being amended;

§ 718.1265 This statute virtually throws out the governing documents in the case of a state of emergency, and allows a Board to exercise various unbridled powers, despite the fact that the declaration or bylaws do not grant the Board such powers under any circumstances.

§ 718.301 Despite the fact that a declaration of condominium sets forth the membership’s voting rights, and does not revoke the developer's rights to vote, this statute revokes a developer’s right to vote its units if it files for bankruptcy or a receiver is appointed to control its affairs, thereby impairing the developer's contractual rights.

The statutes listed above are merely a few of the changes that have been made to the Condominium Act that materially and permanently affected the

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contractual rights of condominium associations and their members. Each statute adds or takes away rights or obligations set forth in associations' governing documents, thereby impairing them. Each statute is 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.** Moreover, each statute is constitutional none-the-less for a plethora of reasons, as is § 718.404(2) Fla. Stat. (2007). First, § 718.102 Fla. Sat. establishes that **all condominiums created and existing** in the State of Florida must comply with the Condominium Act. Second, condominiums are creatures of statutes completely subject to the Legislature’s control and regulation. Third, the State possesses the inherent power to enact legislation to protect the health, safety, morals and general welfare if the citizens. Fourth, no unit owner, including the appellees, has a vested right in the status quo, or the declaration of condominium as originally written, which can be amended by its membership or the Legislature. Lastly, and as set forth by this Honorable Court in *Woodside*, the decision as to what laws need to be enacted to protect the citizenry is to be made by the Legislature, not the courts of this state, and the State has done so by enacting each of these laws.

If this Honorable Court holds that § 718.404(2) Fla. Stat. (2007) is unconstitutional as applied to The Grand, then consequently: (a) every statute listed above; (b) every other amendment to the Condominium Act enacted after

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1986; and (c) every amendment to the Condominium Act enacted in the future will be unconstitutional as applied to The Grand. Quite simply, if § 718.404(2) Fla. Stat. (2007) is deemed unconstitutional, this Honorable Court is necessarily establishing that the policy in Florida is that every condominium in this state is governed not only by a different declaration of condominium, but by a different set of statutes as well, depending solely upon what statutes were already in existence at the time the condominium was created. Such a result would make it virtually impossible for a condominium association to know with which laws it must comply with and those it must ignore. In communities where condominiums are dominant, one condominium can be subject to a set of laws, while its neighbor is subject to a different set of laws and so on and so on and so on. The notion is simply untenable and would create an absolute nightmare for boards of directors, community association managers, unit owners and potential purchasers of condominium units in just trying to figure out which laws apply to a given condominium. If the Legislature deemed it necessary to enact each of these statutes in order to protect the citizenry, as it did when it amended § 718.404(2) Fla. Stat. (2007), then the statutes should protect the millions of families currently living in condominiums, and not just those who will someday live in condominiums that do not even exist yet.

CONCLUSION

This Honorable Court need not determine whether the Statute is constitutional insomuch as the Declaration clearly acknowledges that its terms, along with the Condominium Act, are subject to change. Over the years, The Grand, by and through the Controlling Entities, has embraced such changes when they benefit the Controlling Entities. Now, however, The Grand seeks to avoid such changes like the plague when they do not benefit the Controlling Entities. The appellees simply cannot have it both ways.

The rights and obligations associated with the condominium form of ownership are strictly creatures of statute, which are subject to the Legislature's regulation and control. Indeed, § 718.102 Fla. Stat. holds that all condominiums, created and existing, are subject to the Condominium Act. Additionally, through its police powers, the Legislature has the ability to enact laws necessary to protect the citizenry without concern that declarations will be impaired. To hold otherwise is to say not only that the Legislature is powerless to enact laws to protect the citizens, but that when legislation is passed regarding the governance of condominiums, it only applies to condominiums that are yet to be created, and simply ignores the millions of families who already live in condominiums. That position is simply untenable. For the reasons set forth above, the Statute is constitutional and with which The Grand and its membership must comply.

CERTIFICATE OF COMPLIANCE BY COUNSEL

I HEREBY CERTIFY that this Initial Brief on the Merits complies with the requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided to Rosenbaum, Mollengarden, Janssen & Siracusa, 250 S. Australian Avenue, Suite 500, West Palm Beach, Florida 33401-5506 and Siegfried, Rivera, Lerner, De La Torre & Sobel, P.A., 201 Alhambra Circle, Suite 1102, Coral Gables, Florida 33134, this 8th day of April, 2010.

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