CONDOMINIUM AND PLANNED DEVELOPMENT CERTIFICATION
Sample Exam Questions

Disclaimer: The following questions are provided to the public as examples of types of questions that appear on Condominium and Planned Development Law certification exams. All questions have been pulled from previous examinations and were correct and factual at the time of administration; however, the Condominium and Planned Development Law Certification Committee acknowledges that some questions and/or answers may no longer be accurate due to the passage of time since administration. None of these questions will appear on future exams.

MULTIPLE CHOICE QUESTIONS

1. Developer of a condominium is required to transfer control of the association. **Which of the following is NOT a correct statement about transfer of control?**

(a) After transfer of control, unit owners may, by a 75% vote, cancel contracts entered into by the developer for the operation and maintenance of the condominium property.

(b) Developer must provide as-built plans and specifications for the condominium building at the time of transfer of control.

(c) After transfer of control, the association may increase assessments for common expenses only against developer owned units for costs of repair of construction defects.

(d) Developer may vote its remaining condominium units towards amendment of the declaration.

2. **Which of the following uses of escrowed buyer deposits in excess of 10% of the purchase price of a condominium unit DOES NOT comply with the Florida Condominium Act?**

(a) Actual construction and development of the condominium property in which the unit to be sold is located.

(b) Payments to subcontractors for work performed on the construction site of the condominium in which the unit is to be located.

(c) Sales commissions for developer's sales agents who are onsite at the condominium sales center.

(d) Payment for building materials intended to be used at the condominium property in which the unit is to be located.

3. An associate lawyer from a multi-partner law firm attends an event sponsored by a management firm to speak on a legal issue. The management company invites its managers and also board members and officers of associations managed by the management company. After the speech, the lawyer was approached by a board member who asked for advice on handling an offer by a vendor to paintthe personal unit of the board member with better quality paint if the vendor's company is engaged to do work for the association. The lawyer was late for a meeting, jotted down the name and phone number of the inquiring board member, and stated, time permitting, the lawyer would get back to the board member.

The issue is whether an attorney-client relationship was created. **Which is the correct answer?**

(a) There must be a written representation agreement between the lawyerand the client. Since there is no written agreement, the lawyer has no obligation to contact or give legal advice to the inquiring board member.

(b) The test for determining the existence of an attorney-client relationship is subjective and hinges on the client's reasonable belief that it is consulting a lawyer in that capacity. The lawyer should therefore proceed on the basis that the inquiring board member may believe that there is an attorney-client relationship and either confirm or deny the representation.

(c) No money has been paid or promised. The lawyer has no obligation to the inquiring board member.

(d) An associate attorney cannot agree to legal representation of a client without the written approval of a partner in the law firm, so no attorney-client relationship was formed and there is no duty to act or respond to the inquiring board member.

4. All of the following are correct statements regarding the validity of a rule made by a condominium association board <u>EXCEPT</u>?

(a) The rule cannot restrict use of units

(b) The rule must be reasonable

(c) The Declaration, Articles or Bylaws must confer rulemaking authority on the board

(d) The rule cannot conflict with the superior, recorded condominium documents or any unit owner right that could be inferred from those documents

5. On June 1, 2015, ACME Development Corporation completed the development of One Ocean Condominium. One Ocean Condominium is a single building comprised of 100 residential condominium units in Florida, all of which are operated by One Ocean Condominium Association. The board of administration of the Condominium Association is comprised of three board members, and the Condominium is the only condominium operated by the Condominium Association.

As of June 30, 2015, ACME owned all 100 units. On July 1, 2015, ACME sold 15 units in the Condominium to Harrison LLC, unaffiliated with ACME. On July 20, 2015, ACME sold another 10 units in the Ocean Condominium to Dearborn LLC, unaffiliated with both ACME and Harrison LLC.

As of September 15, 2015, no meeting of the Condominium Association to elect members of the board of administration had been called, and none of the other units in the Condominium had been sold or re-sold. On September 25, 2015, Dearborn called and delivered notice to all unit owners for a meeting of the membership of the Condominium Association to be held on December 1, 2015, in order to elect a member of the board of administration.

At the meeting on December 1, 2015, although getting zero votes from units owned by ACME, Dearborn and Harrison elected one member of the board of administration.

Was the election of one member of the board by Dearborn and Harrison valid?

(a) No. Dearborn's calling of the December 1 meeting was invalid because only an association is authorized to call meetings to elect board members.

(b) No. Dearborn's calling of the December 1 meeting was invalid because the meeting was not held timely, as more than 60 days elapsed between the notice of the meeting on September 25 and the meeting on December 1.

(c) No. The election of one member of the board by Dearborn and Harrison was invalid because Dearborn and Harrison only owned a combined 25 of the 100 units in One Ocean Condominium, which is an insufficient ownership interest to elect 1/3 of the board members.

(d) Yes. The calling and noticing of the December 1 meeting was proper, and the election of one member of the board by Dearborn and Harrison was valid.

6. Which of the following is <u>NOT</u> a "cooperative document"?

(a) A document evidencing a unit owner's membership in the cooperative association.

(b) A document recognizing a unit owner's right of possession or title to a unit.

(c) A plot plan and survey prepared pursuant to statute that identifies the common elements.

(d) The documents that create the cooperative, including the articles of incorporation, bylaws and the ground lease or other underlying lease, if any.

7. A first mortgagee acquired title to a condominium unit through foreclosure. The condominium association was joined as a defendant in the action and the association's declaration incorporates the language currently set forth in FS 718.116(1)(b)1**. With regard to the liability of the first mortgagee for unpaid assessments that became due before the mortgagee acquired title to the unit, liability is limited to the lesser of:**

(a) (i) the unpaid assessments that accrued or became due during the 6 months immediately preceding the acquisition of title; or (ii) one percent (1%) of the original mortgagee debt.

(b) (i) the unpaid assessments that accrued or became due during the 18 months immediately preceding the acquisition of title; or (ii) five percent (5%) of the value of the unit.

(c) (i) the unpaid assessments that accrued or became due during the 12months immediately preceding the acquisition of title; or (ii) one percent (1%) of the original mortgage debt.

(d) (i) unpaid assessments that accrued or became due during the 12 months immediately preceding the acquisition of title; or (ii) one percent (1%) of the value of the unit.

8. What percentage of unit owners in a cooperative are needed to petition the board to require a special membership meeting to be held to consider raising the level of financial reporting above the minimum required by statute?

(a) 20% of the unit owners in the cooperative.

(b) 10% of the unit owners in the cooperative.

(c) Unit owners in a cooperative are not permitted to petition the board for a greater level of financial reporting than what is required by statute.

(d) 20% of the unit owners in a cooperative may petition the board for a greater level of financial reporting if the Bylaws so provide.

9. Which of the following procedures does not comport with the statutory requirements in connection with the imposition of a fine against the owner of a condominium unit for the failure of such owner to comply with a provision of the condominium association's declaration, by-laws, or reasonable rules?

(a) The board of directors may levy a fine not to exceed $100 per violation or $1000 in the aggregate at a duly noticed meeting of the board.

(b) A fine levied by the board of directors may not be imposed unless the board first provides the unit owner with at least fourteen (14) days' notice and an opportunity for a hearing before a committee.

(c) The committee conducting the hearing must be comprised of other unit owners who are not board members or persons residing in a board member's household and such committee is limited to determining whether to confirm or reject the fine levied by the board.

(d) The association may record a lien against the owner's unit for failure of the owner to pay a properly imposed fine.

10. The common elements in an older high-rise residential condominium include the windows and sliding glass doors serving the units. The windows and sliding glass doors are original installations. The Board has adopted specifications for hurricane shutters, which have been installed by a few owners. There have been a number of water leaks in the last few years which appear to be coming from the windows and sliding glass doors. The Association has engaged a contractor to seal and caulk the exterior of the leaking windows and sliding glass doors.

Continued

Despite the maintenance work, some of the leaking windows and sliding glass doors continue to leak and new leaks are occurring in other windows and sliding glass doors. The Association obtained bids from window installation contractors to replace the windows and sliding glass doors with new impact glass, code compliant windows and sliding glass doors rated as hurricane protection. The cost of the replacement windows and sliding glass doors would be substantial, well more than 115% of the annual budget of the Association. There are no reserves for window and sliding glass door repair or replacement but there are funds in a roof reserve.

Although the Board of Directors of the Association has the authority to adopt the annual budget, the unit owners are required to approve special assessments under the governing documents and recently rejected a proposed special assessment to pay to replace the windows and sliding glass doors.

Part 1: **Which of the following is a correct answer?**

(a) A unit owner who suffers damage to a unit due to a water leak from the windows or sliding glass doors is barred from pursuing a claim against the Association since the unit owners rejected the special assessment proposed to fund window and sliding glass door replacement.

(b) The number and severity of the water leaks from the windows and sliding glass doors is an emergency situation under the Condominium Act thereby permitting the Board to levy a special assessment to fund the replacement of the windows and sliding glass doors without having to secure unit owner approval.

(c) The Association has the right to petition The Division of Florida Condominiums, Timeshares and Mobile Homes, Department of Business and Professional Regulation, pursuant to 718.1255 FS for mandatory non-binding arbitration to seek injunctive relief pertaining to the special assessment.

(d) The duty of the Association to maintain, repair and replace the windows and sliding glass doors remains in effect: the Association should investigate other alternatives and funding sources with a goal of eliminating water leaks arising from common element sources.

Part 2**: Which of the following is <u>NOT</u> a correct answer?**

(a) Separate from the funding issue, the decision to install new impact glass, code compliant windows and sliding glass doors rated as hurricane protection could be approved by a majority of the voting interests of the entire membership.

(b) The Association must allow a unit owner to install code-compliant hurricane shutters on the owner's unit no matter the condition of the windows and sliding glass doors.

(c) The Association must allow a unit owner to install new impact glass, code compliant windows and sliding glass doors rated as hurricane protection on the owner's unit given the delay in addressing the replacement of the windows and sliding glass doors.

(d) A unit owner given permission by the Association to install new impact glass, code compliant windows and sliding glass doors rated as hurricane protection on the owner's unit shall be entitled to a credit when the Association installs new impact glass, code compliant windows and sliding glass doors rated as hurricane protection, provided the windows and sliding glass doors installed by the owner remain code-compliant hurricane protection at the time of the Association installs the remaining windows and sliding glass doors.

***Part 3*: Which of the following is correct?**

(a) The Board could include the entire cost of replacing the windows and sliding glass doors in the next annual operating budget in order to fund replacement in that budget year.

(b) The unit owners would have a right to petition for consideration of a substitute budget if the Board included the entire cost of replacing the windows and sliding glass doors in the next annual operating budget.

(c) Since the Association failed to establish and fund a reserve for windows and sliding glass door replacement, it is not permissible to fund the replacement expense in the operating portion of the budget.

(d) Ten percent of the voting interests of the members may petition the board to address the use of the roof reserve monies for window and sliding glass door replacement at the next regular board meeting.

SHORT-ANSWER ESSAYS

1. A declaration of condominium requires approval of 2/3 of all voting interests to amend. The bylaws require approval of 51% of the voting interests present and voting at a meeting for amendments. The bylaws provide that the board of directors can adopt rules "regarding unit use." The Association wants advice on the least complicated, but legally defensible, means to "stop people with a criminal history from buying in" at the condominium**. Discuss the legal issues presented.**

2. A condominium association's declaration provides that all windows are common elements, and the association is responsible for the costs of the maintenance, repair and replacement of the windows as part of the common expenses. An amendment to the declaration has been proposed which changes the maintenance, repair and replacement responsibilities for the windows so that each owner becomes responsible for 100% of the expense to maintain, repair and replace the windows which they are entitled to use. The declaration can be amended by approval of not less than 51% of the owners except that the declaration incorporates the heightened approval requirement in Chapter 718, Florida Statutes, for amendments that 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 and owns the common surplus.

Provide legal arguments to support the validity of the proposed amendment and explain why the amendment would not require approval of all owners.

3. Discuss the legal issues and the pros and cons of including "Kaufman language" in a declaration as originally recorded or as amended after turnover.

4. A declaration of covenants and restrictions for a zero lot line platted townhouse community with a mandatory membership homeowner association with assessment and lien authority states that the developer reserves the right to control the architectural review process for owner construction of new dwellings and improvements, as well as alterations or additions, until the sale of the last lot owned by the developer. The lot owners are obligated under the declaration of covenants and restrictions to submit applications for review and approval of new construction and alterations or additions within designated timeframes to the developer. The declaration of covenants and restrictions contains other customary architectural provisions including a prohibition on certain items, a permissive right to pursue other items with developer approval, and a list of the factors to be considered by the developer when reviewing applications. The declaration of covenants and restrictions states that the authority to review and approve architectural requests will be assigned by the developer to the homeowner association within 60 days after the closing on the sale of the last lot and may, in the sole discretion of the developer, be assigned to the homeowner association at an earlier time. The declaration of covenants and restrictions states that the developer, the homeowner association, or any lot owner, shall have the right to enforce the use restrictions set forth in the declaration of covenants and restrictions. A vice-president of the corporate development entity has timely reviewed applications and communicated its position on each application directly to the applicant. The developer does not hold any noticed meetings, does not allow other lot owners to participate, does not allow the homeowner association, which is in the control of the non- developer lot owners, to participate, and does not provide copies of any applications, plans, specifications, or communications to and from the applicants to the homeowner association. The homeowner association desires to contest this arrangement and at a minimum wants copies of all architectural records.

Discuss the legal issues from both the developer's perspective and the homeowner association.

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Answer Key

Multiple-Choice Answers

1. (c) Violates F.S. 718.301(3).

2. (c) F.S. 718.202(3) prohibits escrowed deposits from being used for salaries, commissions, or expenses of salespersons or for advertising purposes.

3. (b) See *Dean v. Dean*, 607 So. 2d 494 (Fla. 4th DCA, 1992) and *Bartholomew v. Bartholomew*, 611 So. 2d 85 (Fla. 2nd DCA, 1992).

4. (a) See *Beachwood Villas Condominium v. Poor*, 448 So.2d 1143 (Fla. 4th DCA 1984). Rules regulating unit use are specifically contemplated in FS 718.112(2)(c) and have routinely been upheld by the courts.

5. (d) Question is based on F.S. § 718.301. The association failed to call a meeting to elect board members within 75 days following the sale of 15% of the units to others other than the developer, which occurred on July 1. Therefore, as a unit owner, Dearborn LLC had the authority to call such meeting. Dearborn LLC gave notice at least 60 days prior to the meeting (67 days prior). As Dearborn LLC and Harrison LLC collectively owned more than 15% of the units, they were entitled to elect at least one-third of the board members, i.e. one director.

6. (c.) A plot plan and survey are not listed as a necessary cooperative document under 719.103 (13), F.S.

7. (c) See FS 718.116(1)(b)1

8. (a) § 719.104(4)(d), F.S.

9. (d) Section 718.303(3), Florida Statutes, provides a fine may not become a lien against a unit.

10. **Part 1**- (d) The Association has a statutory duty to maintain, repair and replace the common elements and none of the stated facts changes that duty. 718.113(1) FS. **Part 2-** (c) Not correct and therefore the right answer. 718.113(5) FS does not mandate board adoption of specifications for other forms of hurricane protection. The Board may, but is not required to, allow other forms of hurricane protection. See also, Chattel Shipping & Investment, Inc. v. Brickell Place Condominium Assn., Inc. 481 So 2d 29 (Fla 3d 1985). **Part 3–** (a) Correct answer. The cost to replace common elements is a proper operating expense and may be included in an annual budget in the year in which the work is to take place. 718.112(2)(f) FS.

Short Essay 1. Model Answer:

Any provision restricting the transfer of units should be in the declaration, as authorized by F.S. 718.104(5), which permits the declaration as originally recorded, or as amended pursuant to the procedure provided therein, to include restrictions regarding the "use, occupancy and transfer of units." F.S. 718.112(3)(b) permits the bylaws to contain "restrictions on the use, maintenance and appearance of units," but does not grant the right for the bylaws to regulate "transfers." F.S. 718.112(3)(a) permits the bylaws to establish "a method of adopting and amending administrative rules and regulations governing the details of the operation and use of the common elements." There is no grant in this section of the statute contemplating the authority of a board to make rules regulating units, although same can be inferred from F.S. 718.112(2)(c), which requires 14-day pre-meeting notice for adopting of board rules regulating "unit use." However, even this would presumably still not empower the adoption of board rules regarding "transfers."

The validity of condominium association rights of approval has been tested in the Florida courts as to whether such rights are an impermissible restraint against alienation. The most often cited case is Aquarian Foundation, Inc. v. Sholom House, 448 So.2d 1166 (Fla. 3d DCA 1984). In Aquarian Foundation, the court upheld an association's right of approval, based upon the fact that the declaration of condominium required the association to provide an alternate purchaser in the event that it disapproved the sale of a unit. Therefore, most declarations of condominium which contain transfer approval rights, also contain a provision which requires the association to furnish an alternate purchaser (or itself purchase the unit) if it disapproves a prospective purchaser.

The practical problems with this requirement are self-evident. In most cases, associations either do not have or do not wish to raise the money to buy a unit, and typically cannot secure an alternate purchaser within the time frames required. A condominium association's right to reject a purchase application without purchasing the unit was at issue in *Coquina Club, Inc. v. Mantz*, 342 So.2d 112 (Fla. 2d DCA 1977).The Coquina Club's documents prohibited residency by children (this was prior to the Fair Housing Amendments Act of 1988, which generally outlaws such restrictions). A family with children applied to buy a unit at Coquina Club. The board of directors rejected the application. Mr. Mantz, the unit owner who lost the sale, filed suit against the association, claiming that the association was obligated to purchase

the unit. The trial court agreed. The Second District Court of Appeal reversed the trial court and held that the association was not obligated to purchase the unit. The Second District held that since the prospective purchasers did not "facially qualify" for membership in the association, the association was not obligated to further process the application, and could reject the application without triggering a responsibility to buy the unit. The *Coquina Club* court noted that to hold otherwise, would open associations up to collusive possibilities, where people would potentially present sham transactions in an effort to get the association to buy the unit. The court held that the "screening" process was actually a two-step process. First, the association would determine whether the applicant "facially qualified" for membership in the association. If so, the court went on to say, the association could engage in more thorough "screening" of the applicant, including financial stability. Then, if the association elected to reject the applicant (after the "screening" process), the association would be obligated to provide purchase the unit or provide an alternate purchaser, as the declaration may specify.

The concept that has not been squarely tested in the courts, to date, is the ability of an association to disapprove a proposed transfer "for cause" (i.e., create a list of "disqualifications") without triggering the duty to provide an alternate purchaser for the unit or have the association itself purchase the unit. In the case of *Camino Gardens Association, Inc. v. McKim*, 612 So.2d 636 (Fla. 4th DCA 1993), which arose in the homeowners' association context, the court struck down an association's right to deny membership in an association based upon "moral character" and other standards, including financial capability. Although the court struck down the provision as violative of the rule against restraints on alienation, the court did not address (perhaps because it was not before the court) whether a more definitive "cause" clause would withstand judicial scrutiny. Therefore, although such provisions are common, this remains an unsettled question of law.

Another caveat is in order. The United States Department of Housing and Urban Development (HUD) is the federal agency which enforces fair housing laws, which protect various "protected classes," including "minorities" against housing discrimination. On April 4, 2016, HUD issued a "Guidance" document expressing concern about evaluating housing opportunities based upon criminal history because of its "disparate impact" on minorities. The "Guidance" release from HUD is not "the law," but does indicate the enforcement posture the agency would probably take if a complaint was filed. The Guidance goes into considerable detail regarding

HUD's conclusion that minorities are incarcerated at a disproportional rate, thus positing that evaluating housing requests based on criminal past could be discriminatory. For example, the Guidance states:

"A housing provider must, however, be able to prove through reliable evidence that its policy or practice of making decisions based on criminal history actually assists in protecting resident safety and/or property. Bald assertions based on generalizations or stereotypes that any individual with an arrest or conviction record poses a greater risk than any individual without such a record are not sufficient to satisfy this burden."

It seems unrealistic that a condominium association would be in a position to obtain "reliable evidence" supporting the conclusion that a particular policy on criminal backgrounds protects safety and/or property. Therefore, the association should also be made aware of this issue, and the risks of discrimination claims, when considering the advisability of such a provision.

Bullet Points/Issues and Analysis

- Transfer restrictions must be in declaration; F.S. 718.104(5)
- Address F.S. 718.112(2)(i) and F.S. 689.28(2)(c)
- Statute does not contemplate bylaws regulating transfers; F.S. 718.112(3)(b)
- Board imposition of transfer restrictions not supported by statute or case law
- Restraint on alienation analysis
- Right to approve has generally been found valid where there is duty to exercise right of first refusal or provide a substitute purchaser; *Acquarian Foundation Inc. v. Shalom House*
- Exception when applicant does not "facially qualify for membership" in association; *Coquina Club*
- Ability to "disapprove for cause" without exercising right of first refusal or providing alternate purchaser is untested issue in condominium law. What case law exists (*Camino Gardens/HOA*) is negative
- HUD Guidance adopted in 2016 suggests that using criminal background investigations in evaluating housing applications is discriminatory

Short Essay 2. Model Answer:

1. Apply Section 718.110(14), Florida Statues, to argue that the association is entitled to amend the declaration to reclassify the windows as limited common elements upon approval by not less than 51% of the owners as stated in the declaration instead of triggering the heightened approval requirement under the declaration and Section 718.110(4), Florida Statues.

2. In conjunction with the amendment to reclassify the windows as limited common elements, apply Section 718.113(1), Florida Statutes, to argue that the association is entitled to amend the declaration to make the limited common element windows the sole maintenance, repair and replacement responsibility of the owners who are entitled to use such windows, or continue the Association's duty to maintain, repair and replace the windows but at the expense of those entitled to use the limited common elements.

3. Caveat, Section 718.113(1), Florida Statutes, only mentions that the declaration may provide that certain limited common elements shall be maintained by those entitled use them, and it does not expressly referenceshifting repair or replacement obligations to the individual owners entitled to use the limited common elements. However, at least one arbitration decision has previously applied the word "maintenance" to include repair and replacement.

4. Argue that an amendment pursuant to Section 718.113(1), Florida Statutes, does not trigger the heightened approval requirement under the declaration and Section 718.110(4), Florida Statues, because it does not 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 and owns the common surplus.

Short Essay 3. Model Answer:

Generally, the Florida courts have held that the law that exists when a declaration of condominium is created is "as though engrafted onto the condominium documents." See *Suntide Condominium v. Division of Florida Land Sales & Condominiums*, 463 So.2d 314 (Fla. DCA 1984). However, the courts have, on some occasions, applied new laws to pre-existing condominiums. For example, in *Rothfleisch v. Cantor*, 534 So.2d 823 (Fla. 4th DCA 1988), the court upheld a board's authority to grant an easement, without a vote of the unit owners, even though the law that existed when the condominium was created did not give the board that authority. The court reasoned that the hodge-podge application of different condominium laws to different condominiums would create a "morass of legal entanglement," which should be avoided.

The Florida Constitution prohibits the legislature from enacting legislation which impairs vested contract rights. The courts have held that the declaration of condominium constitutes a contract. See *Pepe v. Whispering Sands*, 351 So.2d 755 (1977). Most of the retroactive impairment cases involved land leases and management contracts. Various practices (particularly CPI escalators) were outlawed by changes to the statutes in the 1970's. However the courts, for the constitutional impairment reasons stated above, continued to apply the old laws to condominiums that pre-dated the new legislation. The Florida Supreme Court recently applied this doctrine to hold that the legislative re-allocation of voting rights in mixed use condominiums could not be retroactively applied due to constitutional limitations. See *Cohn v. Grand Condo. Association*, 62 So.3d 1120 (Fla. 2011).

One exception to this "grandfathering" concept involves cases where a developer's original declaration of condominium incorporates future amendments to the Condominium Act. A seminal case was *Kaufman v. Shere*, 347 So.2d 627 (Fla. 3d DCA 1977) which struck down a land lease escalator clause when the declaration of condominium incorporated future amendments to the Condominium Act. The "amended from time to time" language has thus come to be known as *Kaufman* language. Developers' lawyers should never put *Kaufman* language in their condominium documents. The Developer will want to insulate itself from potential "pro-consumer" changes to the Condominium Act. There could be exceptions, but highly doubtful.

The inclusion of *Kaufman* language in unit owner-controlled associations is a bit more complicated. First, there is room for debate as to the degree to which the *Rothfleisch* doctrine applies to operational changes to the statute, when "vested rights" are involved, what "vested rights" are (or if the vested rights doctrine survives *Woodside v. Jahren*, 754 So.2d 931 (Fla. DCA 2000)), what changes to the statute are "procedural" versus "substantive," when substantive, if they are "remedial," and if remedial, subject to the *Pomponio* balancing test. There must also be an expression of legislative intent to apply a new statute retroactively.

The downside to incorporating *Kaufman* language (which some might argue is potentially significant) is than an association might wish to preserve the right to claim exemption from changes in the Florida Statutes. For example, the law was amended in 2004 to prohibit associations from enforcing declaration amendments that enact certain new leasing restrictions as to those unit owners who do not approve the amendment. A pre-2004 association could argue that the Legislature cannot take away their right to make amendments to their "contract" (declaration) as provided therein. Another potentially significant law that could be impacted by the existence or absence of *Kaufman* language involves terminations, where several significant changes have been made over the past several years.

It is a business decision in determining whether or not to include *Kaufman* language in proposed post-turnover condominium documents. Essentially, the Association gains certainty in its operations by not having to debate "which law applies," and can take advantage of the many changes made to the statute over the years that are intended to facilitate operation of associations, without having to adopt amendments. However, it loses the right to try to avoid a new statute it may not like and may subject owners to changes in the law which could impact fundamental property rights. "Spot amendments" incorporating *Kaufman* language may be a choice to avoid risks.

Bullet Points/Issues and Analysis

1. What is "*Kaufman* language."
2. Two Prong Issue; What Difference Does It Make?
    a. Law existing on date of Declaration is "engrafted." *Suntide*

b. Constitutional prohibition against retroactive impairment of contract; extends to third parties (e.g., developer and lenders)

i. Does not apply to procedural or remedial amendments to statute, they apply anyway.

ii. Must be evidence of intent to retroactively apply

1. No degree of impairment tolerated. *Yamaha Parts*

2. *Pomponio* balancing test is alternative view

3. *Rothfleisch* doctrine; "Morass of legal entanglement"

3. Developer would likely never want to put in *Kaufman* language. Lesson learned from rec. lease cases. Most amendments pro-consumer. Any answer to the contrary shows fundamental misunderstanding.

a. Might be limited exception for DCRA being retroactively applied to the extent it wouldn't be without *Kaufman* language. Also, discussion of *Tahiti Beach* ruling on retroactive application of termination statute would go here, another possible pro for putting in original Dec, but still not likely worth the risk. Can't predict the future.

4. Pros for Turned Over Associations

a. Certainty as to "what law applies."

b. Don't have to amend to take advantage of advantageous changes to statute

c. Most amendments to statute facilitate association operations so are desirable to clearly incorporate (e.g., improvement in safe harbor, hurricane protection, etc.)

d. Boards without *Kaufman* language usually don't want to litigate whether amendment they don't like can be avoided, e.g. the 2004 amendment to 718.110(13) implementing the rental amendment grandfathering law

5. Cons for Turned Over Associations

a. Trap for unwary. What if Association in *Cohn* had added *Kaufman* language? Need to advise client, their decision.

b. *Kaufman* language not absolute (e.g., *Island Manor*)

c. You take the bad with the good. Waive any argument of retroactive impairment.

6. Other

a. Can do modified approach

i. Just add amended from time to time language to certain provisions

ii. Add generic *Kaufman* language but carve some provisions out.

Short Essay 4 Model Answer:

1. Retaining architectural control post-turnover is not a prohibited clause in a declaration of covenants under Section 720.3075, FS.

2. Architectural approval records are not a listed official record. If the records were submitted to the developer directly, and not to a board or committee of the homeowner association that the developer might control, the records are arguably not written records of the homeowner association under the catch-all category of Section 720.303(4)(l), FS.

3. Architectural approval records are not listed documents that must be transferred to the homeowner association at turnover and if the records were submitted to the developer directly, and not to a board or committee of the homeowner association that the developer controlled, the records are arguably not records of the homeowner association under Section 720.307(4)(f), FS.

4. Until assigned by the developer, the homeowner association is not an express party to any contract that might be created by the review and approval of owner architectural requests, such as conditions imposed as a requirement of approval, so the records do not fall under Section 720.307(4)(s), FS and do not have to be transferred as part of turnover.

5. Covenants and restrictions set forth in a recorded declaration of covenants and restrictions touch and concern the submitted lands and run with the lands in order to establish a general scheme of development of the concerned parties consisting of the developer, the lot owners, mortgage holders, and the homeowner association. “A real covenant, or covenant running with the land, differs from a merely personal covenant in that the former concerns the property conveyed and the occupation and enjoyment thereof, whereas the latter covenant is collateral or is not immediately concerned with the property granted.” Hagan v. Sabal Palms, Inc., 186 So. 2d 302, 310 (Fla. 2d DCA1966). The homeowner association should argue it has a non-exclusive right to enforce the covenants and argue frustration of purpose and impossibility under established contract cases. If the developer is the only one with records, the requirement for architectural authority would be a mere personal covenant and not a covenant running with the land.

6. The directors of the homeowner association have a fiduciary duty to enforce the covenants and would be unable to do so if the developer does not provide copies of its architectural control records. It would be a breach of duty of the persons previously appointed by the developer to the board of the homeowner association if they had failed to request and obtain these architectural records from the developer. 720.303(1), FS

7. A provision in a recorded original declaration of covenants and restrictions can be somewhat unreasonable and still be enforceable, but failing to provide copies of its architectural records constitutes an unlawful wholly arbitrary or unreasonable interpretation of a covenant which violates public policy. Hidden Harbor Estates, Inc. v. Basso, 393 So 2d 637 (Fla. 4th DCA 1981); Constellation Condominium Association v. Harrington, 467 So. 2d 378 (Fla. 2d 1985).

8. Argue that the declaration of covenants and restrictions establishes mutual contract rights according to the Supreme Court in Providence Square Ass'n, Inc. v. Biancardi, 507 So.2d 1366 (Fla. 1987), and as such, the homeowner association is in fact a party to the contract that requires owners to submit and obtain architectural approval first from the developer, and then eventually the homeowner association; hence, the records should be made part of the official records of the homeowner association pursuant to Section 720.303(4)(l), FS and transferred as part of turnover pursuant to Section 720.307(4)(f), FS.