IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, THIRD DISTRICT

SUSAN COHN,

Appellant,

vs.

THE GRAND CONDOMINIUM ASSOCIATION, INC.,

Appellee.

Case No. 3D08-2942

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE, THE GRAND CONDOMINIUM ASSOCIATION, INC.

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PRELIMINARY STATEMENT

Appellant, Susan Cohn, was a defendant and appellee, The Grand Condominium Association, Inc., was the plaintiff in the Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida. In this brief, the appellant will be referred to as "Cohn" and appellee will be referred to as "The Grand". The two other defendants, appellees in this Court, PH Hotel, Inc. and Ph Retail, Inc., are referred to as "PH Hotel" and PH Retail".

The following symbol will be used:

IB = Initial Brief

R = Record on Appeal

STATEMENT OF THE CASE AND FACTS

"The purpose of providing a statement of the case and of the facts is not to color the facts in one's favor or to malign the opposing party or its counsel but to inform the appellate court of the case's procedural history and the pertinent record facts underlying the parties' dispute." Sabawi v. Carpenter, 767 So. 2d 585, 586 (Fla. 5th DCA 2000). The statement of the case and facts in the Initial Brief "is unduly argumentative and contains matters immaterial and impertinent to the controversy between the parties." Williams v. Winn-Dixie Stores, Inc., 548 So. 2d 829, 830 (Fla. 1st DCA 1989). "The facts should be stated clearly, concisely, and objectively. A slanted or argumentative factual statement is of little or no assistance and does not truly advance any appellant's prospects of reversal." Overfelt v. State, 434 So. 2d 945, 949 (Fla. 4th DCA 1983), *quashed in part, approved in part,* 457 So. 2d 1385 (Fla. 1984). Since the statement of the case and facts in the Initial Brief is argumentative, incomplete, and violates the Florida Rules of Appellate Procedure, The Grand submits the following statement of the case and facts:

The Grand came into existence in June, 1986 when its Declaration of Condominium ("the Declaration"), Articles of Incorporation and By-Laws (collectively "the Governing Documents") were filed in the Public Records of Dade County, Florida. (R. 464-465). The Grand is a mixed-use condominium containing 810 residential units,

141 retail units, and 259 commercial units. Id. All of The Grand's commercial units are operated collectively as a DoubleTree hotel. Id.

Article VI of The Grand's Articles of Incorporation provides that The Grand's "affairs shall be managed by a Board of Directors. . ." (R.). In order to ensure that each group of unit owners (residential, retail, and commercial/hotel) would have an equal say in how The Grand is managed, Article VI established the following method of voting for the seven (7) members of the Board of Directors:

(1) Residential unit owners vote for and elect two directors;

(2) Retail unit owners vote for and elect two directors;

(3) Commercial/hotel unit owners vote for and elect two directors; and

(4) The entire membership votes for and elect one "at large" director.

(R. 451-452). Under the Governing Documents, the residential unit owners, the retail unit owners, and the commercial/hotel unit owners equally hold 29% of the voting interests. (R. 504). In addition, all residential unit owners, the retail unit owners, and the commercial/hotel unit owners share a 13% interest in voting for the "at large" director. Id.

The residential units at The Grand are owned by various individual unit owners, not a single person or entity. (R. 447). The retail units are almost entirely owned and operated by PH Retail. Id. All of the commercial/hotel units are owned and operated by PH Hotel. Id. The voting procedures set forth in The Grand's Declaration and

Governing Documents have been followed at every annual meeting since the turnover of The Grand from the developer in 1993. (R. 452, 464-465).

In 1995, the Florida Legislature enacted section 718.404, which stated that "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." Nothing in the 1995 version of section 718.404(2) provided for the retroactive application of the statute. Thus, The Grand continued to elect its Board of Directors in accordance with its Declaration and Governing Documents.

In 2007, the Florida Legislature amended section 718.404(2) to provide for the retroactive application of the statute. The Legislature's Staff Analysis of the amendment states that the retroactive application "could have the effect of re-writing previously recorded declarations, and therefore may be an unconstitutional impairment of obligation of contract." Fla. S. Comm. on Judiciary, CS for SB 902 (2007), Staff Analysis 18 (Apr. 18, 2007) (Appendix 1). The amendment to section 718.404(2) became effective on July 1, 2007, but the amended statute does not specifically indicate how the modification of the residential and non-residential unit owners' vested interests in their full voting rights, which constitute an appurtenance to each condominium unit, would occur. § 718.404(2), Fla. Stat.

On December 14, 2007, The Grand filed a Complaint for Declaratory Relief. (R.

4-13). The Grand sought a declaration that, among other things, section 718.404 violates Article I, Section 10 of the Florida Constitution because it constituted an unreasonable impairment of the contract between The Grand and the owners of its retail and commercial/hotel units. (R. 11-12). Both The Grand and Cohn filed motions for summary judgment. (R. 412-425, 447-457).

The trial court conducted a hearing on the summary judgment motions and, after a thorough analysis of the pertinent issues, concluded that the retroactive application of section 718.404(2) was unconstitutional as applied in this case. (R. 505). Final summary judgment was subsequently entered in favor of The Grand. (R. 506-507). This appeal followed. (R. 494-501).

SUMMARY OF ARGUMENT

Article I, section 10 of the Florida Constitution prohibits the Florida Legislature from passing ex post facto laws or laws impairing the obligation of contracts. The Grand's Declaration and Governing Documents are contracts. Every unit owner at The Grand entered into a contractual arrangement and agreed to be bound by the terms set forth in the Declaration and the Governing Documents. These contracts expressly set forth a system for electing The Grand's Board of Directors, which manages The Grand's affairs.

Since its inception in 1986, The Grand has possessed three types of units: residential, retail, and commercial/hotel. In order to ensure that each group of unit owners would have an equal say in how The Grand is managed, Article VI of the Articles of Incorporation established an equitable method of voting for the Board of Directors. Every unit owner at The Grand has a legally vested right to their full voting rights set forth in The Grand's Articles of Incorporation. This is because those rights constitute an appurtenance to the unit and cannot be modified without the consent of all unit owners and lienors. The Grand's system for electing its Board of Directors has remained unchanged since 1986, and every Board of Directors election since turnover from the developer has been conducted in this manner.

Under Florida law, virtually no degree of contract impairment is permissible. Nevertheless, the Florida Legislature enacted legislation to apply section 718.404(2)

retroactively even though the staff analysis to the bill acknowledged that it could essentially re-write previously recorded declarations and may constitute an unconstitutional impairment of obligation of contract. Retroactive application of section 718.404(2) in this case would unconstitutionally (1) violate the terms of The Grand's Declaration and Governing Documents, (2) infringe on the contractual arrangement established by the Declaration and the Governing Documents, and (3) deprive The Grand's unit owners of their legally vested, full voting rights, which constitute an appurtenance to their condominium units. Accordingly, the trial court's entry of final summary judgment was correct and should be affirmed.

ARGUMENT

THE TRIAL COURT PROPERLY CONCLUDED THAT SECTION 718.404(2) OF THE FLORIDA STATUTES IS UNCONSTITUTIONAL AS APPLIED TO THIS CASE

Standard of Review

Although legislative acts are afforded a presumption of constitutionality, this Court reviews *de novo* an order finding a state statute unconstitutional. Walton County v. Stop Beach Renourishment, Inc., 998 So. 2d 1102, 1109 (Fla. 2008). However, "[e]ven when the Legislature does expressly state that a statute is to have retroactive application, this Court has refused to apply a statute retroactively if the statute impairs vested rights, creates new obligations, or imposes new penalties." State Farm Mut. Automobile Ins. Co. v. Laforet, 658 So. 2d 55, 61 (Fla. 1995).

Background

After conducting a thorough analysis of the issues raised in the motions for summary judgment, the trial court concluded that, under the facts of this case, it would be unconstitutional to retroactively apply the provisions contained in section 718.404 of the Florida Statutes. (R. 502-505). The trial court reached its conclusion because a retroactive application of section 718.404 in this case would substantially impair previously-existing vested rights of the unit owners in The Grand's contractual relationship. Id. The trial court's ruling was correct because

"[v]irtually no degree of contract impairment has been tolerated in this state." Yamaha Parts Distrib. Inc. v. Ehrman, 316 So. 2d 557, 559 (Fla. 1975). Nevertheless, Cohn argues that the trial court's ruling was erroneous. For the reasons set forth below, Cohn's argument should be rejected.

Unconstitutional Impairment of Vested Contractual Rights

A declaration of condominium, which creates the condominium and serves as its "constitution," strictly governs the relationships among the unit owners and the condominium association. Neuman v. Grandview at Emerald Hills, Inc., 861 So. 2d 494, 496-497 (Fla 4th DCA 2003). Although a declaration of condominium governs the relationships between condominium unit owners and the condominium association, it is more than a simple contract spelling out mutual rights and obligations of the parties thereto. Brickell Bay Club Condominium Ass'n, Inc. v. Hernstadt, 512 So. 2d 994, 996 (Fla. 3d DCA 1987); Pepe v. Whispering Sands Condominium Ass'n, Inc., 351 So. 2d 755, 757-758 (Fla. 2d DCA 1977). In this case, every unit owner at The Grand entered into a contractual arrangement and expressly agreed to be bound by the terms set forth in the Declaration and the Governing Documents. Retroactive application of section 718.404 would impermissibly (1) violate the terms of The Grand's "constitution," (2) infringe on the contractual arrangement established by the Declaration and the Governing Documents, and (3) deprive The Grand's unit

owners of their full voting rights, which are legally "vested rights" and constitute an appurtenance to the condominium unit.

Article VI of The Grand's Articles of Incorporation provides that The Grand's "affairs shall be managed by a Board of Directors. . ." (R. 178). In order to ensure that each group of unit owners (residential, retail, and commercial/hotel) would have an equal say in how The Grand is managed, Article VI established the following method of voting for the seven (7) members of the Board of Directors:

1. Residential unit owners vote for and elect two directors;

2. Retail unit owners vote for and elect two directors;

3. Commercial/hotel unit owners vote for and elect two directors; and

4. The entire membership votes for and elects one "at large" director.

Id. Under the Governing Documents, the residential unit owners, the retail unit owners, and the commercial/hotel unit owners equally hold 29% of the voting interests. (R. 504). In addition, all residential unit owners, the retail unit owners, and the commercial/hotel unit owners share a 13% interest in voting for the "at large" director. Id.

Twenty-one years after The Grand came into existence, the Florida Legislature amended section 718.404(2) of the Florida Statutes. The 2007 amendment provided for the retroactive application of the following provision: "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." § 718.404(2), Fla. Stat. The amendment to section 718.404(2) became effective on July 1, 2007, even though the Legislature's staff analysis of the amendment expressly acknowledged that its retroactive application "could have the effect of re-writing previously recorded declarations, and therefore may be an unconstitutional impairment of obligation of contract." Fla. S. Comm. on Judiciary, CS for SB 902 (2007), Staff Analysis 18 (Apr. 18, 2007).

Every unit owner at The Grand has a vested right to their full voting rights set forth in Article VI of The Grand's Articles of Incorporation because those rights constitute an appurtenance to the unit. § 718.106(2)(d), Fla. Stat. In addition, Section 9.21 of The Grand's Declaration states that no amendment shall "**materially alter or modify the appurtenances to such Unit**, or change the proportional percentage by which a Unit Owner shares the Common Expenses and owns the Common Surplus unless the record Owner thereof and all record owners of liens or mortgage encumbrances thereon shall join in the execution of such amendments." (R. 453)(emphasis added). Similarly, section 718.110(4) of the Florida Statues states:

> Unless otherwise provided in the declaration as originally recorded, no amendment may change the configuration or size of any unit in any material fashion, **materially alter or modify the appurtenances to the unit**, or change the proportion or percentage

> by which the unit owner shares the common expenses of the condominium and owns the common surplus of the condominium unless the record owner of the unit and all record owners of liens on the unit join in the execution of the amendment and unless all the record owners of all other units in the same condominium approve the amendment.

(Emphasis added). Since full voting rights are clearly appurtenances to every unit at The Grand, section 718.110(4) and The Grand's Declaration requires the consent of all of The Grand's unit owners, and all record owners of liens, before the voting rights of any unit can be altered or modified[1]. Retroactive application of section 718.404(2), however, would constitute an unlawful alteration or modification of the appurtenances to The Grand's units without the consent of all the unit owners, or the record owners of liens on the units.

Analysis of Retroactive Impairment of Contractual Rights

Article I, section 10 of the Florida Constitution states that no "ex post facto law or law impairing the obligation of contracts shall be passed." A statute violates this constitutional prohibition when it has the effect of rewriting antecedent contracts, i.e., changing the substantive rights of the parties to existing contracts. Hardware Mut. Cas. Co. v. Carlton, 9 So. 2d 359, 360 (Fla. 1942); Manning v. Travelers Ins. Co., 250 So. 2d 872, 874 (Fla. 1971). Retroactive application of section 718.404(2) would clearly change the substantive rights of

[1] It is undisputed that the consent of the unit owners and lienholders has never been obtained.

The Grand and all of its unit owners. In fact, even Cohn "concedes that the statute absolutely effects [sic] the rights of the Controlling Entities." (IB. 32). The Grand, for example, is obligated to hold elections in accordance with this voting scheme. Nevertheless, Cohn argues that it was within the Legislature's inherent police powers to retroactively change the substantive rights and obligations that The Grand and all of its unit owners willingly agreed to comply with decades ago and thereby impair vested voting rights which are an appurtenance to each unit.

The retroactive application of section 718.404(2) is unconstitutional because it would destroy certain unit owners' vested voting rights. Even though the Legislature has indicated that section 718.404(2) is to be applied retroactively, the courts cannot rely on this directive alone. This Court must evaluate whether section 718.404(2), as applied in this case, would cause the impairment of a vested right. Although section 718.404(2) can be applied to mixed-use condominiums created after 1995, it would be unconstitutional to apply the statute to The Grand because it would deprive unit owners of their legally vested, full voting rights, which constitute an appurtenance to their condominium units.

Even if a statute clearly expresses the intent to be applied retroactively, the Court must still ascertain whether retroactive application is constitutionally permissible. DaimlerChrysler Corp. v. Hurst, 949 So. 2d 279, 284 (Fla. 3d DCA

2007). In DaimlerChrysler, this Court evaluated the retroactivity of an asbestos claims statute that clearly stated it was to be applied retroactively. This Court, however, noted that it is imperative that every statute be evaluated to determine whether retroactive application would impair vested rights. Id. The retroactive application of a statute is invalid when it impairs vested rights. Id.

A legislative enactment is invalid when its application impairs vested rights, creates new applications, or imposes new penalties. Laforet, 658 So. 2d 55 at 61. The retroactive application of section 718.404(2) in this case significantly impairs the vested voting rights of the retail and commercial/hotel unit owners. Under section 718.106(2)(d) of the Florida Statutes, voting rights are an appurtenance to a condominium unit. The applicable provision of the statute states:

> 718.106 Condominium parcels; appurtenances; possession and enjoyment.
>
> * * *
>
> (2) **There shall pass with a unit, as appurtenances thereto**:
>
> * * *
>
> (d) Membership in the association designated in the declaration, with the **full voting rights appertaining thereto**.

§ 718.106(2)(d), Fla. Stat. (emphasis added). The right to vote is an immediate right of present enjoyment, and a present fixed right of future enjoyment. As an appurtenance to units, full voting rights are part and parcel of the condominium unit like the pro-rata share of the common elements appurtenant to each

Condominium unit. Therefore, this right to have and exercise the full voting rights is a vested right which cannot be diminished by an amendment to section 718.404(2).

"The appropriate context in which an analysis of the issue of impairment of obligations of contracts must be made is article I, section 10 of the Florida Constitution . . . ." Cenvill Investors, Inc. v. Condominium Owners Org. of Century Village E., Inc., 556 So. 2d 1197, 1201 (Fla. 4th DCA 1990). In Pomponio v. Claridge of Pompano Condominium, Inc., 378 So. 2d 774 (Fla. 1984), the Florida Supreme Court set forth the method for determining whether a law unconstitutionally impairs the obligation of contracts.[2] "This method requires a balancing of a person's interest not to have his contracts impaired with the state's interest in exercising its legitimate police power." United States Fid. & Guar. Co. v. Department of Ins., 453 So. 2d 1355, 1360 (Fla. 1984). First, "[t]he threshold inquiry is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.'" Id. (internal citation omitted). Second, if the law does amount to a substantial impairment, "the State, in justification, must have a significant and legitimate public purpose behind the

[2] Cohn's assertion that Pomponio has been subsequently overruled is without merit. Smith v. Dep't of Ins., 507 So. 2d 1080, 1095 (Fla. 1987)(agreeing with trial court's application of Pomponio); Sarasota County v. Andrews, 573 So. 2d 113, 115 (Fla. 2d DCA 1991)(discussing Pomponio in analysis of whether county ordinance was unconstitutional as applied).

regulation." Id.

"'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. Under this balancing test, the "[s]everal factors to be considered" are:

> (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 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?

Id. (footnotes omitted). Thus, to decide how much impairment is tolerable, the court "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." Id. at 780.

The statute in Pomponio provided for deposit of rents into the court registry during litigation regarding obligations under condominium leases. Id. at 780.

First, the Florida Supreme Court found that "the statute 'impair[ed]' the landlord's contract," by precluding "the current use of court-retained rent moneys [which] is an economic deprivation for which a landlord obviously had not bargained." Id. at 780-81. Next, the court inquired into the state's interest for enacting the statute as an "exercise of the state's police power to promote the health, safety, and welfare of its citizens." Id. Failing to find specific objectives for the statute, Pomponio further emphasized that the police power was not used in "the least restrictive means possible." Id. at 781-82 (explaining that the statute fails to provide for a disbursement of deposited funds upon a landlord's showing of personal hardship). Balancing "the state's probable objectives and its method of implementation, on the one hand, and the degree of contract impairment inflicted in furtherance of its policy, on the other," the Court concluded that the result is in favor of preserving "the contract over this exercise of the police power." Id. at 781.

Application of the test set forth in Pomponio demonstrates that retroactive application of section 718.404(2) would be unconstitutional in this case. It is undisputed that retroactive application of section 718.404(2) constitutes a severe impairment of The Grand's established contractual relationship, and the material alteration of vested rights of the unit owners without their consent. (IB. 32). Thus, the Court must move to the second prong of the Pomponio analysis and

review the "factors" set forth for consideration under the applicable "balancing test." Pomponio, 378 So. 2d at 779. Nothing in the legislative history of section 718.404(2) indicates it was amended to address a "broad, generalized economic or social problem." In fact, the amendment to section 718.404(2) was quite narrow and focused only on the minute number of mixed-use condominiums that (1) were created before 1995, (2) possessed a number of residential units that equaled or exceeded 50% of the total units operated by the association, and (3) contained governing documents that did not entitle the owners of residential units to vote for a majority of the seats on the "board of administration." Thus, the first factor of the applicable "balancing test" would weigh against the retroactive application of section 718.404(2).

The second factor under the Pomponio "balancing test" is whether section 718.404(2) operates "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. The term "mixed-use condominium" did not exist when The Grand came into existence, and the subject matter of section 718.404(2) invades an area that was never before the subject of state regulation, i.e., the right of a mixed-use condominium to create its own equitable voting system for the election of its board of directors. The Grand is a large DoubleTree Hotel, and has always

been principally a hotel with commercial retail shops. Accordingly, analysis of the second factor of the applicable "balancing test" would weigh against the retroactive application of section 718.404(2).

The final factor of the "balancing test" is whether the law creates "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. Section 718.404(2) retroactively imposes a severe, permanent, and immediate change in a contractual arrangement that was created more than twenty years ago. For example, when The Grand's retail unit owners purchased their units they were entitled to have an equal say in how The Grand is managed because they elected two directors and had the right to vote for one "at large" director. Any retroactive change in this arrangement would necessarily deprive the retail unit owners the benefit of their bargain, i.e., the equitable voting system for electing the Board of Directors, which is an important vested right.

The retail, residential, and commercial/hotel unit owners were all afforded equivalent voting rights when they purchased units at The Grand. Retroactive application of section 718.404(2) would immediately undermine The Grand's contractual arrangement by granting one type of unit owner a greater say over how The Grand is managed than was ever contemplated by the Declaration or the

Governing Documents. Such an immediate diminishment in the value of The Grand's contracts would be "repugnant to our constitutions." Andrews, 573 So. 2d at 115. Since the third factor of the Pomponio "balancing test" strongly weighs against the retroactive application of section 718.404(2), the trial court's ruling should be affirmed.

The Fifth District Court of Appeal previously addressed an analogous issue in Wellington Prop. Mgmt. v. Parc Corniche Condominium Ass'n, Inc., 755 So. 2d 824 (Fla. 5th DCA 2000). In Wellington Prop. Mgmt., when the condominium unit at issue was put on the market, Florida law required that any amendment that altered the "appurtenances to the unit" had to be approved by all of the unit owners. Id. at 827. The condominium association, however, claimed that a subsequent amendment to section 718.110(4) of the Florida Statutes "related back" and permitted the common elements of the condominium to be altered or modified by the association upon a vote of 75% of the total voting interest. The Fifth District rejected the condominium association's argument and concluded that "[p]ermitting this provision to 'relate back' would unconstitutionally interfere with the owners' contractual rights with the developer." Id. at 828. Similarly, permitting section 718.404(2) to apply retroactively would unconstitutionally interfere with the contractual rights of The Grand and all of its unit owners. Id.; Tradewinds of Pompano Ass'n v. Rosenthal, 407 So. 2d 976, 977 (Fla. 4th DCA

1982)("because the lease existed prior to the effective date of Section 718.401(4), Pomponio dictates a finding that under these facts the application of the statute is unconstitutional as impairing the contract rights of the lessors."); Gans v. Miller Brewing Co., 560 So. 2d 281, 283 (Fla. 4th DCA 1990)(virtually no degree of contract impairment has been permitted in the State of Florida).

In Commondore Plaza at Century 21 Condominium Ass'n, Inc. v. Cohen, 378 So. 2d 307, 308-09 (Fla. 3d DCA 1979), this Court found a retrospective application of a 1978 statute allowing attorney's fees to a prevailing condominium association to be unconstitutional as applied to a 1970 contract between an association and its developer because the applicable contract did not provide for attorney's fees to the association. This Court explained that a contract is impaired when the parties' substantive rights are changed and held that "the statutory imposition of attorneys' fees where none were bargained for materially changes the binding force of the agreement." Id. at 309. Accordingly, this Court held that applying the statute that became effective in 1978 to a contract executed in 1970 would impair the obligation of the existing lease and contract between the parties and thus, such retroactive application was "unconstitutional as applied to that instrument." Id. The Court should reach a similar result in this case.

Cohn's "Police Powers" Argument

Cohn essentially argues that the Florida Legislature has the authority to

undermine The Grand's constitutional right to enter into binding contracts pursuant to the Legislature's "police powers." (IB. 32-37). The legitimate exercise of the "police power," however, cannot constitute an impairment of contract. Springer v. Colburn, 162 So. 2d 513, 514 (Fla. 1964). The Contract Clause of the United States and Florida Constitutions "limits otherwise legitimate exercises of state legislative authority, and the existence of an important public interest is not always sufficient to overcome that limitation." U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 21 (1977). Cohn's "police power" argument must fail because "[t]o justify retroactive application it is not enough to show that this legislation is a valid exercise of the state's police power because that power, however broad in other contexts, here collides with the constitutional ban on laws impairing contracts". Yamaha Parts, 316 So. 2d at 559. Since Cohn acknowledges that the retroactive application of section 718.404(2) constitutes an impairment of The Grand's established contractual relationships, the decision in Yamaha Parts is controlling. (IB. 32).

The Grand and all of its unit owners voluntarily entered into a contract. The contractual arrangement included a specific method for selecting The Grand's Board of Directors. Voting rights are "vested rights" which require 100% approval of all unit owners and lienors to change. Section 718.404(2) cannot retroactively undo The Grand's voting system because it would violate

Article I, section 10 of the Florida Constitution (no "ex post facto law or law impairing the obligation of contracts shall be passed.") and conflict with sections 718.106 and 718.110, Florida Statutes. Cohn does not cite any case law holding that the State of Florida can utilize its police power to retroactively apply a statute that would eviscerate a condominium's equitable voting system for the election of its board of directors. The Grand's research has not uncovered such a case because "[v]irtually no degree of contract impairment has been tolerated in this state." Yahmaha Parts, 316 So. 2d at 559. Accordingly, Cohn's police power argument should be rejected.

The Grand acknowledges that the State may, under certain limited circumstances, exercise its police power in a manner that infringes upon an existing contact. For example, in Yellow Cab Co. v. Dade County, 412 So. 2d 395 (Fla. 3d DCA 1982), this Court addressed whether the state interest of encouraging free competition of taxi-cab services outweighed the degree of contract impairment that would result from such an ordinance. In Yellow Cab Co., a cab company contracted with five hotels to be the exclusive taxi-cab provider, specifying that "competitor cabs may bring passengers to those hotels, but are not permitted to pick-up passengers at those locations." Id. at 396. Dade County subsequently enacted ordinances prohibiting exclusive tax-cab service, articulating its interest to "encourage free competition, provide passenger choice,

and promote flow of taxi-cab service in such a fashion as to conserve fuel and improve transportation efficiency on behalf of Dade County citizens." Id. at 396-97.

Applying the balancing test in Pomponio, this Court held that a state may use its police power to regulate taxi-cabs, which have historically been subject to state regulation, and failed to find how Dade County "could have achieved its stated goal without abrogating the exclusive agreements" Id. at 397. The Court concluded "that the interests of the County far outweigh the severity of impairment to appellants' [cab companies'] private contracts," and held that the ordinances were "a reasonable and necessary exercise of . . . police powers." Id. The decision in Yellow Cab Co. is not controlling in this case because it involved the regulation of taxi-cabs and private contracts that were designed to limit free competition, prevent passenger choice, and preclude the flow of taxi-cab service. The instant case does not involve limitations on free competition or the inhibition of a vital method of public transportation. Rather, this case involves the retroactive application of a statute that would eliminate the equitable voting system for the election of a condominium's board of directors and undermine the unit owners' vested rights. Therefore, the decision in Yellow Cab Co. is clearly distinguishable.

Cohn contends that condominium contracts are subject to a heightened

level of legislative control because "there can be no question that the governance of condominiums in the State of Florida is a heavily regulated industry." (IB. 39). Cohn does not cite a single case stating that condominiums are a "heavily regulated industry" in Florida. The fact that there are several statutes addressing condominiums does not establish the creation of a "heavily regulated industry." State regulation of Florida condominiums is miniscule when compared to the truly "heavily regulated industries" of insurance, pharmaceuticals and utilities. Accordingly, Cohn's attempt to characterize "the governance of condominiums" as a "heavily regulated industry" in Florida should be rejected.

Cohn's "Age of the Condominium" Argument

Cohn's final argument claims that the trial court utilized an improper standard when it analyzed whether retroactive application of 718.404(2) in this case would constitute an unconstitutional impairment of The Grand's contracts. This argument must fail because the trial court properly employed the standard adopted in Pomponio to ascertain whether retroactive application of 718.404(2) was constitutionally permissible in this case. (R. 503). Cohn also contends the trial court's statement that "the 2007 amendment applying retroactively to Fla. Stat. § 718.404, arguably, may not be unconstitutional as to all mixed-use condominium agreements" somehow created a situation where the protections of law are available to some citizens, but not others. (R. 505); (IB. 40). Such an

argument is specious because any order declaring a statute unconstitutional "as applied" to a particular case necessarily implies that the statute may not be unconstitutional in all other situations. State v. Hosty, 944 So. 2d 255, 263 (Fla. 2006)(disabled adult hearsay exception in section 90.803(24) was constitutional as applied to mentally disabled adults; issue of whether statute was unconstitutional as applied to disabled adults without a mental impairment was left open); Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986)(statute that set maximum amount of compensation for court-appointed attorney representing an indigent defendant was facially constitutional, but unconstitutional as applied to cases involving unusual or extraordinary circumstances).

According to Cohn, "[t]he Lower Tribunal held that because the Association had existed for twenty-one (21) years, the retroactive application of the statute is unconstitutional." (IB. 40). Cohn's statement misconstrues the trial court's holding and ignores its considerable analysis. The trial court reviewed the factors set forth in Pomponio and concluded that retroactive application of section 718.404(2) was unconstitutional as applied in this case. The fact that The Grand existed for twenty-one years prior to the 2007 amendment to section 718.404(2) was relevant to one aspect of the Pomponio analysis, i.e., whether the area at issue was not subject to state regulation at the time the parties' contractual obligations were undertaken. Since the trial court was required to consider this

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been forwarded via U.S. Mail to: **Eric. M. Glazer, Esquire** counsel for Appellant, Glazer & Associates, P.A., One Emerald Plaza, 3113 Stirling Road, Suite 201, Hollywood, FL 33312 and **Helio De La Torre, Esquire** Siegfried, Rivera, Lerner, de la Torre & Sobel, P.A., 201 Alhambra Circle, Coral Gables, Florida 33134 on April 27, 2009.

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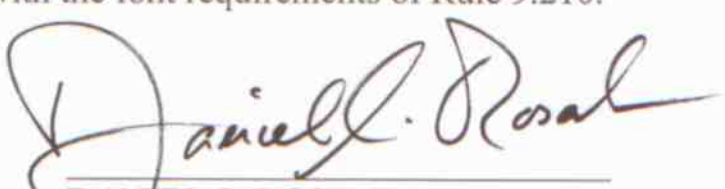
I HEREBY CERTIFY that this brief has been prepared with Times New Roman 14 point type and complies with the font requirements of Rule 9.210.



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factor during its analysis, Cohn's argument on this point is without merit.

CONCLUSION

The Grand respectfully requests this Honorable Court affirm the trial court's ruling and hold that section 718.404(2) of the Florida Statutes is unconstitutional as applied in this case.

Respectfully submitted,

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