IN THE
SUPREME COURT OF FLORIDA

MAISON GRANDE CONDOMINIUM ASSOCIATION, INC.,

Petitioner,

vs. **CASE NO. 78,197**

DORTEN, INC., and ROBERT SIEGEL, as successor Trustee under the Siegel Family Trust,

Respondents.
_____/

ON APPEAL FROM THE COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

BRIEF OF AMICI CURIAE SCHREIBER, PEARL, GORDON, AND GESUNDHEIT IN SUPPORT OF POSITION OF RESPONDENTS

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STATEMENT OF THE CASE AND FACTS

A. The Interests of the Amici. Presently pending in the Eleventh Judicial Circuit in and for Dade County is *Mar-Len Gardens "1" through "12" Corporation, all Florida corporations et al. v. Shirley Schreiber, Edith Pearl, Madeline Gordon, and Florence Gesundheit et al.*, Case No. 84-13259 (the "Mar-Len Gardens case"). Shirley Schreiber, Edith Pearl, Madeline Gordon, and Florence Gesundheit (the "Mar-Len Gardens Amici") are the joint owners of certain land located in North Miami Beach, Florida, upon which the Mar-Len Gardens cooperative apartment complex and recreational and common facilities were constructed. Like Maison Grande Condominium, Mar-Len Gardens involves 99-year net-net leases containing escalation clauses tied to the consumer price index.

The escalation clauses in Mar-Len Gardens are contained in ground leases between the Mar-Len Gardens Amici and each respective cooperative association in the development, while in the Maison Grande Condominium the lease at issue involves recreation facilities. Since the effective date of the enactment of Florida Statute § 719.4015 in 1988, the cooperative associations have withheld the escalated portion of the rent under the ground leases. Their suit, instituted in 1984, challenges the leases.

The determination of the constitutionality of Florida Statute § 718.4015 of the Condominium Act, which is the counterpart to § 719.4015 of the Cooperative Act,[1] may

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[1] The two sections are identical in all material respects. The Condominium Act version provides in relevant part as follows:

> (1) 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....

have a direct effect on the disposition of the Mar-Len Gardens case. The Mar-Len Gardens case thus involves substantially similar issues as those raised in the appeal presently before this Court, namely, whether Florida Statute §§ 718.4015 and 719.4015 prohibiting escalations in rent after 1988 in ground or recreation leases for condominiums or cooperatives can be retroactively applied to leases entered into before the statutes' effective date.

B. Factual Background. Mar-Len Gardens is an apartment complex situated just north of the 163rd Street Shopping Center in North Miami Beach. It was developed in the early to mid-1960's and contains 504 individual apartment units within its twelve buildings. Mar-Len Gardens was conceived by Leonard Schreiber, the late husband of amicus Schreiber, as an affordable adult community where his mother-in-law could live within walking distance of shopping malls and grocery stores but still enjoy amenities like a swimming pool and shuffleboard courts. A-24-25.[2] In the words of the attorney who assisted in the development, Schreiber's concept "wasn't just building a building, it was operating a program with people, how to keep these elderly people interested, what they are going to do[;] so it wasn't just brick and mortar." A-

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> (2) This public policy prohibits the inclusion or enforcement of such escalation clauses in leases related to condominiums for which the declaration of condominium was recorded on or after June 4, 1975 ...; and it prohibits any further escalation of rental fees after October 1, 1988, pursuant to escalation clauses in leases related to condominiums for which the declaration was recorded prior to June 4, 1975.

Fla. Stat. § 718.4015.

[2] References to the Mar-Len Gardens Amici's appendix filed herewith will be identified with an "A" followed by the page in the appendix.

34.[3] At that time, Schreiber's vision of a retiree community with recreational facilities was unique. A-18-19.

Schreiber and the other principals of the developer corporation chose to market Mar-Len Gardens as a cooperative, an arrangement widely used in New York City, to reduce the purchase price of the individual units. Each shareholder acquired the right to use an apartment and the various Mar-Len Gardens recreational facilities for a period of 99 years, through purchasing stock in the particular building's cooperative association and receiving a proprietary lease for a unit. Title to and hence the cost of the underlying real property, however, was not included.[4] This technique allowed the Mar-Len Gardens apartments to be made available for prices in the range of $7,100 to $9,900, which were very favorable housing costs for the time. These prices were lower than comparable condominiums (where title to the land was sold to the unit owners) being sold in the same neighborhood.

In return, each Mar-Len Gardens shareholder agreed to pay the lessors a monthly rent for use of the land. Under the lease's terms, the ground rent would remain constant for a period of 20 years, and then would be adjusted according to cost-of-living statistics. A-2-3. From the very beginning, the intention was to generate profits from the future income under the leases, not from the sales of the units themselves. A-31, 62, 44-45. The units were intended to be sold at cost (in fact, the

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[3] Stanley H. Spieler, Esquire and his then partner, the Honorable Moie Tendrich, drafted the documents and oversaw the closings. A-27. As Mr. Spieler noted, at that time condominium development was in its infancy and none had facilities comparable to that of Mar-Len Gardens. A-32.

[4] The development was set up so that title to the Mar-Len Gardens lands were in the names of the wives of Messrs. Schreiber, Leonard Pearl, Marcos Gesundheit, and Sidney Gordon because under normal life expectancies the husbands would predecease the wives. A-10. In fact, Amici Schreiber and Gesundheit are now widows.

unit sales resulted in losses). A-31, 43-44. The rental stream was to be the Amici's retirement income, and the escalation clauses were intended to protect that income from the vagaries of inflation. A-56, 35-36.

The Mar-Len Gardens leases also included a recapture provision that gave each cooperative association the opportunity to purchase its ground leases at a contractually preset price in the tenth through the twelfth years of its existence, long before the ground rents became subject to escalation. A-11-14. None of the twelve associations elected to exercise this right.

Over the years, Mar-Len Gardens units have been resold for amounts far in excess of their original purchase prices, commanding as much as $30,000 to $35,000. For example, one original purchaser of a unit, Sidney Posner, a retired New York attorney, paid approximately $7,500 for the unit in 1965. A-57-61. Years later, in 1973, he purchased another unit from another unit-owner, and then resold the first one for a profit of $21,000. *Ibid*. Throughout these transactions, Mr. Posner was fully aware that he would be paying rent on a ground lease that contained a cost-of-living escalation clause. A-62-64.

The Mar-Len Gardens case commenced in 1984, when the twelve cooperative associations and a small group of individual shareholders filed a class action suit on behalf of all Mar-Len Gardens residents for declaratory relief and damages. At that time the various Mar-Len Garden ground leases had another 79 years left in their terms. The residents and associations sought a declaration that the ground leases were void and unenforceable in whole or in part, and relief in the form of a return of all rentals paid under the leases for the preceding years and attorney's fees. The Dade County Circuit Court denied the shareholders' motion for class certification and the Third District Court of Appeal affirmed. *Mar-Len Gardens "1"*

Corporation v. Schreiber, 536 So.2d 1191 (Fla. 3d DCA 1989). The proceeding is now before the trial court on the individual claims of the shareholders.

ISSUES ON APPEAL

I. WHETHER THE TRIAL COURT ERRED IN RULING THAT THE RETROACTIVE APPLICATION OF § 718.4015 WOULD VIOLATE THE FLORIDA AND FEDERAL CONSTITUTIONS.

II. WHETHER THE RETROACTIVE APPLICATION OF § 718.4015 WOULD VIOLATE THE DUE PROCESS (TAKINGS) CLAUSES OF THE FLORIDA AND FEDERAL CONSTITUTIONS.

SUMMARY OF THE ARGUMENT

The decision of this Court in *Fleeman v. Case*, 342 So.2d 815 (Fla. 1976), which prohibited the retroactive application of the statutory predecessor to § 718.4015 under the Florida and federal contract clauses, controls the issue before this Court. The *Fleeman* holding represented an implicit application of a balancing test that, although refined in subsequent Supreme Court decisions, would result in the same conclusion today. In addition, the retroactive application of § 718.4015 would result in an impermissible taking without compensation under both the Florida and federal Constitutions.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN RULING THAT THE RETROACTIVE APPLICATION OF § 718.4015 WOULD VIOLATE THE FLORIDA AND FEDERAL CONSTITUTIONS.

As the Respondents note, this Court's decision in *Fleeman v. Case*, 342 So.2d 815 (Fla. 1976), controls the question of the validity of Florida Statute § 718.4015 (and its Cooperative Act counterpart, § 719.4015). That decision held that the statutory predecessor of § 718.4015 could not be applied retroactively without violating the contract clauses in the Florida and United States Constitutions.[5] Furthermore, as Respondents observe, the Supreme Court's decision in *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So.2d 774 (Fla. 1979), did not bring into question the validity of the reasoning of *Fleeman* or of *Yamaha Parts Distributors Inc. v. Ehrman*, 316 So.2d 557 (Fla. 1975), on which *Fleeman* relied. *Pomponio* represented only a refinement of a balancing process in which the Florida Supreme Court had already been engaging.

The Mar-Len Gardens Amici do not seek to add to the Respondents' discussion of these issues. Rather, Amici seek to offer an application of the balancing test in the Mar-Len Gardens factual context in order to illuminate the soundness and vitality of the *Fleeman* holding. As the Association points out (Brief at 11-12), the three-part question is whether the retroactive application of the statute would impair substantial contract rights; whether the statute reflects a sufficiently overriding public purpose to outweigh those rights; and whether that purpose might be served by less-restrictive means.

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[5] U.S. Const. art. 1, § 10; Fla. Const. art. 1, § 10.

A. The Statutes Impairs Substantial Contract Rights

Under the first prong of the balancing test, the Association argues that when the lease was entered "[the developer/landlord] could not have bargained for the unforeseen double-digit inflation which occurred . . . the net effect of which was to bestow upon [the developer/landlord] extraordinary profits." (Brief at 22.) Or as the Association argued to the court of appeal, at the time of the contract the Respondents "could not possibly have reasonably expected that its gains would assume the proportions that they in fact have." (Initial Brief to court of appeal at 15-16). Thus, according to the Association, there is no substantial impairment of any contract right because "windfall profits" were not contemplated.

The Association's contention is founded on faulty premises. If the Association is intending to say that as of 1971 no one could have expected inflation in the U.S. economy to be as severe as it turned out to be a few years later, then that may well be true. But it is beside the point. The parties' inclusion of an escalation clause tied to the rate of inflation proves conclusively that they foresaw the existence of inflation. Their ability to divine its exact rate and severity is irrelevant to the inquiry. Indeed, if the parties could have "predicted" or "foreseen" how inflation would rise, they would not have needed to use an open-ended escalator clause. That's exactly why an unlimited, uncapped escalation clause has utility: because inflation *cannot* be predicted.

Alternatively, if the premise of the Association's assertion is that the rise in rent concomitant with the rise in the rate of inflation constitutes a "gain" in profits, then the Association is simply repeating its later assertion that the escalated rent is a

"windfall profit." As elaborated below, this is incorrect.[6] There is neither a "windfall" nor "profit" in escalations tied to the cost of living any more than a person receiving Social Security indexed to the cost of living gets a "windfall" or "profit" when inflation occurs and the increases merely enable the recipient to stay in the same relative position. Without any doubt, the freezing of the escalation clause at the same level for the next 79 years of the lease impairs substantial contract rights.

Also under the first part of the test, Amicus Curiae State of Florida argues (Brief at 7) that because the condominium industry is the creature of statute and is heavily regulated, developers of condominiums should expect the enactment of further legislation.[7] This argument, if true, would create an impermissible burden on all contracting parties since virtually every aspect of the economy is the subject of either federal, state, or local legislation or regulation. Under the premise of this argument, virtually no government action could run afoul of the contract clause. Indeed, given the government's involvement in almost every sphere of economic activity, the acceptance of this argument would essentially nullify all case law creating a "balancing" test": Because we are all on notice that the government may attempt to regulate or further regulate our activities, we have no right to rely on the existing legislative and regulatory regime. To state the proposition is to expose its absurdity.

In any event, in the case of the Mar-Len Gardens Amici, the argument would be misplaced. When Mar-Len Gardens was developed as a cooperative in the early

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[6] The Association's "windfall" profit argument relates to both the first and second prongs under the balancing test.

[7] The Association argued this point to the court of appeal but has apparently abandoned it on its petition to this Court.

1960's, the Florida Legislature had not yet seen fit to regulate that form of real property ownership.[8]

B. The Interests Under the Statute Do Not Out Weigh the Contract Rights

Under the second prong, it must be shown that the legislation advances a sufficiently important public purpose to outweigh the contract rights. As depicted by the Association (*see* Brief at 26), § 718.4015 is intended to protect the purchasing power of elderly retirees living on fixed incomes by controlling the cost of housing and to eliminate "unforseen windfall profits" to the landlord/developer. As illustrated by the Mar-Len Gardens Case, the real effect of the statute's retroactive application would be to provide the unit-purchasers with a windfall.

The statute at issue itself appears to be built on false premises and stereotypes. The legislature in adopting § 718.4015 seems to view elderly retirees as the proverbial little old husband and wife living hand-to-mouth on subsistence social security income in dilapidated retirement housing. In reality, many Florida "retirees" enjoy the benefit of substantial retirement income on private pension plans enriched by their public Social Security benefits (which are themselves indexed to cost-of-living changes!), living in luxury condominiums and enjoying the "good life." As the Sidney Posner example discussed above illustrates, buyers sophisticated enough to know what they were getting entered into the transaction with their eyes wide open and a full appreciation of both the risks and benefits they were getting. Thus, the "balancing" test itself is without foundation.

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[8] The first statute relating to cooperatives was passed in 1970. *See* Ch. 70-135, Laws of Fla. The subject of escalation clauses in grounds or recreation leases in condominiums or cooperatives was not the object of legislation until 1975. Ch. 75-61, Laws of Fla.

On its face, the statute if applied retroactively punishes most harshly the developer who marketed cooperative or condominium units at prices at or below the cost of development in order to attract purchasers who could only afford limited up-front costs or who chose to defer their costs as do people who can afford to buy for all cash but instead use a mortgage. This is exactly the Mar-Len Gardens situation. Out of such a transaction, the purchaser gets low front-end costs and a lease that gives him full rights to possess and hold the premises for 99-years. The developer, in return, expects to get a profit from the income stream generated by the lease. As structured in the Mar-Len Gardens development, that income stream represents the sole profit to the Amici.[9] Had the developer known that he could not protect his profit stream against inflation, he would have had the opportunity to convey full fee simple title and have charged a significantly higher price to recapture his land costs and build the accompanying recreational amenities.[10]

If a developer/landlord possesses the foresight to include an escalation clause in the lease, all he is doing is protecting his investment against the ravages of inflation. Under such a clause, the rent, *in real dollar terms*, does not change; it

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[9] The rent was fixed for twenty years. Thus, the escalation was set to begin at the point in time when the Amici and their spouses were entering into their retirement years.

[10] *See also* J. Lewis & G. Zenz, Condominium Recreational Leases in Florida 29 (August 30, 1979) (available from the Bureau of Condominiums of the Florida Division of Land Sales and Condominiums). In 1979, Professors Lewis and Zenz of Florida State University performed an extensive study and survey of recreation leases in condominiums that was commissioned by the Bureau of Condominiums. They concluded that the evidence available supported the view "that the recreational lease instrument has been used to allow [developers] to charge a lower initial amount for condominium units with a portion of the profit being deferred in the form of future lease payments." *Id.* A copy of the relevant portions of this study is attached at pages 46-56 of the Appendix.

simply goes up in nominal terms with inflation. By way of analogy, if the developer had placed his funds in an interest-bearing account that generated a yield exactly equal to the year's rate of inflation, one could not say that at the end of the year the developer realized a "profit." Instead, the developer would have merely kept pace with inflation and avoided depletion of the purchasing power of his asset. His net return would be zero. It is absolutely incorrect for the Association to argue that the escalation clause generates a "windfall" to the developer.[11]

The irony and unfairness of the legislative intent behind the statute at issue is that the "retirees," who the legislature seeks to protect, receive cost-of-living adjustments on their own Social Security pensions to protect their buying power from the effect of inflation. The U.S. Congress, when it indexed Social Security benefits in 1972,[12] was confirming the social utility of cost-of-living escalation clauses--clauses which can be found in many instruments, including leases (commercial and residential) and labor contracts. The legislative history of that enactment establishes definitively the merit of taking steps to protect one's buying power against the effects of inflation.[13]

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[11] This obviously distinguishes *Department of Ins. v. Teachers Ins. Co.*, 404 So.2d 735 (Fla. 1981), and *U.S. Fidelity & Guar. Co. v. Dep't of Ins.*, 453 So.2d 1355 (Fla. 1984) (cited in Association Brief at 11-12, 16-19), both of which upheld the retroactive application of the "automobile insurance excess profit law." That statute, which was part of an overall tort and insurance reform legislation, required an insurer to return to policyholders profits calculated to be amounts in excess of five percent of the anticipated underwriting profit, Ch. 77-468, § 23, Laws of Fla.; *see U.S. Fid. & Guar. Co.*, 453 So.2d at 1357. As we have seen, the instant statute does not provide the developer/landlord with protection of *any* portion of his profit.

[12] *See* Social Security Amendments of 1972, Pub. L. No. 92-603, § 102, 86 Stat. 1335 (codified in scattered sections of 42 U.S.C.).

[13] *See, e.g.*, H.R. Rep. 231, 92d Cong. *reprinted in* U.S. Code Cong. & Admin. News 4989, 5026 ("Your committee has given careful consideration to several proposals to provide automatic cost-of-living increases in social security benefits and

The Mar-Len Gardens Amici, through the cost-of-living escalation clauses in the ground leases, seek nothing more than to preserve the purchasing power of their retirement income.

The only "windfall" arising from the transaction under the retroactive application of § 718.4015 would be in favor of the unit owner who, after paying below market rates for his unit since the land was not sold with the unit and no profit was put in the unit price, is able to pay rent in ever-decreasing real dollars as inflation continues. Indeed, the Mar-Len Gardens associations passed up their right to buy out their leases and avoid any cost-of-living adjustments. In short, a retroactive application of the statute would allow the unit purchaser to "have his cake and eat it too" and deprive the developer of his profit from the venture. The unit owner would keep his unit at below cost, get Social Security cost-of-living increases, and the developers' widow and spouses would lose much of their bargained-for profit through an income stream that would be eroded each year by inflation.

C. The Statute Is Not Reasonably Tailored to Fulfill Its Objective

The final step in the inquiry is whether the legislature could have achieved its purposes through less-restrictive means. The legislature could have adopted alternatives less restrictive than the freezing of the level of rent for the remainder of the long-term lease, including running the statute prospectively only. Indeed, as noted below, the existence of the common law doctrine of unconscionability makes the statute unnecessary in the first place. What the statute effectively does is sweep away

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has concluded that authority should be provided for cost-of-living increases if future price rises should cause serious erosion in the purchasing power of social security benefits.").

contracts for which people have freely bargained and rearrange the parties' respective rights and obligations giving one side an advantage--indeed, a windfall--for which it never bargained. The statute simply rejects the free-market view upon which the nation is founded.

In sum, the *Fleeman* decision arrived at the proper conclusion: Florida Statute § 718.4015 is unconstitutional under the contract clause.

B. THE RETROACTIVE APPLICATION OF § 718.4015 WOULD VIOLATE THE DUE PROCESS (TAKINGS) CLAUSES OF THE FLORIDA AND FEDERAL CONSTITUTIONS.

The retroactive application of § 718.4015 to deprive a developer/landlord of his pre-existing contract rights under the escalation clause is a textbook example of a taking of property impermissible under both the Florida and United States constitutions. If § 718.4015 represents the legislature's gut feeling that purchasers of condominium or cooperative units may generally be unsophisticated and unaware of the escalation clauses when they enter into a sales contract and that the developer is really "hiding" the costs of the unit by backloading it into the transaction as rent, then the statute is wholly unnecessary. A genuinely unsophisticated purchaser who enters into a truly oppressive lease has a common law remedy for unconscionability. *See, e.g.*, *Steinhardt v. Rudolph*, 422 So.2d 884 (Fla. 3d DCA 1982). And one who is sophisticated, such as Sidney Posner, *supra* at 4, who profits from the sale of his unit and then buys another unit *should not have a "remedy."*

On the other hand, if the legislature is of the mind that it must void the escalation clause to combat a perceived social ill regardless of whether a purchaser was fully aware of the existence of the provision, then the legislature is doing exactly what the contract clause and takings clause forbid: "forcing some people to bear

public burdens which, in all fairness and justice, should be borne by the public as a whole." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318-19, 107 S.Ct. 2378, 2388 (1987) (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569 (1960)). If the legislature wishes to solve what it perceives to be a social problem by confiscating the value of a person's pre-existing vested contract right to cost-of-living increases (i.e., the constant dollar value of his profits), it must pay just compensation.[14]

CONCLUSION

Amici curiae Schreiber, Pearl, Gordon, and Gesundheit respectfully request that the Court affirm the decision of the court of appeal and answer the certified question in the positive.

Respectfully submitted,

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[14] Contrary to the Association's argument (Brief at 32-33), that contract right is not a mere "strand" in the "bundle", it is the benefit of the bargain.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing and of the appendix to the brief were mailed this 30th day of September, 1991, to:

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