MEMORANDUM ON CONSTITUTIONAL ISSUES RAISED BY THE RETROACTIVE APPLICATION OF THE UNIFORM COMMON INTEREST OWNERSHIP ACT

FROM: Jim Smith, Reporter

DATE: Aug. 4, 2020

I. Background

The original drafting committee for the Uniform Common Interest Ownership Act (UCOIA) (1982) recognized the desirability of applying UCOIA to all common interest communities within the enacting state, but perceived constitutional impediments to that approach. A comment to Section 1-201, the basic scope provision applying UCOIA to communities created after the effective date of the act, observes:

> Two conflicting policies are posed when considering the applicability of this Act to "old" and "new" common interest communities in the enacting State. On the one hand, it is desirable, for reasons of uniformity, for the Act to apply to all common interest communities located in a particular State, regardless of whether the common interest community was created before or after adoption of the Act in that State. To the extent that different laws apply within the same State to different common interest communities, confusion results in the minds of both lenders and consumers. Moreover, because of the inadequacies and uncertainties of common interest communities created under prior law, if any, and because of the requirements placed on declarants and unit owners' associations by this Act which might increase the costs of new common interest communities, different markets might tend to develop for common interest communities created before and after adoption of the Act.
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> On the other hand, to make all provisions of this Act automatically applicable to "old" common interest communities might violate the constitutional prohibition of impairment of contracts. . . .[1]

Two comments to Section 1-204, *Applicability to pre-existing common interest communities*, also discuss constitutional issues:

> 3. . . . First, Section 1-204 provides that the enumerated provisions automatically apply to common interest communities created under pre-existing law, even though no action is taken by the unit owners. . . . To avoid possible constitutional challenges, these provisions, as applied to "old" common interest communities, apply only to "events and circumstances occurring after the effective date of this Act;" moreover, the provisions of this

[1] UCOIA § 2-101 comment 1. This comment is not original to UCOIA (1982). The same language appears in the Uniform Condominium Act (UCA) § 1-102 comment 1 (1977).

Act are subject to the provisions of the instruments creating the common interest community, and this Act does not invalidate those instruments. . . .

Second, the prior laws of the State relating to common interest communities are not repealed by this Act because those laws will still apply to previously-created projects, except when displaced. Some States at one point made certain provisions of their condominium statutes automatically applicable to pre-existing condominiums. In certain instances, this attempted retroactive application has raised serious constitutional questions, has caused doubts to arise as to the continued validity of those condominiums, and has created general confusion as to what statutory rules should be applied. . . .[2]

5. In considering which sections of the Act might be applied automatically to projects created under other law, the drafters [of the 2008 UCOIA amendments] remain concerned to avoid constitutional infirmity as a consequence of challenges under Article I, Section 10 of the United States Constitution, which bars a State – but not the federal government – from passing any law " . . . impairing the Obligation of Contracts. . . ."

That subject, which was addressed in Comment 3 to this section in the original version of this Act, has subsequently been raised in a number of litigated cases, with mixed results. *Compare, e.g*., *Fourth La Costa Condominium Owners Ass'n v. Seith*, 159 Cal. App. 4th 563 (2008) (statute not unconstitutional) *with Association of Apartment Owners of Maalaea Kai, Inc. v. Stillson*, 116 P.3d 644 (Hawaii 2005) (statute unconstitutional as applied).[3]

The policy issues are not free from difficulty. On the one hand, for reasons of consistent management, judicial interpretation and consumer expectations among common interest communities in the same State, a single

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[2] This comment is not original to UCOIA (1982). The same language appears in the Uniform Condominium Act (UCA) § 1-102 comment 3 (1977).

[3] The comment does not correctly state the holding of the *Stillson* case. The case involves application of a Hawaii statute adopted in 1988, which allows the association of a leasehold condominium to purchase the fee estate on behalf of the lessees. The statute requires approval by lessees of condominium units to which 75% of the common interests are appurtenant. The association in *Stillson* conducted a vote, purchased the fee estate, and assessed monthly conversion surcharges to all lessees to pay for the purchase price. The Stillsons, purchasers of a unit in 1974, had voted against purchase of the fee estate. The Stillsons refused to pay the monthly surcharges, and the association sued to foreclose on their unit. The trial court granted judgment for Stillson, reasoning that retroactive application of the statute "to permit assessment of the Stillsons for a share of fee conversion costs, under the circumstances of this case, would violate the Contracts Clause of the United States Constitution." 116 P.3d at 648. But the Hawaii supreme court reversed and remanded, holding that the association satisfied the statutory voting requirement. The court remanded for the trial court to determine whether the actual assessment complied with a statutory directive that the assessment be made in a "fair and equitable manner." Thus, the supreme court, unlike the trial court, upheld the statute and applied it retroactively to the dissenting lessees.

> body of law that applies with equal force to all common interest communities in a State regardless of when created, would be greatly preferable. This, of course, is the general result in the field of corporate law, where all amendments to corporate statutes generally apply to all corporations in a state, regardless of whether they have retroactive application.
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> On the other hand, aside from the issue of possible constitutional infirmity, at least one practical reason – that being the "law of the project", which is known to all residents of a common interest community from the time they first became residents – is often raised to justify a refusal to apply new real estate laws retroactively to older projects. . . .

II. The Federal Constitution.

Challenges to the application of UCOIA to preexisting common interest communities (hereinafter "preexisting communities") might proceed under three clauses to the US Constitution: the Contracts Clause, the Takings Clause, and the Due Process Clause. Although complex problems may arise concerning the application of these clauses in some contexts, it is abundantly clear that all challenges to UCOIA that one might anticipate under all three clauses would not succeed. The US Supreme Court case law is so definitely settled that extended analysis is unnecessary. Short explanations follow.

A. Contracts Clause

Article I, Section 10 of the US Constitution provides: No State shall . . . pass any . . . Law impairing the Obligation of Contracts." Originally the Contracts Clause served as a significant limit on legislative modification of contract rights, particularly in the context of debtor relief legislation. This practice ended with the Supreme Court's landmark decision in *Home Building & Loan Association v. Blaisdell*,[4] upholding a Minnesota mortgage moratorium law enacted as an emergency measure during the Great Depression. The Court held that legislation retroactively reducing the economic value of contract obligations does not violate the Contract Clause when enacted in pursuit of legitimate governmental objectives. Justice Hughes, writing for the majority, observed that the Contract Clause is "qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people."[5]

Subsequent Supreme Court decisions follow *Blaisdell*, upholding laws that permanently modify contract obligations and operate in contexts other than debtor relief

[4] 290 U.S. 398 (1934).

[5] Id. at 434. The Court also stated: "The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts. . . . The question is not whether legislation affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to the end." Id. at 437, 438.

legislation.[6] Of particular importance is *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*,[7] rejecting a Contracts Clause challenge to a state statute that reduced prices payable under a long-term supply contracts. *Energy Resources*, a unanimous decision of the US Supreme Court, refines the *Blaisdell* analysis with a three-part test:

> (1) The threshold inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship."
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> (2) If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem.
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> (3) Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of "the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." Unless the State itself is a contracting party, "[a]s is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure."[8]

Statutes frequently affect contracts entered into before adoption of the statute. UCOIA is no exception, as it presently applies nineteen UCOIA "looking-back" sections to common interest communities created before a state's adoption of UCOIA. Whenever a statute has any effect on a preexisting contract, it may be said to "impair" an "obligation" of the contract. As indicated above, the Contract Clause allows substantial impairment of preexisting contract rights for any legitimate governmental end. For this reason, the retroactive application of UCOIA (applying all of UCOIA to preexisting communities) creates no appreciable risk of invalidation under the federal Contracts Clause.

Either individual unit owners or declarants who own units or other real estate within the community may bring actions asserting impairment of their contract rights by the retroactive application of UCOIA. The starting point of the claim of the plaintiff (individual unit owner or declarant) involves identification of a "contractual relationship." Normally the relevant contract will be the declaration for the common interest community, as it stood before the state adopted UCOIA. The declaration constitutes a contract among all unit owners, including the declarant while the declarant owns units. In contrast, statutory law does not create a contractual relationship with persons (such as unit owners) who may be benefitted by a statute. In other words, statutes are not contracts; they are just statutes. This is important

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[6] *E.g.*, *Energy Reserves Group, Inc. v. Kansas Power and Light Co*., 459 U.S. 400 (1983) (sustaining price ceilings on newly discovered natural gas that are lower than prices under long-term supply contracts); *Veix v. Sixth Ward Building & Loan Ass'n*, 310 U.S. 32 (1940) (sustaining permanent legislation limiting depositors' withdrawals of funds from savings and loan associations).

[7] 459 U.S. 400 (1983).

[8] Id. at 411-13 (citations for internal quotations omitted). In *Energy Resources*, the Court found no significant impairment of the natural gas seller's contractual rights, reasoning that because the natural gas industry is "heavily regulated" as a general matter, the seller did not have "reasonable expectations" that its contract price was immune from legislative reduction. Id. at 413-16.

in this context. For example, if UCOIA replaces an old condominium statute and UCOIA applies to a preexisting common interest community, a unit owner's claim under the Contracts Clause cannot complain about a statutory right under the old condominium statute that UCOIA removes.[9] The claim must be based on *contract* – a provision of the condominium declaration – which UCOIA impairs.

So, what happens under the three-part test if a unit owner identifies a contract right under the declaration that is limited or removed by enactment of UCOIA? First, the court will ask whether the impairment is "significant." Some impairments are not significant. One recent example, *Sveen v. Melin*,[10] considered Minnesota's adoption of a Uniform Probate Code (UPC) provision (Section 2-804) governing revocation of a person's nonprobate transfers of assets made to a spouse before divorce. The *Sveen* Court held that the UPC automatic-revocation-on-divorce provision does not substantially impair contract rights under a designation of life insurance policy beneficiary made before enactment of the statute. The impairment is not substantial because it reflects the legislature's judgment as to the policyholder's intent, does not impair the policyholder's expectations, and supplies a default rule that the policyholder may override. *Sveen* resolved a long-standing dispute as to the legality of the UPC's approach to contractual-beneficiary designations. Some lower federal courts and state courts had held that the retroactive application of the revocation-on-divorce statute violated the Contracts Clause.

If the court finds a contract impairment to be significant, it proceeds to the second stage of the *Energy Resources* Contracts Clause analysis to ask if the State has "a significant and legitimate public purpose behind the regulation." As long as the State articulates a possible public purpose, the case advances to the third stage, which asks whether the measure is "reasonable" and "appropriate" to achieve its purpose. The court must defer to the "legislative judgment as to the necessity and reasonableness of a particular measure" when, as would be the case with UCOIA, the State is not a party to the contract. This is a hand-off approach. It means the court does not interject its own opinion as to the wisdom of the statute, or whether a different statute could have achieved its ends with less impairment of contract rights.

B. Takings Clause

The Fifth Amendment Takings Clause provides: "nor shall private property be taken for public use, without just compensation." Modern takings law has two main branches: physical invasions and regulatory takings. The application of UCOIA to preexisting common interest communities is highly unlikely to result in viable takings claims in either category.

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[9] See *General Motors Corp. v. Romein*, 503 U.S. 181 (1992) (statute limiting workers' compensation benefits does not impair prior employment contract that lacks express term governing workers' compensation benefits; expectations of employees that statutory benefits would not be diminished do not matter).

[10] 138 S. Ct. 1815 (2018).

1. Physical Invasions

A government often uses its power of eminent domain to acquire real estate, but there are also situations in which governmental conduct is not designed to transfer the right of possession (an estate) from a private owner to the government, but it nevertheless has an effect on the owner's possessory rights. A regulation may allow government or a third party to enter privately owned land for a particular purpose. Alternatively, a government activity that takes place near privately owned land may interfere with the owner's right to possession. In such cases, the owner may bring an action asserting a taking.

The Supreme Court has developed a bright-line rule to handle some of the fact patterns. A taking is found if a physical invasion onto private property, by the government or pursuant to governmental authority, results in a permanent physical occupation. That physical invasion would constitute the tort of trespass if committed by a private individual. Governments, however, are generally immune from tort liability under the doctrine of sovereign immunity, but they can be liable to owners under the Takings Clause for equivalent conduct. Even if the intrusion does not occupy a significant percentage of the owner's property or cause a great loss in economic value, the action violates the federal Takings Clause.[11]

There are no provisions of UCOIA that authorize a physical invasion of a unit owned by a unit owner. Conceivably, an executive board might enact a rule that results in a physical invasion of a unit, such as the installation of a utility line through a unit[12] or a minor change in the location of a unit's boundary wall. But such a rule is not authorized by UCOIA, and therefore could not be attributed to state action (the state's adoption of UCOIA). Any invasion that took place pursuant to the rule would be a trespass, allowing the unit owner the normal remedies available to a victim of trespass.

Likewise, possible "invasions" of common elements do not present a takings risk. In some common interest communities (e.g., condominiums), the unit owners own the common elements as tenants in common. UCOIA contains provisions allowing the executive board to transfer possession or use of common elements to persons, including the grant of utility easements. For two reasons, these provisions create no risk with respect to the Takings Clause. First, a court almost certainly would not consider the board's decision to be state action. Although UCOIA allows an executive board to convey rights in the common elements, it does not require the board to do so. The board is not a state agency, and its decisions concerning possession and use of the common elements are discretionary. Second, an individual unit owner does not have a right of exclusive possession over the common elements. A single unit owner has a shared right of possession with all other unit owners, and

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[11] *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982) (ordinance requiring apartment owner to allow cable company to install cable wire along outside of building is per se taking).

[12] See *Loretto*, s*upra* note 11.

when a board conveys an interest in the common elements, at least some unit owners have approved the conveyance (board members are unit owners).

2. Regulatory Takings

Government regulation that substantially reduces the value of a landowner's property may violate the takings clause even though there is no physical entry upon the property. In a long line of cases, the Supreme Court has identified a number of factors to consider. They include but are not limited to:

- The economic impact of the regulation on the owner.
- Interference by the regulation with the owner's investment-backed expectations.
- The character of the governmental action.
- The degree to which the owner's proposed activity has nuisance-like characteristics.
- Whether the regulation seeks to prevent the owner from causing a nuisance.
- Whether the regulation secures an "average reciprocity of advantage" among a sizeable number of property owners.
- Whether the regulation destroys a recognized property right.[13]

The first element, which asks how much the regulation decreases the value of the owner's property, appears to be the most important factor. In *Lucas v. South Carolina Coastal Commission*,[14] the Court fashioned a per se rule to handle one narrow category of regulatory takings. If a regulation deprives the owner of all economic value, it is a taking unless the regulation is justified on the basis that it prevents the owner from committing a nuisance under previously established "background principles of the State's law of property and nuisance."[15] Thus, a total deprivation of value is a taking unless the government can establish that it is suppressing a nuisance.

Regulatory takings claims based on the retroactive application of UCOIA might be brought by individual unit owners or by declarants. Obviously, neither type of claimant would be able to assert a per se *Lucas* claim. Whatever UCOIA provisions the plaintiff would identify as undesirable, they would not have the economic impact of making the plaintiff's property valueless.

When the per se takings rule does not apply, a statute or regulation may still result in a regulatory taking based on the court's application of the multi-factor analysis described above. For an individual unit owner, a regulatory takings claim will fail at the outset. All regulatory takings claims are based on economic harm. The starting point is the plaintiff's allegation that the regulation has significantly reduced the fair market value of her property. A unit owner will not be able to prove this. The adoption of UCIOA either has no effect on the overall market values of units, or (hopefully) it has a positive effect to some extent.

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[13] See generally *Penn Central Transportation Co. v. New York*, 438 U.S. 104 (1978).
[14] 505 U.S. 1003 (1992) (owner of beachfront lots has right to build house, notwithstanding beach protection legislation).
[15] Id. at 1029.

Professional appraisals of units will not show the contrary, no matter how much a plaintiff unit owner complains that she does not like particular UCOIA provisions that now affect her and her unit.

A declarant who formed a common interest community under pre-UCOIA law under some circumstances might be able to demonstrate the adoption of UCOIA has significantly reduced the market value of its real estate. UCOIA imposes some obligations on declarants and limitations on what declarants are allowed to do that are not present under pre-UCOIA law. But based on the takings factors other than economic harm, a declarant will not prevail. The character of the governmental action in passing UCOIA is not to extract a benefit from the declarant, but to protect unit owners and the broader community from harms sometimes stemming for the process of land development. A declarant does not have a "recognized property right" in completing its development with immunity from possible changes in land use regulations. For the same reason, a declarant would not have "investment-backed expectations" that regulations would not change with respect to the declarant's units that are not yet sold and undeveloped real estate within the common interest community.

In addition, any economic harm to a declarant in all likelihood would be substantially ameliorated by a legislature's inclusion of transition rules when it applies UCOIA to preexisting communities. It is highly likely that the transition rules will allow a declarant a generous period of time (e.g., several years) before all new UCOIA rules become fully applicable to the declarant's activities.

C. Due Process Clause

The Due Process Clause protects private property from government interference. Due process analysis has two prongs: procedural due process and substantive due process. Procedural due process means that the government must provide fair procedures, such as notice and a hearing, before it terminates or modifies a person's rights. No procedural-due-process are raised by the application of UCOIA to preexisting common interest communities. A state enacting legislation such as UCOIA needs to comply with its normal procedures for passing laws (a public process), but it does not need to take special measures to notify or involve persons who will be affected by the law (unit owners).

Substantive due process means persons have certain rights unrelated to procedure protected by the Due Process Clause. The relationship between substantive due process and takings analysis is murky. Some Supreme Court cases suggest that substantive due process is not relevant to claims of deprivations of property, which should be cognizable only under the Takings Clause. Other cases suggest both clauses, with their different elements, properly apply.

Substantive due process has two lines of inquiry. Under the modern view adopted by the Supreme Court during the New Deal, legislation generally satisfies the Due Process Clause if it is rationally related to a legitimate governmental objective. This test applies unless the legislation infringes upon "fundamental rights," in which event heightened scrutiny

is appropriate. The rational relationship test is highly deferential to legislative decision making. The government wins virtually all cases adjudicated under this standard. UCOIA does not implicate any fundamental rights; no UCIOA provisions are subject to challenge under the fundamental rights test.

The second line of substantive-due-process inquiry involves a judicially constructed list of enumerated rights. For example, a real estate developer may have the right to a building permit, which the government is not allowed to deny if the developer meets all the requirements for retention or issuance of the permit.[16] None of the presently enumerated due-process rights match claims that individual unit owners may make in challenging UCOIA provisions. Possibly a declarant who obtained a permit or other "vested rights" under pre-UCOIA law might challenge the retraction of the permit or rights due to the adoption of UCOIA. Any such claims that might have merit, however, are avoided if the adoption of UCOIA is accompanied by transition rules that protect declarants who are undergoing continuing sales and development activities for a reasonable period of time.

III. State Constitutions

State constitutions are a different kettle of fish. States differ widely in the content of their individual state constitutions, and more importantly, in how their state courts interpret their state constitutions. For many issues of state constitutional law, including those related to the protection of property rights and contract rights, there are no widely shared rules and norms. In state court litigation, often constitutional claims are made both under the federal constitution and the analogous clauses of the state constitution, and sometimes it is difficult to tell whether the state's court holding is based on the federal clause, the state clause, or both.

There are relatively few reported state court decisions that discuss constitutional issues concerning the retroactive application of state statutes to condominiums and other common interest communities. Some find constitutional infirmities, and some do not. The cases do not present a substantial impediment to the full application of UCOIA to preexisting common interest communities (with appropriate transition rules and exceptions for past events and past transactions), not only because the cases finding constitutional flaws are few in number; but more importantly, the judicial trend (except for Florida cases) is in the direction of constitutional validity. Several of the representative cases are discussed below.

Florida courts have frequently invalidated retroactive applications of the state's condominium act. An example is the 2016 decision in *Tropicana Condominium Association v. Tropical Condominium*, LLC.[17] In 2007, the Florida legislature amended its condominium act to allow the termination of condominiums with an approval vote of 80% of the unit owners, so long as not more than 10% of the unit owners oppose the termination.[18] The

[16] See *Walz v. Town of Smithtown*, 46 F.3d 162 (2d Cir. 1995) (homeowners have due process right to street excavation permit to allow connection of their house to public water system).
[17] 208 So. 3d 755 (Fla. Dist. Ct. App. 2016).
[18] Fla. Stat. § 718.117(3).

Tropicana Condominium community, created in 1983 with 48 units, had a declaration requiring unanimous approval to terminate the condominium. The unit owners conducted a vote and amended their declaration in a manner sufficient for termination under the 2007 statutory amendment, but the court concluded that the amendment unconstitutionally impaired the contract rights of the dissenting unit owners. The court explained that the original declaration "bestows" a "vested right" and a "veto right on every unit owner." Retroactive application of the 2007 amendment "would eviscerate the Tropical owners' contractually bestowed veto rights" by permanently changing "those unit owners' safeguards against condominium termination that are built into the Declaration."[19] The court summarily rejected the association's argument that "the 2007 amendment increases options and creates a more equitable situation because of the difficulty of achieving unanimous consent."[20]

The *Tropicana Condominium* decision probably is consistent with prior Florida caselaw.[21] But analysis under the federal Contract Clause leads to the opposite outcome – retroactive application does not violate the US constitution. Clearly the 2007 amendment impaired the unit owners' contract approval rights for termination. Whether the impairment in moving from a 100% vote to an 80% vote is a "substantial impairment" is reasonably debatable, but it does not matter. The 2007 amendment advances a legitimate governmental objective: facilitating termination that is in the economic interest of, and approved by, a large majority of the unit owners. The legislative decision is entitled to substantial deference. The *Tropicana Condominium* characterizations of the change in voting as "permanent" and impaired rights as "vested rights" and "veto rights" are immaterial. The degree of interference with contract rights is not balanced against the ends advanced by the measure.

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[19] Id. at 759. The court relied on the Florida constitution's Contract Clause, which has language identical to the federal constitutional clause.

[20] Id. at 758-59.

[21] See, e.g., *Pomponio v. Claridge of Pompano Condominium, Inc*., 378 So. 2d 774 (Fla. 1979) (statute protecting tenants under condominium lease by permitting payment of rents into registry of court pending litigation cannot be applied retroactively; statute unconstitutionally impairs contract rights of lessors); *Pudlit 2 Joint Venture, LLP v. Westwood Gardens Homeowners Ass'n*, 169 So. 3d 145 (Fla. Dist. Ct. App. 2015) (statute making parcel owner jointly and severally liable with previous parcel owner for unpaid assessments unconstitutionally impairs owner's contractual rights under original declaration, which provides that delinquent assessments do not pass to successors in title). The Florida cases deal with a number of complex issues, and sometimes Florida courts allow retroactive application. One complexity stems from what is known as the "*Kaufman* doctrine," which posits that if a declaration refers to the Florida Condominium Act "as amended from time to time," statutory amendments automatically apply without constitutional impediment. *Kaufman v. Shere*, 347 So. 2d 627 (Fla. Ct. App. 1977).

The Florida legislature routinely makes amendments to its condominium act retroactive. This has led to the high volume of Florida Contracts Clause cases. For whatever reason, frequent judicial invalidation has not made the Florida legislature timid. Perhaps the legislative strategy is simply to make a single body of state condominium law applicable to all condominiums, to the maximum extent permitted by its judiciary.

A California case, *Fourth La Costa Condominium Owners Association v. Seith*,[22] allowed the retroactive application of a statute that made it easier to amend condominium declarations and bylaws. The governing documents of a condominium community, created in 1969, allowed amendments only by an affirmative vote of at least 75% of the unit owners. A subsequent amendment to the Davis–Stirling Common Interest Development Act authorizes a petition to the superior court, which may reduce the number of votes required to a simple majority (more than 50%) if the association follows specified procedures. A dissenting unit owner complained that the statute unconstitutionally impaired the obligation of contract under the federal and state constitutions.[23] Relying upon US Supreme Court precedent, the *Seith* court upheld the statute:

> To any extent the reduction in the percentage of affirmative votes required to amend CC & R's may be said to substantially impair preexisting contract rights, there is no unconstitutionality because the statutes have a significant and legitimate public purpose and act by appropriate means. "As is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." Section 1356 is intended "to give a property owners' association the ability to amend its governing documents when, because of voter apathy or other reasons, important amendments cannot be approved by the normal procedures authorized by the declaration. In essence, it provides the association with a safety valve for those situations where the need for a supermajority vote would hamstring the association."[24]

The *Seith* case reflects the approach followed by a majority of state courts in following federal constitutional precedents with respect to the protection of private property from government interference generally, and the retroactive application of legal change in particular.

A Connecticut case considered the retroactive application of UCOIA's "super-priority" statutory lien securing the obligation of unit owners to pay assessments.[25] In *Village Walk Condominium, Inc. v. Head*,[26] the association of a condominium community created in 1973 brought a judicial foreclosure action in 2010 against a unit owner to recover unpaid assessments. The association also joined the unit owner's mortgagee as defendant, asserting priority under the super-priority section of Connecticut's UCOIA, adopted in 1983.[27] The

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[22] 71 Cal. Rptr. 3d 299 (Ct. App. 2008).

[23] California's constitution, like many states, includes a Contracts Clause functionally identical to that of the federal constitution. "A . . . law impairing the obligation of contracts may not be passed." Cal. Const. art. I, § 9.

[24] 71 Cal. Rptr. 3d at 317 (internal citations omitted).

[25] UCIOA § 3-116 creates a statutory lien for unpaid common expense assessments owed to the community association. The lien has priority for up to 6 months of assessments over a mortgage on the unit owned by the delinquent unit owner.

[26] 2011 WL 3199454 (Conn. Super. Ct. June 24, 2011), *aff'd per curiam*, 43 A.3d 838 (Conn. App. Ct. 2012).

[27] Connecticut's UCOIA does not generally apply to condominiums created before its effective date, but Connecticut applies a series of looking-back sections to preexisting condominiums, including Section § 3-116, the super-priority lien provision.

condominium community was generally governed by the Connecticut Condominium Act of 1976, not by UCOIA, and the Condominium Act of 1976 does not grant the association a super-priority lien. The mortgagee asserted its mortgage has priority over the association's lien, "arguing that it loaned funds to [the unit owner] in reliance on the declaration, that the federal and state constitutions do not allow new laws to be retroactively applied to existing contracts, and that the language of the declaration prevents new statutory schemes such as the CIOA from being applied to the declaration." The court rejected the mortgagee's Contracts Clause argument, relying on the three-part test of the US Supreme Court in *Energy Resources* (discussed *supra*). The mortgagee also raised similar arguments under the Connecticut constitution, which the court rejected without discussion stating that they were "inadequately briefed."

The general tendency of state supreme courts is to reform their interpretations of their state constitutions to conform to federal constitutional law. A recent example is *Chong Yim v. City of Seattle*,[28] a Washington decision from 2019 that replaces state constitutional standards that were highly protective of private property rights with federal standards. Seattle passed an ordinance requiring that residential landlords follow a "first-in-time-rule" (FIT Rule). Under the FIT Rule, landlords filling their vacant units must advertise their rental criteria, screen all applicants on a first-come, first-serve basis, and offer the unit to the first qualified applicant. The trial court held that the FIT rule is unconstitutional as a regulatory taking and a violation of the landlords' substantive due process rights, relying on state-law precedents that (1) recognize a regulatory taking when a regulation "destroys" a "fundamental attribute" of property ownership – here the landlords' right to choose tenants – and (2) apply heightened due process scrutiny to a regulation that limits a "fundamental attribute" of property ownership. The Washington supreme court reversed, rejecting state-law precedents and adopting the US Supreme Court standards for regulatory takings and for substantive due process (rational-basis review).

[28] 451 P.3d 675 (Wash. 2019).