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IN THE SUPREME COURT OF FLORIDA

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CASE NO. 71,594

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CONDOMINIUM ASSOCIATION OF PLAZA TOWERS NORTH, INC.,

Petitioner,

v.

PLAZA RECREATION DEVELOPMENT CORP., a Florida corporation, and SECURITY MANAGEMENT CORP., a Maryland corporation,

Respondents.

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# ANSWER BRIEF OF RESPONDENTS

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On Discretionary Review from the
Third District Court of Appeal
Case No. 86-3097

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CARLTON, FIELDS, WARD,
EMMANUEL, SMITH & CUTLER, P.A.
Attorneys for Respondents
Post Office Box 3239
Tampa, Florida 33601
(813) 223-7000

CYPEN & CYPEN
825 Arthur Godfrey Road
Miami Bch., FL 33140
(305) 532-3200

TABLE OF CONTENTS

TABLE OF CITATIONS

**Other Authorities**

## STATEMENT OF THE CASE AND FACTS

Petitioner's statement of the case and facts is prolix, and it presents material completely unnecessary to this Court's consideration of the legal issues before it. We therefore offer here a short and plain statement of what is relevant to that consideration.

This was an action by Security Management Corporation, which was the successor by merger to the original plaintiff, Plaza Recreational Development Corporation ("PRDC").[1/] PRDC, the lessor under a condominium recreation lease dated March 30, 1972 ("Lease"), sued for unpaid rent under the Lease. (R. 358.)

The rent adjustment clause, Article XXV of the Lease, provided for adjustments to the initial, or "base," rental of $6,851.00 per month every five years, starting January 1, 1975. (R. 358.)[2/] The Lessee sought to avoid its obligation for unpaid rent by arguing that Section 711.231, Florida Statutes (renumbered § 718.401(8)), which became effective June 4, 1975, rendered the escalation clause invalid. It argued that the "automatic

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1/ In the courts below, the Respondents were the appellees and plaintiffs and the Petitioner was the appellant and defendant. For ease of reference, the parties will be referred to as "the Lessor" (Respondents) and "the Lessee" (Petitioner). The following citation symbols will be used: "RA" - Respondents' Appendix; "A" - Petitioner's Appendix; "R" - Record. All emphasis is supplied unless otherwise indicated.

2/ The unpaid escalated rentals sought by the Lessor were as follows:

a. June 1975 through December 1979: 55 months at $2,025 per month, for a total of $111,375.
b. February 1980 through December 1984: 59 months at $6,224 per month, for a total of $367,216.

amendment" language in the Declaration of Condominium ("the Declaration"), which incorporated Florida's Zondominium Act "as it may be amended from time to time," made that statute applicable to the Lease. (R. 358-59.) The Lessee also contended that a settlement stipulation entered into by these parties in other litigation rendered this statute applicable to the Lease and thereby voided the rent escalation clause of the Lease. (R. 358-59.)

The Lessee correctly sets forth in its brief numerous portions of the Declaration and the Lease. The essential fact necessary for this Court's determination of this case, however, is the absence of any general incorporation of the Declaration as a whole or any express incorporation of the "automatic amendment" provision of the Declaration. Moreover, the Lessor was not the same party as the Declarer.

The Lessee also correctly recites portions of the parties' settlement stipulation in Rosen v. Hedlund, Case No. 7 -10885 (17th Jud. Cir.) (R.A. 3.), which it contends rendered Section 718.401(8) applicable to the Lease. However, that stipulation, by its terms, only preserved those benefits to which the Lessee was entitled under Florida statutes. It did not affirmatively grant benefits to the Lessee that it would not otherwise have.

The trial court entered judgment for the Lessor, explicitly rejecting the Lessee's arguments and holding that the Lease did not incorporate either the Declaration or Condominium Act in their entirety. That judgment was appealed to and affirmed by the Third

District Court of Appeal. Condominium Association of Plaza Towers North, Inc. v. Plaza Recreation Development Corp., 514 So.2d 381 (Fla. 3d DCA 1987). (R.A. 2.)

The Third District first reiterated the long-settled rule that Section 718.401(8) would not be applied retroactively. The court then unequivocally rejected the Lessee's assertion that the Declaration had been incorporated in its entirety into the Lease "by the multiple references in the lease to the [declaration] . . . ." Id. at 382. As the court held:

> There is no specific provision in the lease which expressly adopts the [future amendment] provision of the declaration . . ., and in the absence of same, we will not turn the seneral lansuase of the lease on its head so as to incorporate by incorporation future amendments to the Condominium Act -- especially where, as here, the result of such an interpretation is to void specific rental provisions in the lease.

Id, Such a "drastic result," the court concluded,, should come only from "clearly expressed lease terms which expressly adopt the Condominium Act, as amended." Id. Finally, the court rejected the Lessee's suggestion that the Rosen v. Hedlund settlement stipulation changed that result.

The Lessee sought discretionary review. This Court accepted jurisdiction by order dated October 31, 1988.

## SUMMARY OF ARGUMENT

This Court has unequivocally held that Section 718.401(8), Florida Statutes, does not apply retroactively to a rent escalation clause, such as the one at issue here, which was executed before June 4, 1975. Fleeman v. Case, 342 So.2d 815 (Fla. 1976); Buckley Towers Condominium, Inc. v. Buchwald, 354 So.2d 868 (Fla. 1978).

Nor does that statute apply to this Lease by virtue of the Declaration's automatic incorporation of the Condominium Act and future amendments thereto. As in Cove Club Investors, Ltd. v. Sandalfoot South One, Inc., 438 So.2d 354 (Fla. 1983), here the Lessor and the developer-declarer were completely different entities and the Lessor was not a party to the Declaration. Nor was there any provision in the Lease incorporating either the Declaration in its entirety or the "automatic amendment" provision of the Declaration.

Significantly, all of the cases upon which the Lessee relies involved a situation in which the declarer agreed in the declaration to be bound automatically by future amendments to the Condominium Act and either (1) the declarer and the lessor were one and the same or (2) the lease expressly incorporated the declaration in its entirety. That is not the case here.

Since the Lessor never agreed in the Lease to be bound by future amendments to the Condominium Act, either through incorporating the Declaration and its "automatic amendment"

language or otherwise, the courts cannot rewrite the Lease to add such a provision. Accordingly, the Third District correctly held that the Lease's rent escalation clause was not invalidated by the subsequently-enacted amendments to the Condominium Act and that the Lessor is entitled to collect the rents agreed upon in the Lease. That is in complete accord with the numerous Florida decisions holding that Section 718.401(8) cannot be applied retroactively to avoid escalation clauses agreed to before enactment of that statute.

Furthermore, the parties' settlement stipulation in other litigation did not make that statutory amendment applicable to this Lease. The stipulation provided no new or greater rights to the Lessee than those to which it would be otherwise entitled. Rather, it simply preserved the Lessee's right to whatever benefits it might have under statutes which applied to it. Since this Court has repeatedly held that the statute cannot be applied retroactively to void an escalation clause, in a Lease such as this the stipulation in no way operates to alter that result here.

Finally, quite apart from the impropriety of applying this statute retroactively to void provisions of this pre-existing Lease, the Lessor is in any event certainly entitled to enforce the first escalation which was actually put into effect prior to the effective date of the statute. The Lessee argues that payments which were escalated under the first contractual adjustment as of January 1, 1975, but which became due after enactment of the statute in June, 1975, were thereby invalidated;

but that argument ignores the fact that their amount was definite and fixed well before the statute. The Lessee's position would, therefore, once again result in an impremissible and retroactive impairment of that fixed objection.

## ARGUMENT

### POINT ONE

SECTION 718.401(8) DOES NOT APPLY TO THIS PRE-EXISTING LEASE BECAUSE THE LESSOR NEVER AGREED TO BE BOUND BY FUTURE AMENDMENTS TO THE CONDOMINIUM ACT.

This Court has expressly held that Section 711.231 (now renumbered Section 718.401(8), Florida Statutes (1987)) cannot be applied retroactively to rent escalation clauses entered into before June 4, 1975, the effective date of the statute. In Fleeman v. Case, 342 So.2d 815 (Fla. 1976), the Court held that the statute was intended to apply only to leases executed after the effective date of the statute. The Court further held that, if the Legislature had intended the statute to apply retroactively, the statute would then unconstitutionally impair the obligation of contract. This Court has consistently adhered to Fleeman. See, e.g., Buckley Towers Condominium, Inc. v. Buchwald, 354 So.2d 868, 869 (Fla. 1978); Cove Club Investors, Ltd. v. Sandalfoot South One, Inc., 438 So.2d 354, 356 (Fla. 1983).

The district courts of appeal likewise have adhered to Fleeman. For instance, in Regency Towers, Inc. v. Arnold, 350 So.2d 18 (Fla. 2d DCA 1977), the court expressly recognized this Court's holding on the question:

> The first question concerns the retroactive application of Section 711.465, Florida Statutes, (1975). This question has been answered by the Supreme Court in Fleeman v. Case, 342 So.2d 815 (Fla. 1976), and we find no error in the trial judge's holding that the statute could not be applied retrospectively.

Accord Seminole-on-the-Green v. Kelly, 445 So.2d 1071, 1072 (Fla. 2d DCA 1984). In Association of Golden Glades Condominium Club, Inc. v. Golden Glades II Club Recreation Corp., 441 So.2d 154 (Fla. 3d DCA 1983), rev. denied, 455 So.2d 1033 (Fla. 1984), the Third District similarly held that the statute does not apply to a lease which antedated the statute.3/ The Fourth District held to exactly the same effect in Palm-Aire Country Club Condominium Association No. 2, Inc. v. F.P.A. Corp., 357 So.2d 249, 251 (Fla. 4th DCA), cert. denied, 365 So.2d 713 (Fla. 1978).

As these decisions demonstrate, it is clear that Section 718.401(8) does not apply, in and of itself, to retroactively void an escalation clause entered into before the effective date of the statute. Rather, there must have been a contractual intent that the Condominium Act and its future amendments be automatically applied to the parties' lease. Thus, in order for Section 718.401(8) to apply to pre-existing escalation clauses, the lessor have agreed to be automatically bound by the Condominium Act amended from time to time," either by agreeing to that directly in the lease or by agreeing to that in a declaration which incorporates amendments to the Act. Because there was no

3/ In a subsequent decision involving this same lease, the Third District again held that the statute could not be applied retroactively to void the lease's escalation clause. Association of Golden Glades Condominium Club, Inc. v. Security Management Corp., 518 So.2d 967 (Fla. 3d DCA 1988). The court then certified the following question to this Court: "To what extent does Section 718.401(8), Florida Statutes (1985), apply to rent escalation clauses entered into before the effective date of the statute?" That action is presently pending before this Court as Case No. 71,909.

such agreement by the Lessor here, Florida law precludes the retroactive application of this statute to void the escalation clause of this Lease.

This Court's decision in Cove Club Investors, Ltd. v. Sandalfoot South One, Inc., 438 So.2d 354 (Fla. 1983), is squarely controlling on this issue. There, the declaration of condominium incorporated the Condominium Act and its subsequent amendments. However, as in this case, the lessor did not execute the declaration. Instead, the declarer was the parent of the lessor. And, although, as here, the recreation lease made multiple references to certain, specific parts of the declaration, it never provided that the lessor would be bound by all provisions of the declaration. Obviously, the parties that did sign the declaration were bound, by its terms, to all subsequent amendments to the Condominium Act. As this Court emphasized, however, "nowhere does the Petitioner agree to be bound by the Declaration nor by the Condominium Act." Id. at 355. Accordingly, the Court held:

> Since it did not agree to be bound by the Act, section 718.401(8), Florida Statutes, will not touch the petitioner. As we pronounced in Fleeman v. Case, 342 So.2d 815 (Fla. 1976), this statute cannot be applied retroactively to leases signed prior to the inception of the statute, because the legislature did not intend retroactive application. Furthermore, we concluded that even had the legislature intended retroactive application, we would have been compelled to hold it invalid as impairing the obligation of contract absent any agreement to be bound by future amendments to the Act.

Id. at 356.

Sandalfoot involved exactly the same situation as this. As in Sandalfoot, the Lessor was not the developer and it did not execute the Declaration.4/ Just as in Sandalfoot, the Lease was attached to the Declaration as an exhibit but the Lessor signed only the lease. And, although there were references in the Lease to specific parts of the Declaration, nowhere in the Lease did the Lessor expressly agree to be bound by the Declaration in its entirety or by the provision for automatic incorporation of the Condominium Act, as amended. As this Court explicitly held in Sandalfoot, absent such an agreement, the mere reference to certain specific provisions of the Declaration is not legally sufficient to bind the Lessor to the entire Declaration.

Sandalfoot is accordingly dispositive of the Lessee's argument that the incorporation of limited portions of the Declaration into the Lease operated as an agreement to be bound by the entire Declaration. Furthermore, quite apart from that controlling decision, long-standing principles of contract construction confirm the correctness of the Third District's refusal to imply an incorporation of the entire Declaration into the Lease as a result of the express inclusion of certain specified portions of the Declaration.

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4/ The developer here submitted specific property to condominium ownership pursuant to Chapter 711, Florida Statutes, "as amended from time to time." Section 711.08, Florida Statutes (1965), required a statement submitting the condominium property to condominium ownership. The developer's statement to that effect simply constitutes its compliance with that requirement. Certainly it does not bind the Lessor, which did not even sign the Declaration.

As noted, the Lease refers, in several different places, to specific portions of the Declaration. For instance, the Lease expressly incorporates those terms of the Declaration which relate to the Lease. (R.A. 1, p. 24.) In addition, paragraph 26 of the Lease confirms that those provisions of the Declaration that are "relative to this Lease" constitute consideration "to the Lessor for this Lease." (R.A. 1, p. 20-21.) But, under fundamental rules of contract construction, those references to specific, limited provisions of the Declaration cannot serve to imply all of the Declaration's provisions into the Lease. Quite to the contrary, those limited references negate any implication that all of the provisions of the Declaration were intended by the parties to be binding upon them.

Obviously, there would have been no need to incorporate specific portions of the Declaration if, as the Lessee contends, the entire Declaration was intended to be incorporated into the Lease. Indeed, the very fact that the parties expressly incorporated only certain limited portions of the Declaration demonstrates that they did not intend to incorporate the others. Herring v. State, 140 Fla. 170, 191 So. 290 (1939) (rule of expressio unius est exclusio alterius establishes that the enumeration of particular things excludes that which is not mentioned); 17A C.J.S. Contracts § 312; 17 Am. Jur. 2d Contracts § 285.

The Lessee unsuccessfully argued below that the Condominium Act and its subsequent amendments were necessarily incorporated into the Lease as a result of its incorporation of the definition section of the Declaration, which in turn defined the Condominium Act as Florida Statutes §§ 711, et seq. "as the same may be amended from time to time." However, as the Third District correctly recognized, that definitional provision does not incorporate the entire Condominium Act into the Lease. Rather, it simply incorporates certain definitions which are to be applied in the Lease unless the context in which the term is used requires otherwise. (R.A. 1, p. 22.) Thus, the context in which a term is used in the Lease must be examined to determine whether the definitions of the Declaration are applicable to the Lease. When the single reference to the Condominium Act which is contained in the Lease is examined in context, it is clear that the Lessee's argument fails.

The only explicit reference to the Condominium Act in the Lease is to the "duty of the Lessee to assess its unit owners in accordance with the Condominium Act . . . in such amounts as shall be necessary to pay its obligations . . . to the Lessor hereunder . . . ." (R.A. 1, p. 18.) As the context of this reference makes clear, the term "Condominium Act" is used solely with respect to the Lessee's duty to make the assessments required to pay its obligations to the Lessor under the Lease. Since the Lessee had expressly agreed in the Lease that its payment obligations would be escalated in the manner specified in the Lease, that explicit

covenant cannot be negated by the general incorporation of this definition provision. The context of the reference to the Condominium Act makes that plain.

The critical fact with which the Lessee refuses to come to grips is that the Lease itself does not contain a provision incorporating either the Declaration in its entirety or the "automatic amendment" provision of the Declaration. The absence of such a provision cannot be supplied by judicial fiat.

This Court made that precise point in Home Development Co. v. Bursani, 178 So.2d 113 (Fla. 1965), declaring that, if the parties intended a certain provision, "it would have been a simple matter . . . to have said so. The fact that they did not, indicates an intention to exclude such a provision." Id. at 117 (citing Azalea Park Utilities, Inc. v. Knox-Florida Development Corp., 127 So.2d 121 (Fla. 2d DCA 1961)); see also Jacobs v. Petrino, 351 So.2d 1036 (Fla. 4th DCA 1976), cert. denied, 349 So.2d 1231 (Fla. 1977); Greenwald v. Food Fair Stores Corp., 100 So.2d 200, 202 (Fla. 3d DCA 1958) (if "the particular element of the alleged extrinsic negotiation . . . is mentioned, covered, or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element").

This principle is especially compelling here. The parties carefully identified the precise portions of the Declaration that they intended to incorporate as a part of this Lease. Yet, it would have been a simple matter for the parties to have incorporated the Declaration in its entirety or its "automatic

amendment" provision had the parties intended or desired that result. As in Bursani, then, the Court cannot infer that intent "after the fact" for the parties.

The decisions relied upon by the Lessee to support its argument that amendments to the Condominium Act were automatically incorporated into the Lease are inapposite. Each of those cases involved condominium documents that either were executed by a lessee and a declarer which were one and the same entity or the lease itself expressly incorporated the Declaration, which in turn incorporated the Condominium Act "as amended from time to time."

For instance, in Ansora Enterprises, Inc. v. Cole, 439 So.2d 832 (Fla. 1983), cert. denied, 466 U.S. 927, 104 S. Ct. 1710 (1984), the developer that executed the declaration of condominium was also the lessor that executed the lease agreement. The declaration specifically incorporated the Condominium Act "as it may be amended from time to time." Id. at 834. Here, of course, completely different entities executed the Lease and the Declaration, and the Lease itself -- which was the only document to which the Lessor agreed -- did not expressly incorporate either the Declaration or the Condominium Act in their entirety.

Likewise, because of the material differences in the documents being reviewed, as well as the differences in the issues presented, the decision in Century Villase, Inc. v. Wellinston, 361 So.2d 128 (Fla. 1978), is inapposite. There, this Court retroactively applied Section 711.63(4) to allow a condominium unit owner to pay rent into the court's registry pending an action

on a lease. The Court first held that the Legislature had intended for that statute to be applied retroactively, which is, according to Fleeman and its progeny, not so with respect to the statute sought to be applied retroactively here. The Court also found that there was no impairment of contract because the lease, which had been executed by the developer/lessor -- who were one and the same party there -- incorporated the declaration's definitions of the Condominium Act "as amended from time to time." Again, that is not the case here.

Finally, contrary to the Lessee's suggestion, Halpern v. Retirement Builders, Inc., 507 So.2d 622 (Fla. 4th DCA), rev. denied, 518 So.2d 1277 (Fla. 1987), does not support its position. There, the court held that subsequent amendments to the Condominium Act were expressly incorporated into the management agreement between the parties. In that case, however, the parties specifically and unequivocally provided in the management agreement that the declaration was a part of the management agreement. Thus, the integration clause in that agreement expressly incorporated the declaration as a part of the parties' agreement:

> This instrument, together with the Declaration of Condominium to which this Agreement is attached, and the Exhibits attached to said Declaration of Condominium, including this Agreement, constitute the entire asreement between the parties . . . .

Id. at 624. Because the declaration incorporated future amendments to the Condominium Act, the management agreement -- which by its very terms incorporated the declaration -- constituted an agreement to be bound by any such statutory amendments.

Unlike in Halpern, there is no provision here incorporating the Declaration of Condominium into the Lease. And, since the Lease contains an integration clause expressly excluding any agreements other than those contained in the Lease and containing no reference to any incorporation of the Declaration as a part of the Lease -- as was the case in Halpern -- no agreement to be bound by the entire Declaration can be implied into the Lease.

Moreover, not only is there no explicit incorporation of the entire Declaration in the Lease, the Lease contains various provisions that affirmatively negate any such intent by the parties. For instance, the Lease contains an integration clause, which provides that "this instrument contains the entire agreement between the parties . . ." and that there are "no collateral agreements . . . which are not expressly contained in this agreement."[5/] (R.A. 1, p. 14.) This provision is completely at odds with the Lessee's contention that the parties intended to incorporate the entire Declaration as a part of their agreement, even though that alleged "collateral agreement" was not expressly contained in the Lease.

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5/ Such integration clauses are clearly valid and enforceable, and they serve to hold the parties to the actual terms of their contract. See, e.g., Saunders Leasing Sys., Inc. v. Gulf Cent. Dist. Center, Inc., 513 So.2d 1303 (Fla. 2d DCA 1987); Ortiz v. Orchid Springs Dev. Corp., 504 So.2d 510 (Fla. 2d DCA 1987).

Furthermore, the Lease specifically prohibited any modification of "any provision" of the Lease without the written consent of the Lessor. (R.A. 1, p. 14.) Yet, under the Lessee's interpretation of the Lease, subsequent amendments to the Condominium Act would modify the Lease automatically, without the Lessor's written consent, thereby negating the Lease's express prohibition against any such modification.

Perhaps even more importantly, the Lease specifically imposes upon the Lessee a firm and irrevocable obligation to pay the full rent for the full term of the Lease. (R.A. 1, p. 17.) That unqualified payment obligation would be negated if the Court were to imply an agreement to alter that payment obligation upon subsequent amendment of the Condominium Act.

Clearly, the Lessee's position -- which would render specific provisions of the Lease meaningless, including its explicit integration clause -- seeks an impermissible result. It is a settled precept that a contract should not be construed in a manner that would render express contractual provisions void. Peoples Gas System, Inc. v. City Gas Co., 147 So.2d 334, 336 (Fla. 3d DCA 1962) ("No word or part of an asreement is to be treated as a redundancv or surplusage if any meaning reasonable and consistent with other parts can be given to it . . . since it would not have been inserted had it not been intended to serve some purpose in expressing the intention of the Parties."). But,

that would be exactly the result if the entire Declaration were implied to be a part of a written agreement, which states on its face that it constitutes the parties' sole agreement.

The fact of the matter is, the Lessee's assertion that this Court should find that the Lessor agreed to be bound by the Declaration in its entirety -- rather than only by those provisions specifically incorporated into the Lease -- would require this Court to remake the Lease. It is fundamental, however, that "courts may not rewrite a contract or interfere with the freedom of contract or substitute their judgment for that of the parties thereto in order to relieve one of the parties from the apparent hardship of an improvident bargain." Bursani, 178 So.2d at 117 (quoting Beach Resort Hotel Corp. v. Wieder, 79 So.2d 659 (Fla. 1955)); see also Bella Vista, Inc v. Interior & Exterior Specialties Co., 436 So.2d 1107, 1108 (Fla. 4th DCA 1983); Levenson v. American Laser Corp., 438 So.2d 179, 183 (Fla. 2d DCA 1983); Dawson v. Malloy, 428 So.2d 297 (Fla. 4th DCA 1983), rev. denied, 436 So.2d 89 (Fla. 1983).

Finally, the Lessor's position in Lefton v. Plaza Recreation Development Corp., Case No. 75-198-Civ-CA (S.D. Fla.), is not in any way inconsistent with its position here. Indeed, the Lessee's need to grasp at this slender straw shows just how weak its position is.

Lefton involved issues completely unrelated to those now before this Court. The question before that court was whether the recreation lease and the sale of condominium units were "tied"

together so as to constitute a violation of the federal antitrust laws. The federal court found that they were not. The Lessor had argued that the recreation area and the units were one product for marketing purposes. There was no issue as to the legal effect of language in the Declaration on the Lease rents, and the antitrust issues addressed in Lefton did not -- and could not -- affect the rental payment obligations set forth in the Lease.

Whether a lease provision for escalation of rents can be retroactively voided by the Legislature is singularly a question of Florida law. It long has been settled under Florida law that such a contractural obligation cannot be voided in the absence of the parties' agreement to incorporate future amendments to the Condominium Act into their lease. The Third District correctly adhered to those decisions here and its decision should be affirmed.

## POINT TWO

### THE PARTIES' SETTLEMENT STIPULATION IN OTHER LITIGATION DOES NOT MAKE THE STATUTE APPLICABLE.

As demonstrated above, since the Lessor never agreed in the Lease to be bound by amendments to the Condominium Act through incorporation of the Declaration or its "automatic amendment" provision, the subsequently-enacted amendment voiding escalation clauses did not apply to the Lease. Nor did the parties' settlement stipulation in Rosen v. Hedlund make that statute applicable to the Lease.

That stipulation did not grant the Lessee any rights greater than those to which it would have otherwise been entitled under the law. It provided only that the stipulation itself would not "deprive" the Lessee of the benefits of future legislation. Indeed, the order approving that stipulation expressly states that "this provision shall not in any way be construed to deprive Releasor(s) of any legislative benefits or rights regarding the above described Lease arising after October 2, 1973; . . . ." (R.A. 4.)

Contrary to the Lessee's suggestion at page 32 of its brief, then, this stipulation was not an agreement by the Lessor to be bound by all future amendments to the Act. Rather, the stipulation simply was intended to prohibit the Lessor from affirmatively relying on the stipulation as a sword to bar the Lessee's right to claim the benefits of future amendments to the Condominium Act.

Thus, if the Legislature passes a statute which, by its terms, applies to this Lease, or which the courts deem to apply retroactively to this Lease, then the stipulation would not be deemed to deprive the Lessee of the benefits of that legislation. Here, of course, because the Lease did not incorporate amendments to the Condominium Act, the amendment voiding escalation clauses did not apply retroactively to this Lease and no rights ''resulted from" that legislation to the Lessee. The Lessee, therefore, cannot be "deprived" of the benefit of this statutory amendment because it was not entitled to the benefit in the first place. In

short, the Lessee's inability to take advantage of that legislation stems from its inapplicability to this Lease, not from the stipulation.

Simply stated, the stipulation only protected what the Lessee would otherwise have under the law. Since the Lessee never had the statutory rights it now claims, the stipulation does not serve to provide them to the Lessee.

## POINT THREE

## EVEN IF THE CONDOMINIUM ACT AMENDMENT WERE INCORPORATED INTO THIS LEASE, IT DOES NOT APPLY TO THE JANUARY 1975 ESCALATION

In its Point 111, the Lessee raises an argument which this Court must address only if it finds that the 19-75 Condominium Act Amendment is somehow incorporated into this Lease. Assuming that it will prevail on that threshold issue, the Lessee further argues that rents increased and set by the January 1975 escalation -- but payable after the statute became effective on June 4, 1975 -- are unenforceable./ The argument is fundamentally flawed.

First, the Lease calls for an adjustment of rents every five years, with the first adjustment occurring in January 1975. It is undisputed that, at the time of the January 1975 rent adjustment, the Condominium Act did not prohibit escalation clauses. At that time, then, the Lessor's right to receive rents at the contractual rate became set and definite for the next five years. Thus, when

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6/ The Lessee apparently concedes that rents for January 1975 through June 4, 1975 were properly escalated.

the statute was enacted in June 1975, there was no "escalation" for the January 1975 to December 1979 period for the statute to invalidate, because the Lessor's right to receive rent during that period at the contractual rate already had become fixed. The Legislature can no more pass a statute divesting the Lessor of that contractual right to payment than it can impair any other long-term contract under which future payments remain to be made.

Second, it is not true, as the Lessee attempts to argue, that no prior judicial decision "really deals" with this issue. In fact, two Third District decisions, which the Lessor cited to both courts below, have disposed of all the issues the Lessee raises. Kaufman v. Shere, 347 So.2d 627 (Fla. 3d DCA 1977), cert. denied, 355 So.2d 517 (Fla. 1978), presented the exact situation that would obtain here if this Court were to find that the Lease incorporates the 1975 amendment. The trial court had granted a judgment allowing a rent increase from May 1974, but prohibiting any further rent escalations after June 4, 1975, the effective date of the statute. The Third District affirmed.

As to the May 1974 escalation, the court found that "the trial judge properly refused to invalidate the rent increase of May 21, 1974, which occurred before the effective date of the statute." Id. at 628. Having ruled that the 1975 statute could not apply to void the May 1974 escalation, the "only remaining question" was whether the statute would prevent future escalations

under the Lease. The court found that it did since, unlike here, the lease there expressly incorporated the provisions of the Condominium Act "as it may be amended from time to time." Id.

Kaufman thus disposes of the Lessee's argument, holding that the 1975 amendment cannot apply to an escalation that occurred before the statute's effective date. If, however, there were any doubt that Kaufman foreclosed the issue, a later decision, Association of Golden Glades, Condominium Club, Inc. v. Golden Glades Club Recreation Corp., 441 So.2d 154 (Fla. 3d DCA 1983), rev. denied, 455 So.2d 1033 (Fla. 1984), puts any such doubt to rest.

The majority opinion in Golden Glades is brief. The lengthy dissent of Judge Ferguson, however, makes clear that each of the Lessee's arguments here was made to -- and rejected by -- the Third District. As Judge Ferguson stated: "The question presented this time is whether [the statute] . . . impacts leases which pre-date the statute so as to preclude collection of those escalated rents which become due subsequent to the effective date of the statute. The majority says no. I disagree." Id. at 155 (emphasis in original). Thus, the Third District flatly rejected the argument "that the effect of incorporating [the statute] by reference into the long-term lease was to render the escalation clause unenforceable as to amounts due subsequent to June 5, 1975, the effective date of this statute." Id. (footnote omitted).

The Lessee seeks to avoid Kaufman and Golden Glades by relying on a completely inapplicable decision, Penthouse North Association, Inc. v. Lombardi, 461 So.2d 1350 (Fla. 1984). Penthouse North was, purely and simply, a statute of limitations case. There, a condominium association argued that its directors had breached fiduciary duties to the association by executing, in 1966, a recreation lease containing a rent escalation clause tied to the consumer price index. The association was not notified until 1979 that the escalation clause would be enforced, and it promptly instituted suit. The lessors did not actually demand the escalated rent until 1981.

This Court held that the statute of limitations did not start to run in 1966. Rather, it began when the damages -- the last element of the association's cause of action -- occurred, which was no earlier than either when the association received notice in 1979 that the rent escalation clause would be enforced or when the lessors actually demanded the escalated rent in 1981.

The Penthouse North ruling correctly states the law for statute of limitations purposes. No cause of action could accrue to start the statute of limitations running until the association was actually damaged. That did not occur until the lessee was required to pay the disputed rent. However, the fact that the lessee was not damased until that point has nothing to do with whether the lessor had an existing contractual right to that payment. Thus, Penthouse North adds no support to the proposition

-- urged by the Lessee -- that a statute can impair contract rights that were fixed and established before that statute was enacted.

Indeed, this principle has been firmly established since the earliest reported decisions of this Court. In Myrick v. Battle, 5 Fla. 345 (1853), the Court held that a legislative act occurring between the making and collection of a note could not alter the interest rate applicable to the note. In so holding, the Court accepted the payee's argument that the right to future interest at the statutory rate in effect when the note was made vested at that point. Later legislation, which reduced the statutory rate and which was on the books when the note became due, could not impair that vested right.

If that were not the case, parties' contractual expectations would always be at risk of impairment by subsequent legislation, and payment obligations under every long-term lease or contract could be altered or negated by after-the-fact statutes. The obligors under such contracts would thereby be deprived of the rents for which they had bargained. That result clearly is intolerable. Moreover, if the Lessee's position were correct, this Court would not have invalidated the Florida statute permitting condominium recreation lease payments to be made to the court registry. **See** Pomponio v. Claridge of Pompano Condominium, 378 So.2d 774 (Fla. 1979). Rather, the Court would have found no such impairment because the statute became effective before the rental payments actually became due, even though the contractual

obligation to make them -- as here -- preceded the statute. Thus, this Court's own decision makes clear that the Lessor's right to the escalated rents under the first adjustment vested in January 1975, even though they did not become payable by the Lessee until some point thereafter.7/

## Conclusion

For the foregoing reasons Respondent respectfully urges this Court to affirm the decision of the Third District Court of Appeal.

Alan C. Sundberg
Sylvia H. Walbolt
Christopher L. Griffin
CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER, P.A.
One Harbour Place
First Florida Bank Bldg.
P.O. Drawer 190
Tallahassee, Florida 32302
(904) 224-1585

CYPEN & CYPEN
825 Arthur Godfrey Ro d
Miami Bch., FL 33140
(305) 532-3200

Attorneys for Respondents .

By: _____
Sylvia H. Walbolt
Fia. Bar No. 033604

7/ Indeed, taken to its logical end, the Lessee in effect argues that no right to receive rents is "vested" until the rent is immediately payable, and that the Legislature can therefore alter a rent obligation any time before it is actually due, without retroactively impairing the contract. That result, however, would necessarily void all future rent escalations after June, 1975, thereby making Fleeman, Buckley Towers, and Sandalfoot wrongly decided.

## CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by federal express this 17th day of January, 1989, to Jeffrey E. Streitfeld, Esq., attorney for petitioner, Post Office Box 9057, Ft. Lauderdale, Florida 33310.

Sylvia H. Walbolt