O/a 2-8-89

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IN THE SUPREME COURT OF FLORIDA

FILED

CASE NO. ~~71,594~~

DEC 14

CLERK, SUPREME COURT

By _____ Deputy Clerk

CONDOMINIUM ASSOCIATION OF PLAZA NORTH, INC.,

Petitioner,

v.

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

Respondents.

PETITIONER'S INITIAL BRIEF

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

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE**

FLORIDA STATUTES

INTRODUCTION

This case is one seeking discretionary review of the decision of the Third District Court of Appeal in Condominium Association of Plaza Towers North, Inc. v. Plaza Recreation Development Corp. and Security Manasement Corp., 514 So.2d 381 (Fla. 3d DCA 1987). (App.7).

The decision of the District Court announces a rule of law directly and expressly conflicting with the holdings in Angora Enterprises, Inc. v. Cole, 439 So.2d 832 (Fla. 1983), cert. denied, 466 U.S. 927, 104 S.Ct. 1710, 80 L.Ed.2d 183 (1984) (App.4), Cove Club Investors, Ltd. v. Sandalfoot South One, Inc., 438 So.2d 354 (Fla. 1983) (App.6), and Halpern V. Retirement Builders, Inc., 507 So.2d 622 (Fla. 4th DCA), pet. for rev. denied, _____ So.2d ___ (No. 70,886, Nov. 2, 1987) (App.5), on the issue of whether a lessor under a condominium recreation lease has agreed to be bound by future amendments to the Condominium Act.

The decision of the District Court, on substantially the same controlling facts as Halpern, supra, applies Angora, supra and Cove Club, supra, to produce different results, in the application of the "automatic amendment" doctrine.

This is an appeal from an Amended Final Judgment (App.3) in a condominium recreation lease case.

Petitioner, CONDOMINIUM ASSOCIATION OF PLAZA TOWERS NORTH, INC., Defendant/Appellant below, is the Lessee under the Lease (App.1). It will be referred to herein as "Petitioner" and/or "ASSOCIATION".

Respondent, SECURITY MANAGEMENT CORP., Plaintiff/Appellee below, is the successor by merger of the Lessor. It will be referred to herein as "Respondent" and/or "Lessor". The original Plaintiff/Appellee below, PLAZA RECREATION DEVELOPMENT CORP., was the original Lessor under the Lease, and will be referred to herein as "PRDC" and/or "Lessor".

References to the Record will be prefixed by the symbol "R".

References to the Appendix attached to this Brief will be prefixed by the symbol "App.", and where appropriate, the page number of the particular item; i.e., "App.1, p.27".

References to the exhibits in evidence will be by abbreviation such as "Def.'s Exh. A".)

STATEMENT OF THE CASE

This action began in 1975, after Defendant/Appellant ASSOCIATION stopped paying escalated rent under the subject recreation Lease, as of June, 1975. The then-Lessor, PRDC, sued for the unpaid escalated rent. (R.1-37). All "base" rent has always been paid. Trial was delayed primarily because of an agreement between the parties to await the outcome of another case. (R.75-76, 77, 83, 106-107).

The case was tried on Plaintiff's Supplemental Complaint (R.113-151), and Defendant's Answer and Affirmative Defenses and Counterclaim (R.169-210, 249-267, 274-291), and the Reply and Answer thereto (R.270-271, 296-297, 301-321, 322-323).

An extensive Pre-Trial Stipulation was filed, in which there was no dispute as to the facts or the amounts of unpaid rent involved. (R.358-376, 381-399).[1] In the final analysis, there were but two issues tried:

1. Whether §718.401(8), Florida Statutes, prohibiting the enforcement of escalation clauses in recreationleases, was applicable to the subject Lease; and

2. If so, what is the amount of rent due under the Lease?

The ASSOCIATION defended and counterclaimed asserting two bases for the applicability of §718.401(8) (the "Statute"):

1. The "automatic amendment" language in the Declaration of Condominium, incorporating by reference the provisions of the

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[1] Petitioner is not sure which version of the Pre-Trial Stipulation contained in the Record is the final version. The two versions differed only as to calculations of the amounts of rent and interest due if Respondent prevailed. These differences are not material to this appeal.

Condominium Act "as the same may be amended from time to time", based on Angora Enterprises, Inc. v. Cole, 439 So.2d 832 (Fla. 1983). (App.4). Respondent avoided and defended on the grounds that it was not the developer of the condominium, and did not sign the Declaration, relying on Cove Club Investors, Ltd. v. Sandalfoot South One, Inc., 438 So.2d 354 (Fla. 1983). (App.6).

2. The provisions of a Settlement Stipulation, and Court Orders adopting same, in earlier litigation.

Two escalations of rent were involved. One, in January, 1975, raised the rent from $6,851.00 per month to $8,876.00 per month. The second, in January, 1980, raised the rent to $13,075.00 per month.

The ASSOCIATION asserted there were three possibilities as to the rent owed under the Lease, if the Statute were applicable:

1. The escalation put into effect in January, 1975 was rendered unenforceable subsequent to June 4, 1975, the effective date of the Statute.

2. Even if the January, 1975 escalation remained effective beyond June 4, 1975, it could only be enforced through December 31, 1979, after which the rent reverted to the "base" rent.

3. Finally, if the January, 1975 escalation remained effective, all further escalations, including that of January, 1980, were unenforceable, and the rent is frozen at the January, 1975 escalated level.

In the December 1, 1986 Amended Final Judgment (R.485-489), the trial court found the Statute did not apply, and further found the January, 1975 escalation would remain enforceable through

December 1979 in any event. Because the court found the Statute to not apply, it necessarily did not reach the second and third alternatives as to the rent due.

ASSOCIATION perfected its appeal to the Third District Court of Appeal. In its decision dated September 15, 1987, the Third District affirmed the finding that the amendments to Chapter 718, Florida Statutes, did not apply to the subject Lease, determining that an incorporation "should only be accomplished by clearly expressed lease terms which expressly adopt the Condominium Act, as amended," citing Cove Club Investors Ltd. v. Sandalfoot South One, Inc., supra, as authority for its decision. Finding an insufficient incorporation of the Declaration of Condominium, the Court applied Fleeman v. Case, 342 So.2d 815 (Fla. 1976), so as to prohibit the retroactive application of the Florida Condominium Act amendments to the subject Lease. Rehearing was denied November 24, 1987.

ASSOCIATION filed its Notice to Invoke Discretionary Jurisdiction on December 9, 1987. On March 11, 1988, ASSOCIATION served its Motion to Consolidate this case with Association of Golden Glades Condominium Club, Inc. v. Security Management Corp., Case No. 71,909, then pending before this Court. On October 31, 1988, this Court entered two Orders, one accepting jurisdiction and setting Oral Argument in this case for February 8, 1989, and the other consolidating, for all appellate purposes, this case with Case No. 71,909.

STATEMENT OF THE FACTS

The facts were not disputed, although the parties disagreed on th interpretation of most of the documents in evidence.

Backqround

The condominium operatedby ASSOCIATION, Plaza Towers Condominium North (herein "Plaza North"), is one of two separately-declared condominiums in the Plaza Towers development. Its sister building is Plaza Towers Condominium South (herein "Plaza South").

The entire property was originally owned by Acmar Engineering Co., which purchased it in **1957** as part of a larger tract. On August **13, 1968,** Articles **of** Incorporation of Plaza Building Corp. (herein "PBC") and Respondent PRDC were filed. At all times material, the officers and directors of the two corporations were the same. Except as to the original subscribers, at all times material up to the merger of both PBC and PRDC into Respondent SECURITY MANAGEMENT in November **1981,** SECURITY owned all shares of both corporations. (R.**382-383).**

On December **30, 1968,** Acmar Engineering Co. conveyed to PBC both the land on which Plaza South was created, and the recreation area land. The documentary stamps affixed to the deed reflect the payment of only nominal consideration by PBC. Acmar Engineering Co. did, in the deed, reserve an easement over a "Mutual Access Drive Easement". On February **13, 1969,** construction of the Plaza South building and the recreation area began; the contractor was PBC. **(R.383).**

On January **27, 1970,** PBC deeded the recreation area to PRDC. The documentary stamps affixed to the deed reflect the payment of

only nominal consideration. (R.383).

On March 16, 1970, the Declaration of Condominium of Plaza South was recorded. Attached thereto was a Lease of the recreation area to Condominium Association of Plaza Towers South, Inc., which in paragraph VII contemplated the execution of a similar Lease of the same recreation area to Respondent PRDC in the future. (R.383).

On August 25, 1970, three instruments were recorded:

1. A deed of the Plaza North land from Acmar Engineering to PBC. Again, the documentary stamps on the Deed reflected only nominal consideration.

2. A construction mortgage, executed by PBC and PRDC, of the Plaza North land and the recreation area.

3. An Easement Agreement, executed by PBC, PRDC, Plaza Towers Management Corp., and the holders of mortgages on the Plaza North land, the Plaza South land, and the recreation area. The Agreement creates a perpetual mutual access easement in favor of the Plaza North land, over the Plaza South land, for the purpose of ingress and egress to the recreation area. (R.384).

On November 17, 1970, construction of the North building began, with PBC as the contractor. (R.385).

On November 4, 1971, the Declaration of Condominium of Plaza Towers Condominium North was recorded. (Def.'s Exh. A). The subject Lease is attached to the Declaration as Exhibit No. 4 thereto. (App.1). Both the Declaration and Lease had been executed on November 2, 1971. The Lessor, PRDC, did not execute the Declaration of Condominium. The developer of the Condominium, PBC, joined in

the execution of the subject Lease. (R.385).

The subject recreation area does not serve the general public, which has no right to join and use the facilities. (R.386). The Lease provides for non-exclusive use by ASSOCIATION, the property being subject to a similar lease to the association for Plaza South. (R.387). Article VII of the Lease limits the potential "other Lessees" to the unit owners of Plaza South. (Def.'s Exh. A; App.1, p.4). Thesubject Lease provides that ASSOCIATION is responsible for only 50% of the costs attributable to the property. (R.387).

The Rosen v. Hedlund Litigation

In 1971, litigation was commenced by certain unit owners in Plaza South, to which PBC became a party. Rosen v. Hedlund, Case No. 71-10885 (Warren), 17th Jud. Cir. A Settlement Stipulation was entered into in October, 1973 to which PRDC and ASSOCIATION became parties. On March 12, 1975, an Order was entered, finding that the settlement agreement was effective and binding upon the parties thereto as of October 10, 1973. (R.385). Attached to the Order was a Settlement Stipulation which was adopted as an Order of the Court. Section IV.G. provided:

> Condominium Association of Plaza Towers North, Inc. also agrees to indemnify Plaza Recreation Development Corp. against direct or collateral attacks on the Long Term Lease more specifically described in the following paragraph arising from facts which were known or should have been known up to October 10, 1973, and Condominium Association of Plaza Towers North, Inc. agrees to waive its right to attack the Long Term Lease more fully described in the following paragraph with respect to facts which reasonably should have been known up until October 10, 1973. It is agreed that Condominium Association of Plaza Towers North, Inc. (as defined in V. A) not be

> deprived of any legislation benefits or rights regarding the above-described Lease which have resulted or may hereafter result from legislation enacted subsequent to October 10, 1973.

(Def.'s Exh. D).

On April 20, 1976, a Second Amended Order was entered in Rosen v. Hedlund, re-affirming the provisions of the Settlement Stipulation concerning the Lease. The Order confirmed that acceptance by ASSOCIATION of the sums to be paid by the developer under the settlement (which were paid [R.386]) would constitute a release by ASSOCIATION of, inter alia:

> Any and all direct or collateral complaints, claims, demands, actions, judgments and executions which (ASSOCIATION has) or may have concerning the Long Term Lease heretofore entered into between Plaza Recreation Development Corp., Plaza Building Corp., and (ASSOCIATION) ... created by or arising out of any and all facts which are known to (ASSOCIATION) as of October 10, 1973, or facts which reasonably should have been known to (ASSOCIATION) as of the aforesaid date: provided, however, that this provision shall not in any way be construed so as to deprive (ASSOCIATION) of any legislative benefits or rights regarding the above described Lease arising after October 10, 1973; ...

(Def.'s Exh. E, paragraph 2[c]).

The Lefton Litigation

In 1975, certain of the unit owners in Plaza South brought a suit against PRDC and PBC, alleging that the non-exclusive lease of the recreation area to their condominium association was a "tie-in" of the Recreation Lease to the purchase of units in the Condominium, in violation of the Sherman Antitrust Act. Lefton v. Plaza Recreation Development Corp., and Plaza Building Corp., Case No. 75-198-CIV-CA (S.D. Fla.). (R.386).

On July 15, 1982, in response to Motions for Summary Judgment on the tie-in claim filed by both sides, Judge Clyde Atkins granted the Defendant's Motion for Summary Judgment, finding that the recreation area and the condominium units were but a "single product" under the antitrust laws. (R.386) (Def.'s Exh. I).

In seeking the summary judgment, the developer and Lessor filed an Affidavit of the Executive Vice President of the developer, in which he swore that the recreation area was an integral part of the Plaza South development, and that the recreation area did not have, and was never intended to have, any function other than for the use of the unit owners in the two condominiums. (Def.'s Exh. I).

In the Order, Judge Atkins found that the material facts were not in dispute, and on page 1 found:

> The recreation facility is used exclusively by residents of Plaza Towers South and Plaza Towers North, a companion condominium built on adjoining property by Plaza Building a few years after Plaza South was completed. The recreation facility is surrounded by the two condominiums on all sides but one, which faces an intracoastal waterway. The condominiums' developers created Plaza Recreation Development Corporation to hold title to the recreation facility and to lease it back to the condominium unit owners pursuant to the provisions of a 99-year lease. The lease made it possible for the developers to realize a substantial long-term income and to lower the initial purchase price of the individual condominium units.

Judge Atkins also found that PBC and PRDC:

> ... sold the recreation facility and the condominium units as a single package. The defendants did not sell 'recreation club memberships' to the general public; the recreation facility was made available only to purchasers of units at either Plaza South or Plaza North.

Finally, Judge Atkins found that:

> ... while the net cost of purchasing each condominium unit ultimately may be higher as a result of the lease, the lease did make it possible to lower the initial purchase price of the individual condominium units. In effect, the lease is nothing but a convenient and profitable method for financing the purchase of a part of the condominium's common property, and the recreation facility is exactly what it appears to be -- an integral part of the over- all condominium living package. It is no less a part of the condominium than the condominium's landscaping.

Judge Atkins found the only fact which even suggested the existence of two separate products is the existence of the lease itself.

> If instead of leasing the recreation facility the defendants had sold the facility outright as part of the condominium's common area, there would be no question that it was simply a part of the overall condominium complex. The facility would simply be one more amenity provided as a part of the condominium package, no different than the condominium's parking spaces or landscaping. The fact that the recreation facility is paid for by a separate lease rather than by including it in the purchase price of the individual condominium units does not change the facility's status. The lease does not magically transform one product into two, it is simply part of the consideration paid for condominium living.

Accordingly, Judge Atkins found that the lease and the condominium units did not constitute two separate products, and granted summary judgment in favor of Plaintiff/Appellee's predecessors, PRDC and PBC.

The Condominium Documents (Def's Exhibit A)

a. The Declaration of Condominium.

Article I, "Submission Statement", submits the Plaza North land to the condominium form of ownership, pursuant to the Condominium

Act, "F.S. 711 Et Seq." and incorporates the provisions of the Act by reference. Subsection G of Article I defines "Condominium Act" to mean "the Condominium Act of the State of Florida (F.S. 711 Et Seq.), as the same may be amended from time to time".

Article XVII, "Long-Term Lease" recites the execution of the Lease, which is "attached hereto as Exhibit No. 4, and made a part hereof, just as though said Lease were fully set forth herein". It recites that:

> The Association has acquired the foregoing leasehold interest pursuant to Florida Statute 711.121, and pursuant to said Statute and said Long-Term Lease, ...

b. The Lease. (App.1)

Although the original Lessor, PRDC, did not sign the Declaration of Condominium, the Lease is replete with incorporation by reference of the Declaration into the Lease. All emphasis herein is the undersigned counsel's.

For example, Article XXXI of the Lease provides, in part:

> The terms and provisions as to the Long-Term Lease, under Articles XVII, XVIII and XIX-Q.T., of the Declaration of Condominium to which this Long-Term Lease is attached, shall be deemed to have been repeated and reallesed. just as thoush thev were set forth in this Long-Term Lease.
>
> (App.1, p.24).

Article XXIX.B of the Lease provides:

> B. Incorporation of Definitions by Reference:
>
> The definition of the words, terms, phrases, etc., as provided in Article I of the Declaration of Condominium to which this Long-Term Lease is attached as Exhibit No. 4, are incorporated herein by reference and made a part hereof, andunlessthecontextotherwiserequires, said definition shall prevail. (App.1, p.22).

Article XXVI of the Lease, further provides that:

> .... All of the provisions of the Declaration of Condominium to which this Long-Term Lease is attached as exhibit No. 4, relative to this Lease, ... are hereby declared to be an integral part of the consideration given by the Lessee to the Lessor for this Lease; ... (App.1, pp.20-21).

Article XXIII of the Lease again incorporates by reference the definitions as contained in the Declaration of Condominium:

> The terms 'Condominium parcel', 'Condominium unit', 'unit', 'unit owner', 'owner of a unit', 'parcel owner', 'common elements', and 'common expenses', and all other terms in this Lease, shall be defined as said terms are defined and used in the Declaration of Condominium to which this Lease is attached as Exhibit no. 4. (App.1, p.16).

Article XXIII further provides:

> The Lessee Association's leasehold interest in and to the leased premises described in Exhibit 'A' attached hereto and made a part hereof, has been and is declared to be acquired pursuant to Florida Statute 711.121. All monies due and to become due under the provisions of this Long-Term Lease, including, without limitation, expenses of rent, ... are - and shall continue to be for the term of this Lease, declared to be common expenses of the Condominium being created upon the real property described in Exhibit 'B' attached hereto, by virtue of the Declaration of Condominium to which this Long-Term Lease is attached as Exhibit No. 4 and made a part hereof, and as common expenses, all monies due or to become due under this Long-Term Lease are part of the costs of maintaining the common elements of said Condominium.
>
> ...
>
> In the event that the Lessor's liens granted by the provisions of Article XXIII., should, for any reason or cause whatever, be determined to be invalid, extinguished or unenforceable, then the Lessee agrees that such facts shall not extinguish nor diminish in the slightest degree

the Lessee's financial or other obligations hereunder, and that it will, in the manner as now prescribed by Chapter 711, Florida Statutes, and as such statute may be amended, make such assessments and enforce its lien therefor on the individual Condominium units in the Condominium property, in order to comply with and fulfill the Lessee's obligations to Lessor hereunder- .... (App.1, pp.17-18).

SUMMARY OFARGUMENT

Point I

This case is controlled by Anqora Enterprises, Inc. v. Cole, supra, and Halpern v. Retirement Builders, Inc., supra. Amendments to the Florida Condominium Act prohibiting the enforcement of escalation clauses, §718.401(8), Florida Statutes, applies to the subject Lease because:

a. The Declaration of Condominium for Plaza Towers Condominium North incorporates the Condominium Act "as the same may be amended from time to time";

b. While it is true that the Respondent/Lessor PRDC did not sign the Declaration of Condominium, it (and Respondent SECURITY MANAGEMENT, its successor) agreed to be bound by the Declaration due to multiple incorporations by reference of all the relevant portions of the Declaration concerning the Lease;

c. The facts surrounding the development of the community, and the terms of the subject Lease and Declaration, are clearly distinguishable from the facts and agreement at issue in Cove Club Investors, Ltd. v. Sandalfoot South One, Inc., supra. In Cove Club there was an agreement for membership in an already-existing public country club with outside members, entered into by two separate and unrrelated entities. In Plaza Towers North, the developer and lessor were formed by the same persons for the purpose of developing one piece of property, and the recreation area serves only the unit owners in the two sister buildings in the Plaza Towers Condominium community, Plaza Towers North and Plaza Towers South. Respondent/Lessor

has previously, in related litigation, taken a position inconsistent with its position before this Court, namely, that the sale of the unit and the lease of the recreation area is but one product and one transaction.

Point II

The trial court and Third District Court of Appeal erred in failing to find that a **1973** Settlement Stipulation between the parties, in which they agreed that ASSOCIATION would not be deprived of any legislation benefits regarding the Lease which may result from subsequent legislation, constituted a separate expression of intent by the Lessor that the Lease be subject to future amendments to the Condominium Act, including the escalation clause statute. When parties agree that subsequent legislation will apply to them, it is not necessary that the Legislature have intended that the new laws apply retroactively: it is the intent of the parties, and not of the Legislature, which controls.

Point III

The trial court and Third District Court of Appeal erred in also finding that the enactment of the Statute effective June 4, **1975,** did not preclude the enforceability of an escalation in rent put into effect in January of that year. The Statute prohibits the enforcement of escalation clauses in recreation leases. The provisions of the Lease concerning the payment of rent were executory, and the right to receive rentals is only a contingent right which does not vest until the rentals become due. Therefore, as to the escalated rentals due after June **4, 1975,** the Statute made them unenforceable as of that date.

A R G U M E N T

POINT I

WHETHER THE LESSOR IS BOUND BY AMENDMENTS TO THE DECLARATION OF CONDOMINIUM RESULTING FROM AMENDMENTS TO THE FLORIDA CONDOMINIUM ACT AS A RESULT OF: (A) THE INCORPORATION OF PROVISIONS OF THE DECLARATION IN THE LEASE, (B) THE INTER-RELATIONSHIP AND INTERDEPENDENCE BETWEEN THE DECLARATION AND THE LEASE, AND (C) THE COMMONALITY OF OWNERSHIP AND INTEREST BETWEEN THE DEVELOPER AND LESSOR.

Introduction

The trial court and Third District Court of Appeal erred in finding that the escalation clause in the subject Lease was not rendered void and unenforceable as of June 4, 1975, as a result of the enactment of 1711.231, Fla. Stat. (1975), renumbered §718.401(8), Fla. Stat. (1985).

There was, and is, no dispute that the subject Declaration of Condominium contains the exact same language in its submission statement as the declaration in Ansora Enterprises, Inc. v. Cole, 439 So.2d 832 (Fla. 1983),[2] cert. denied, 104 S.Ct. 1710 (1984), approving Cole v. Angora Enterprises, Inc., 403 So.2d 1010 (Fla. 4th DCA 1981) (App.5). From this language, submitting the property pursuant to the Condominium Act "as the same may be amended from time to time", the Court held the developer/lessor expressly consented to be bound by all future amendments to the Act, including the subject Statute. The court below, however, found Angora, supra did not apply, because Respondent PRDC did not sign the Declaration,

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2 App.4.

and did not agree in the Lease to be bound by the Declaration or the Act, relying on Cove Club Investors, Ltd. v. Sandalfoot South One, Inc., 438 So.2d 354 (Fla. 1983) (App.6).

The Automatic Amendment Doctrine

This doctrine of contract law was first applied to condominium recreation leases in Kaufman v. Shere, 347 So.2d 627 (Fla. 3d DCA 1977), cert. denied, 355 So.2d 517 (Fla. 1978). It was adopted by the Supreme Court in Century Village, Inc. v. Wellinston, etc., Condominium Association, 361 So.2d 128 (Fla. 1978), and re-affirmed by the Court in Angora Enterprises, Inc. v. Cole, supra.

In a nutshell, the doctrine holds that there is no constitutional issue of retroactive application of a statute which might otherwise impair the obligation of contracts if the developer/lessor has, in the declaration of condominium, expressly consented to be bound by all future amendments to the Condominium Act. Such express consent in the instant case comes through the use in the subject Declaration of the exact same language employed in the declaration of condominium in Angora, supra:

LAKESIDE VILLAGE DECLARATION	**PLAZA TOWERS NORTH DECLARATION**
ANGORA ENTERPRISES, INC. hereby states and declares that said realty, together with improvements thereon, is submitted to Condominium ownership, pursuant the Condominium Act of the State of Florida, F.S. 711 et seq. (hereinafter referred to as the "Condominium Act"), and the provisions of said Act are hereby incorporated by reference and included herein thereby	PLAZA BUILDING CORP. ... hereby states and declares that said realty, together with improvements thereon, is submitted to Condominium ownership, pursuant the Condominium Act of the State of Florida, F.S. 711 et seq. (hereinafter referred to as the "Condominium Act"), and the provisions of said Act are hereby incorporated by reference and included herein thereby ....

(Subsection G of Article I defines condominium act as follows:)

Condominium Act, means and refers to the Condominium Act of the State of Florida (F.S. 711 et seq.) as the same may be amended from time to time.

403 So.2d 1010, 1012 (emphasis in original).

(Subsection G of Article I defines condominium act as follows:)

Condominium Act, means and refers to the Condominium Act of the State of Florida (F.S. 711 et seq.) as the same may be amended from time to time.

(Def's. Exh. A, pp.1-2) (Emphasis supplied).

From the use of this language, the Supreme Court held that the developer/lessor expressly agreed to be bound by all future amendments to the Condominium Act, including the subject statute. Id.

An examination of the Cove Club decision, the Angora and Cole decisions, the Halpern decision, and the facts of the instant case, show the error of the courts below. The issue is not whether the Lessor signed the Declaration. The issue is whether the Lessor agreed to be bound by the Declaration. The Lessor did so agree, time and time again in the Lease.

In Angora, as here, the lease was attached as an exhibit to the declaration and incorporated by reference. The developer/lessor in Angora argued that the submission statement in the declaration referred only to the condominium property, and not to the leased recreation area. Thus, the developer/lessor argued, since the leased area was not submitted to the condominium form of ownership pursuant to the Condominium Act, the leased area was not affected by the submission. That argument was rejected by both Courts.

As the Fourth District stated:

> We are impressed by this argument, but cannot distinguish it from the Supreme Court's holding

> in Century Village .... Moreover we feel that fundamental fairness should dictate otherwise. The subject submission statement makes at least three patent references to the long term lease which is annexed thereto as an exhibit. As such, it was obviously intended to be integral part of the whole. One cannot issue forth with the language in the submission statement such as: 'which long term lease is attached to this Declaration and made a part hereof' and then argue that the same lease is not a part thereof pursuant to the condominium act.

403 So.2d at 1012 (emphasis added). The Supreme Court, after noting that the lease also referred back to the declaration, stated:

> The lessor argues that these are separate documents, each standing alone, but to adopt that rationale is to ignore the realities of the situation. And to say that the lessor who in his corporate capacity was both the developer and the management firm, did not agree to the terms of the declaration is to refuse to see what is plainly written in black and white.

439 So.2d at 834 (emphasis added).

The Cove Club Case

At issue in Cove Club, supra, was a recreation agreement: a combination lease and mandatory country club membership agreement entered into by the country club owner (herein "Club") as lessor, and the developer and the association as lessees. (Def.'s Exh. K; App.2). The Fourth District had found the Club, as lessor, consented to the subject statute's incorporation into the terms of the agreement, following its decision in Cole, supra. Sandalfoot South One, Inc. v. Sandalfoot Cove Country Club. Inc., 404 So.2d 752 (Fla. 4th DCA 1981). In the Cove Club recreation agreement (App.2), there were only three references to the declaration of condominium. Paragraph 11 provided that the term of the lease would begin upon

the recording of the declaration. Paragraph 13 provided different procedures for amendment before and after the recording of the declaration. Finally, paragraph 5 stated, in part:

> The parties hereto do specifically agree that the provisions of this agreement, particularly those as to the payment of the Recreation Fee herein provided shall be incorporated in and be a part of the Declaration..., and be, and are hereby made and imposed as covenants running with the land of the Condominium parcel.

These are the only references in the recreation agreement to the Sandalfoot South declaration. It is noteworthy that nowhere did the Club incorporate by reference *any* of the terms and provisions of the declaration.

In the Supreme Court, the Club argued that it was neither the declarer nor the developer of the condominium, that the Club facilities served not only other condominium complexes but also the general public, and that it did not sign the declaration. Consequently, it argued, it never agreed to be bound by the declaration even though the parties who did sign it were bound by subsequent amendments to the Act.

The Supreme Court found merit in this argument:

> We have examined the recreation agreement and find that though the (Club) acknowledges its commitment to provide the recreational facilities and services to the condominium owners, it does not agree to be bound by the declaration. We find that the agreement lays out in clear language that the declarer was developing the condominium, that the country club had facilities available, and that the association was 'desirous of securing' the benefit of those services and facilities. But nowhere does the (Club) agree to be bound by the declaration nor by the Condominium Act. There is no way to tie up this petitioner with the declaration and the

language contained therein. (Footnote omitted).

Cove Club, supra, at 355.

The Subject Lease: Incorporation by Reference

In the instant case, however, although the Lessor did not sign the Declaration itself, it bound itself to the Declaration by constantly expressly incorporating by reference into the Lease all of the provisions of the Declaration relating to the Lease, including all of its definitions.

For example, Article XXXI of the Lease incorporates by reference various sections of the Declaration "to which this Long-Term Lease is attached", including Article XVII, "Long-Term Lease", which

> ... shall be deemed to have been repeated and realleged, just as though (it) were set forth in this Long-Term Lease. (App.1, p.24).

Article XXIX.B, expressly incorporates by reference all of the definitions contained in Article I of the Declaration "to which this Long-Term Lease is attached as Exhibit No. 4", including, of course, the definition of the Condominium Act "as the same may be amended from time to time". (App.1, p.22).

Article XXVI goes further, providing that all of the provisions of the Declaration relative to the Lease "are hereby declared to be an integral part of the consideration given by the Lessee to the Lessor for this Lease". (App.1, pp.20-21).

Article XXIII again incorporates by reference the definitions contained in the Declaration, and states that all terms in the Lease shall be defined "as said terms are defined and used in the Declaration ... to which this Lease is attached as Exhibit No.4". (App.1, p.16).

Article XXIII further provides that the ASSOCIATION's leasehold interest "is declared to be acquired pursuant to Florida Statute 711.121", and states that even if the Lessor's liens on the condominium property should be extinguished, ASSOCIATION will, "in the manner now prescribed by Chapter 711, Florida Statutes, and as such statute may be amended", make such assessments and enforce its liens therefor in order to comply with the ASSOCIATION's obligations under the Lease, including, of course, its rental obligations. (App.1, pp.17-18).

Accordingly, unlike the club owner in Cove Club, supra, the Lessor in the instant case did agree to be bound by the Declaration and its incorporation by reference of the Condominium Act, "as the same may be amended from time to time," by adopting the relevant provisions of the Declaration into the Lease itself.

It defies common sense to argue, as did the Club in Cove Club, that "(t)here is no way to tie up this petitioner with the declaration and the language contained therein". 438 So.2d at 355. The instant Lease contains 33 (at least) express references to the Declaration to which it is attached as an exhibit (which Declaration makes the Lease a part thereof), incorporates all relevant provisions of the Declaration (including its definitions) into the Lease, and expressly recognizes that the Lease has been entered into pursuant to that provision of the Condominium Act which enables the execution of recreation leases. §711.121, Fla. Stat. (1965), renumbered §718.114, Fla. Stat. (1985).

The Halpern Case

Halpern, supra, is factually similar to this case regarding the development of the property. The principals of the developer, brothers David and Albert Yorra, formed one corporation to act as the developer and seller of the condominium units, and another corporation to act as owner of the recreation facilities and manager of the community. The developer executed the declaration of condominium, and the manager executed a management agreement which, among other things, gave the unit owners the right to use recreational facilities owned by the manager, the functional equivalent of a lease.

The management agreement contained an escalation clause tied to the Consumer Price Index, just like the subject Lease. The submission statement in the declaration similarly submitted the condominium property to condominium ownership pursuant to the Act, which was defined in Article I.G of that declaration to mean and refer to Chapter 711, Florida Statutes "as the same may be amended from time to time", just like the instant Declaration.

As a result of a general statement in the management agreement incorporating the declaration, the Fourth District distinguished Cove Club, supra, just as ASSOCIATION does:

> The fact that here the management company is a separate entity from the developer is of no significance when the management agreement in its terms incorporates the condominium declaration. (App.1, at **981-982).**

The Court found, just as ASSOCIATION here argues, that:

> In Cove Club Investors there was nothing to show that the petitioner, the lessor, who was not the developer of the condominium, had agreed to be bound by the Declaration or the Condominium Act. (R-App.1, at **981).**

As in Cove Club, the declarant and the manager/lessor were different entities. Nonetheless, the Court held the manager had agreed to be bound by the future amendments to the Act, by virtue of general language in the Lease incorporating by reference the declaration. The fact that the management company was a separate entity from the declarant was "of no significance". **507** So.2d at **625.**

In this case, however, the District Court held that the general incorporation by reference of a document did not constitute an agreement to be bound by the terms of the incorporated document. The District Court, instead, held that in the absence of a specific "clearly expressed" provision in the Lease which expressly adopts the specific provision of the Declaration incorporating the Act, or in the absence of "clearly expressed lease terms which expressly adopt the Condominium Act, as amended", the lessor would not be found to have agreed to be bound by amendments to the Act.

Even in the absence of express incorporation by reference language, a document must be considered incorporated by reference into another where the incorporating document specifically provides that it is subject to the other document. Hurwitz v. C.G.J. Corp., **168** So.2d **84** (Fla. 3d DCA **1964);** Collins v. National Fire Insurance Co. of Hartford, **105** So.2d **190** (Fla. 2d DCA **1958).** Even if the party sought to be bound by the other document is not a signatory thereto, he will nonetheless be bound if he knew of the writing. Tutko v. Banks, **167** So.2d 110 (Fla. 3d DCA **1964).** Thus,

> Where a writing expressly refers to and sufficiently describes another document, that other document, or so much of it as is referred to, is to be interpreted as part of the writing.

United States Rubber Products, Inc. v. Clark, 145 Fla. 631, 200 So. 385, 388 (Fla. 1941).

Accordingly, the contemporaneous transaction rule applies: where one instrument is given contemporaneously with the other, as part of the same transaction and each refers to the other, they should be considered together in determining their meaning and effect. E.g., Popwell v. Abel, 226 So.2d 418 (Fla. 4th DCA 1969); Fraser v. Lewis, 187 So.2d 684 (Fla. 3d DCA 1966). Indeed, the rule is not necessarily confined to instruments executed at the same time by the same parties, so long as they deal with the same subject matter. J.M. Montgomery Roofing Co. v. Fred Howland, Inc., 98 So.2d 484 (Fla. 1957).

The Declaration and Lease Cannot Be Separated

The interrelationship of the subject Declaration and Lease is undeniable. Each incorporates by reference the relevant provisions of the other, and each recognizes that one is attached as an exhibit to the other.

The Lease itself recognizes that it would not be entered into but for the creation of the condominium through the vehicle of the Declaration.

For example, Article XVIII of the Lease, which grants the Lessor a lien on the condominium property, recites that the giving of the lien "is an essential consideration flowing to the Lessor and without which this Lease would not have been made". (App.1, p.12).

Article XXIII of the Lease, which grants the Lessor an additional lien on each of the condominium units, recites that the

Defendant ASSOCIATION's leasehold interest has been acquired pursuant to the enabling section of the Condominium Act and that all monies due under the Lease are common expenses of the condominium, "by virtue of the Declaration of Condominium to which this Long-Term Lease is attached as Exhibit No. 4 and made a part hereof". (App.1, pp.17-18).

Article XXVI of the Lease provides that all of the provisions of the Declaration relative to the Lease "are hereby declared to be an integral part of the consideration given by the Lessee to the Lessor for this Lease". (App.1, pp.20-21).

Further, the Lease recognizes that the Lessor is granted certain rights and privileges by the Declaration of Condominium, such as:

a. An easement over part of the condominium property (Lease, Article VII, p.5).

b. A lien on the condominium property and the condominium units (Lease, Articles XVIII, XXIII).

c. The number of units in the condominium,[3] may not be increased or decreased without the Lessor's prior written consent (Lease, Article XXIII).

d. The Lessor has the right to require the Board of Directors of the CONDOMINIUM ASSOCIATION to apply unit owner payments for common expenses according to certain priorities set forth in the

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[3] which units are created by the recording of the Declaration submitting the property to the condominium form of ownership.

Lease (Lease, Article XXIII), notwithstanding the fact that the application of funds for common expenses is otherwise under the Declaration within the Board of Directors' discretion.

e. The recording of an amendment to the Lease is deemed to be an amendment to the Declaration as to any provisions in the Declaration relative to the Lease (Lease, Article XXVII).

f. Under certain circumstances, the Lessor may unilaterally amend the Declaration of Condominium (Lease, Article XXVIII).

The Declaration itself provides it may not be amended without the written consent of the Lessor (Declaration, Article VII). In at least one instance, this power has been exercised by the Lessor: in 1974, the Lessor joined in the execution of a resolution amending the Declaration of Condominium. (Def.'s Exh. B).[4]

Finally, the Lease recites in Article XXIX.A that it is a covenant running with the land, and that by "the land" is meant both the recreation area and the condominium property.

All of the foregoing make it abundantly clear that the instant case is a far cry from Cove Club, supra, where "their (was) no way to tie up (the Club) with the declaration and the language contained therein". Id. at 355. Indeed, whereas the Cove Club agreement merely recited that the condominium was "desirous of securing" the benefit of the Club's services and facilities, the instant condo-

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* Although this amendment is denominated an amendment to the "Declaration", it is actually an amendment to the By-Laws of the CONDOMINIUM ASSOCIATION. However, Article VIII of the Declaration incorporates the By-Laws by reference into the Declaration.

minium documents reflect an interrelationship between the Declaration and Lease, to deny which would be "to ignore the realities of the situation" and "to refuse to see what is plainly written in black and white". Angora, supra, at 834.

The development of the Plaza Towers complex also compels reversal, and conclusively refutes the Lessor's argument that it is not bound by the Declaration. The instant recreation area serves only the subject condominium and its companion, Plaza South. The leased recreation area is an integral part of the development, and not something separate such as the public country club in Cove Club, supra. Unlike the Sandalfoot Cove Country Club, the Plaza Towers recreation area is for the exclusive use of the unit owners in the two condominiums.[5]

PBC and PRDC have previously successfully argued that the Plaza Towers South Condominium and the recreation lease were one and the same "product" for antitrust purposes, in their successful defense of Lefton v. Plaza Recreation Development Corp., et al., Case No. 75-198-CIV-CA (S.D. Fla.). They cannot take a different, contrary, position before this Court. In Lefton, Judge Clyde Atkins found there was no dispute among the parties that PBC constructed the recreation area and that the "developers" created the Lessor corporation to hold title to the recreation facility and to lease

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[5] The subject Lease, in Article VII, limits the potential "other Lessees" to occupants of "the real property submitted to the condominium form of ownrship by virtue of the Declaration of Condominium of Plaza Towers Condominium South."

it back to the unit owners, which lease "made it possible for the developers to realize a substantial long-term income and to lower the initial purchase price of the individual condominium units". (Def.'s Exh. I).

For Respondent to argue that the subject Lease is a separate and distinct document, unrelated to the Declaration creating the condominium, and to argue that the Lessor cannot be tied to the Declaration, is to assert a factual position completely contrary to the position successfully urged in the Lefton suit. It also, in the words of the Supreme Cout in Angora, supra, at 834, is to refuse to see "what is plainly written in black and white", and "to ignore the realities of the situation".

Finally, any attempt to separate the Lease from the Declaration in the instant case would also violate the statute which enabled the execution of such leases in the first instance: Section 711.121, Fla. Stat., which both the Declaration and Lease recite is the statute pursuant to which the Lease was entered into. This statute requires that the lease be a part of the declaration, either by repetition of its terms in the body of the declaration, or by attachment of the lease as an exhibit to the declaration.

Accordingly, the Lease has no effectiveness other than as part of the Declaration. The Lessor, by recognizing in Article XXIII of the Lease that the ASSOCIATION was entering into same pursuant to the statute, therein agreed that the Lease was being entered into as part of the Declaration. Accordingly, since the Declaration and the condominium created thereby were subject to the Condominium Act "as

the same may be amended from time to time", the Lease which is a part of the Declaration as a matter of law must also be subject to the Act and any amendments thereto.

Therefore, the trial court and Third District erred in finding the Lessor did not agree to be bound by the Declaration, and that the Statute does not apply to the subject Lease.

POINT II

WHETHER THE LESSOR AGREED IN THE 1973 SETTLEMENT STIPULATION THAT THE ASSOCIATION WOULD HAVE THE BENEFIT OF ALL SUBSEQUENT LEGISLATION, INCLUDING THE SUBJECT STATUTE.

The Stipulation for Settlement of the Rosen v. Hedlund litigation, Case No. 71-10885 (Warren) (17th Jud. Cir.) is a separate expression of intent by the Lessor that the Lease be subject to future amendments to the Condominium Act. The critical contested language of the Settlement Stipulation is as follows:

> It is agreed that Condominium Association of Plaza Towers North, Inc. (as defined in V.A) not be deprived of any legislation benefits or rights regarding the above-described Lease which have resulted or may hereafter result from legislation enacted subsequent to October 10, 1973. (Def.'s Exh. D).

The Settlement Stipulation was adopted as an Order of Court on March 12, 1975, which Order found the Stipulation to be effective and binding as of October 10, 1973. (Def.'s Exh. D).

Later, on April 20, 1976, the Court entered a Second Amended Order re-affirming that the unit owners in the subject condominium were not to be deemed to be deprived of "any legislative benefits or rights regarding the above-described Lease arising after October 10, 1973". (Def.'s Exh. E).

The Settlement Stipulation constitutes yet another express agreement by the Lessor that it would be bound by future amendments to the Condominium Act concerning the Lease which benefitted Defendant ASSOCIATION. In return, the ASSOCIATION was releasing any claims which existed or were based on facts known, or which should have been known, at that time.

The subject statute falls squarely within the scope of "legislation benefits or rights" which "may hereafter result" from subsequently enacted legislation. This language is clear and unambiguous and must be enforced according to its terms. See, Angora, supra; Cole, supra. No parol evidence is admissible to vary the clear provisions of the Settlement Stipulation, and Lessor is bound by the language it adopted therein, no matter how disadvantageous that language later proved to be. Security First Federal Savings and Loan Association v. Jarchin, 479 So.2d 767 (Fla. 5th DCA 1985); Balto v. Maley, 464 So.2d 579 (Fla. 4th DCA 1985); see also, Angora, supra; Cole, supra.

There is only one reasonable construction of the relevant portion of the Settlement Stipulation. If future legislation benefitted Defendant ASSOCIATION, it would have the benefit of that legislation. Any other interpretation would make the provision meaningless. If it did not refer to subsequently enacted statutes, then what did it mean?

Contracts are to be construed whenever possible to give meaning and effect to all of their terms and provisions, American Employers' Insurance Co. v. Taylor, 476 So.2d 281 (Fla. 1st DCA 1985) and to avoid constructions which would lead to absurd conclusions. Quinerly v. Dundee Corp., 31 So.2d 533 (Fla. 1947). Indeed, it is the duty of the court to prevent absurd interpretations of a contract. American Medical International, Inc. v. Scheller, 462 So.2d 1 (Fla. 4th DCA 1984).

The court below found the Settlement Stipulation did not make the Statute apply, finding the ASSOCIATION was not "deprived" of its

benefit, as it was not entitled to its benefit in the first place. With all due respect to the trial judge, this is fallacious, circular reasoning.

The trial court failed to give effect to the objects of the prohibited deprivation, which are both benefits and rights. The trial court's construction only looked at whether the ASSOCIATION was deprived of a right under the Statute, and not at whether it was being deprived of a benefit.

"Deprived" is defined, alternatively, by Webster's Ninth New Collegiate Dictionary (Merriam-Webster, Inc. 1984) as both:

> 2: to take something away from, as in "the reorganization of the school deprived him of his professorship"; and
>
> 4: to withhold something from, as in "a citizen deprived by accident of birth of one of his rights".

In the context of the instant case, the trial court has withheld from the ASSOCIATION the benefit of the Statute - which Plaintiff's predecessor agreed would not be done.

Further, the trial court failed to give effect to the Second Amended Order in the Rosen litigation, entered April 20, 1976 (Def.'s Exh. E) which re-affirmed that the release of any claims by the ASSOCIATION:

> ... shall not in any way be construed so as to deprive (ASSOCIATION) of any legislative benefits or rights regarding the above described Lease arising after October 10, 1973;...

Both the Settlement Stipulation, and the Second Amended Order, therefore, constitute express agreement by the Lessor that the ASSOCIATION would have the benefit of any subsequently enacted

legislation regarding the Lease. Such benefits would not be taken away or withheld, and ASSOCIATION would not be kept from "having, using or enjoying" the benefits of such legislation.

The trial court's finding, basing itself on the fact that no legislative right under the Statute existed in the first place, also overlooks the foundation of contractual agreements to be bound by future legislation. As with the "automatic amendment" doctrine, whether the Legislature intended the Statute to apply to pre-existing leases is of no import. In Fleeman v. Case, supra, relied on by the court below, the Court held the Statute was not intended to apply retroactively to pre-existing leases such as the subject Lease. Yet, in Angora, supra, Fleeman was distinguished and held to not control, because the lessor had agreed to be bound by future amendments to the Act, regardless of whether the Legislature intended for the amendment to apply. Angora, supra, at 835.

Similarly, in the Settlement Stipulation, the parties agreed that ASSOCIATION would have the benefits of any future legislation concerning the Lease. Again, legislative intent would be irrelevant: the parties agreed the ASSOCIATION would not be deprived of the benefit of any such legislation.

Therefore, the trial court erred in finding the Stature did not apply by virtue of the Settlement Stipulation.

POINT III

WHETHER THE ENACTMENT OF §711.231, EFFECTIVE JUNE 4, 1975, PRECLUDED COLLECTION OF ESCALATED RENTALS WHICH BECAME DUE AFTER THAT DATE.

The trial judge also erred in finding, as to the escalation put into effect in January, 1975 for the period through December, 1979, that same was valid and enforceable even if the June 4, 1975, Statute otherwise applied to void the escalation clause.

The issue here is whether the enactment of the statute precluded collection of the escalated rents which became due subsequent to the effective date of the statute.

Section 711.231 and, as renumbered §718.401(8)(a), both provide as follows:

> It is declared that the public policy of this state prohibits the inclusion or enforcement of escalation clauses in land leases or other leases or agreements for recreational facilities, land, or other commonly used facilities serving residential condominiums, and such clauses are hereby declared void for public policy. (Emphasis supplied).

The Lessor argued below that both Kaufman v. Shere, 347 So.2d 626 (Fla. 3d DCA 1977), cert. denied, 355 So.2d 517 (Fla. 1978) and Association of Golden Glades Condominium Club, Inc. v. Golden Glades Club Recreation Corp., 441 So.2d 154 (Fla. 3d DCA), rev. denied, 455 So.2d 1033 (Fla. 1984) required that the January, 1975 escalation remained effective even if the Statute otherwise applied to the Lease. However, neither decision really deals with the issue, and the precedental value of those cases on this issue is in doubt in light of the Supreme Court's subsequent decision in Penthouse North Association, Inc. v. Lombardi, 461 So.2d 1350 (Fla. 1985).

In Kaufman, supra, the progenitor of the "automatic amendment" doctrine, the unit owners sought declaratory relief in light of the escalation clause statute. The trial judge, in finding that the statute declared escalation clauses unenforceable prospectively only,

> ... granted a partial summary judgment allowing the increase of May 21, 1974, but prohibiting any further rent escalations after June 4, 1975.

347 So.2d at 628. The unit owners appealed "the upholding of the May, 1974 increase, arguing that (the statute) should be applied retroactively". Id. The lessors cross-appealed the application of the automatic amendment doctrine in the first place.

On the question of what to do about the May, 1974 escalation, this Court's entire discussion was as follows:

> With regard to plaintiff's argument that Section 711.236 should be applied retroactively, we find that the Florida Supreme Court's recent ruling in *Fleeman* V. *Case*, 342 So.2d 815 (Fla. 1977), is completely dispositive of this question. The Court there ruled that Section 711.236 is inapplicable to contracts which antedate its enactment. Thus, the trial judge properly refused to invalidate the rent increase of May 21, 1974, which occurred before the effective date of the statute.

Id. This holding clearly stands for the enforceability, for example, of the escalated rent for the months prior to the enactment of the statute. However, this Court was not called upon to, and did not answer the question now presented: whether the January, 1975 escalation could be enforced past June 4, 1975?

Similarly, the majority opinion in Golden Glades, supra, is of even less precedental value. The majority opinion reads, in its

entirety, as follows:

> Section **718.401(8),** Florida Statutes **(1981),** which prohibits rental escalation clauses in leases for condominium recreational facilities does not apply to prohibit enforcement of such clauses in contracts which antedate the statute. ***Fleeman*** v. *Case,* **342** So.2d **815** (Fla. **1976).**
>
> Affirmed.

Indeed, Plaintiff's reliance on Golden Glades, supra, arises only because of Judge Ferguson's well-reasoned dissent, upon which ASSOCIATION's argument is based. Accordingly, this Court is now free to considerwhether the subject statuteprohibitedtheenforcement of the Rent Adjustment Clause after June **4, 1975,** thereby prohibiting the collection of escalated rents which became due after that date.

In Golden Glades, the lessor, as here, argued that all escalated rentals under the January, **1975** escalation became vested on that date, because this first five-year period rent increase went into effect prior to the effective date of the statute. The lessor in that case similarly argued that Kaufman v. Shere, supra, was controlling.

Judge Ferguson, however, agreed with the appellant condominium association's response that obligations flowing from a lease which are to become due at some future date are not vested but are merely contingent, relying on DeVore v. Lee, **158** Fla. **608, 610-611,** 30 So.2d **924, 926** (Fla. **1947).**

This important principle was re-affirmed by the Florida Supreme Court in Penthouse North, supra, another condominium recreation lease case, wherein the Court held that the statute of limitations for a condominium association's cause of action challenging the

execution of a recreation lease with an escalation clause would not begin to run until it received notice that the escalation clause would be enforced or when escalated rent was actually demanded.

> This is so because the obligation to pay rent is a contingent one which becomes an enforceable debt only as the rent is earned through the lessee's use of the property. *DeVore* v. Lee, **158** Fla. **608, 30** So.2d **924 (1947).**

Penthouse North, supra, **461** So.2d at **1352.**

Therefore, as to those escalated rentals which did not become due until after June **4, 1975,** enforcement of the escalation clause is prohibited under the subject statute.

The fact that the subject statute is being applied to a lease entered into prior to June **4, 1975** is not the issue. Such application is proper under the "automatic amendment" doctrine. E.g., Angora Enterprises, Inc. v. Cole, **439** So.2d **832** (Fla. **1983).**

Indeed, supposed retroactive application of the statute is otherwise an issue only because of the constitutional prohibition against legislation which impairs vested contractual rights in violation of Article I, Section 10 of the United States and Florida Constitutions (the Contract Clause). See, Fleeman v. Case, supra; Century Village, Inc. v. Wellington, etc. Condominium Association, supra, No constitutional issue arises in the instant case, however, because of the parties' contractual agreement to be bound by future amendments to the Condominium Act; i.e., the "automatic amendment" doctrine. Century Village, supra; Angora, supra; compare, Fleeman, supra.

Fleeman, supra, merely held that in enacting the statute, the Legislature did not intend retroactive application. Fleeman merely

offered dicta that even had the Legislature intended the statute to apply retroactively, such application would violate the Contract Clause.

The Contract Clause, however, only protects vested rights, and not contingent ones. Weaver v. Graham, 450 U.S. 24 (1981); Suntide Condominium Association, Inc. v. Division of Florida Land Sales and Condominiums, 409 So.2d 65 (Fla. 1st DCA 1982). Since the escalated rentals for the period from January, 1975 through December, 1979 were not payable in advance, but merely accrued and were payable each month, Plaintiff/Lessor had no "vested" right to receive those payments accruing after June 4, 1975, when, according to the statute, the Rent Adjustment Clause in the subject Lease was no longer enforceable. Golden Glades, supra (Ferguson, J. dissenting).

This is because, as the Supreme Court noted in DeVore v. Lee, supra, 30 So.2d at 926:

> [t]he undertaking to pay rent periodically ripens into a debt only as the times for payments of rent arrive. (Citations omitted). In other words, the debt becomes fixed from time to time as the amount of rental is earned by the use of the property by the lessee. An obligation for the full amount that the lessor would eventually receive from the lessee for the occupancy of the property for the entire time mentioned in the lease would not be established merely upon the execution of the instrument, for 'rent does not accrue to the lessor as a debt or claim, unless payable in advance, until the lessee has enjoyed the use of the premises...'.

Therefore, as to these executory, contingent rentals due after June 4, 1975, the statute makes them unenforceable. They are demanded under an executory provision of the Lease (the Rent Adjustment Clause) which became void and unenforceable on June 4, 1975.

It is significant, as Judge Ferguson noted in his dissent in Golden Glades, supra, at 155 n.2, that the Legislature used the word "enforcement" in the statute, which denotes that even as to a contract which was valid at its inception the agreement could be rendered non-performable. The "void", used in the same sentence, when applied to contracts, commonly means without legal affect ab initio. In the instant case, however, it must be given another accepted meaning: that the Lease is without legal force so far as it is executory, in order that the terms harmonize. Thus, while the statute cannot be applied to void the escalation clause as to the part governing rent increases for the period from January 1, 1975 through June 4, 1975, since that part of the escalation clause had been executed prior to the effective date of the statute, it must be applied to the escalated rentals which were merely contingent on that date. Id.

Therefore, the rent adjustment put into effect on January 1, 1975 became unenforceable as of June 4, 1975, and the Lessor may not recover escalated rentals which became due after that date.

Issues Not Reached Below

Because the trial court found the Statute did not apply, it did not reach the other issues raised by ASSOCIATION:

1. whether the January, 1975 escalation, even if enforceable through December, 1979, remained enforceable after that date, and

2. the amount of rent due effective January, 1980, and in the future.

CONCLUSION

This case presents the facts and document language contemplated by Cove Club. There is a sufficient "tying up" of the Lessor to the Declaration of Condominium, even though the Lessor was an entity technically separate in legal existence from the developer and its principals. This Court should adopt an interpretation, in reading Ansora and Cove Club together, adopted by the Fourth District Court of Appeal in Halpern.

Where there is a showing of interrelationship between the developer and lessor, and there is also present incorporation of the relevant provisions of the Declaration of Condominium into the Lease, the Lessor should be bound even if the amendment should adversely affect the interests of the Lessor. Where the Lessor and developer are distinct in all respects, not part of a common development plan, and there exists no specific language of incorporation of the relevant portions of the Declaration of Condominium into the Lease, there being no way to tie up the Lessor with the Declaration, the result should be as stated by this Court in Cove Club.

Accordingly, the decision of the lower courts should be reversed, withamandate issued to find for the Petitioner CONDOMINIUMASSOCIATION OF PLAZA TOWERS NORTH, INC., that effective June 4, 1975, the Lease was and is amended to exclude therefrom the enforcement of the escalation of the rent tied to the cost of living, and for further proceedings consistent with the opinion of this Court.

Respectfully,

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Attorneys for Petitioner

By _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of Petitioner's Initial Brief were furnished by mail to: IRA M. ELEGANT, ESQ., Buchbinder & Elegant, P.A., 46 S.W. First Street, Fourth Floor, Miami, FL 33130; STEPHEN CYPEN, ESQ., Cypen, Cypen & Dribin, Post Office Box 402099, Miami Beach, FL 33140; NANCY SCHLEIFER, ESQ., 800 Brickell Avenue, Suite 1200, Miami, FL 33131; and ALAN C. SUNDBERG, ESQ., CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER, P.A., First Florida Bank Bldg., P.O. Drawer 190, Tallahassee, FL 32302, this 12th day of December, 1988.

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