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CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,197

MAISON GRANDE CONDOMINIUM ASSOCIATION, INC.,

Petitioner,

vs.

DORTEN, INC., etc., et al.,

Respondents.

______________________________/

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

BRIEF OF RESPONDENTS

PODHURST, ORSECK, JOSEFSBERG,
EATON, MEADOW, OLIN & PERWIN, P.A.
25 West Flagler Street, Suite 800
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By: Joel S. Perwin, Esquire
Fla. Bar No. 316814

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I
STATEMENT OF THE CASE AND FACTS

A. The Procedural Background. Neither the Association nor the State has informed the Court that this litigation is only the latest chapter of a long-running dispute between the developers of Maison Grande Condominium and its unit owners. The first cost-of-living adjustment was made in January of 1973, and the lease calls for cost-of-living adjustments to be made on a yearly basis thereafter. In 1975, the Association refused to pay the prescribed cost-of-living adjustment, and filed an action in federal court asserting that the rent-escalation provision violated the federal antitrust laws. *Maison Grande Condominium Association, Inc. v. Maison Grande, Inc.*, Case No. 75-56-Civ-Eaton, S.D. Fla. At the same time, the plaintiffs below (respondents Dorten, etc.) filed an action in state court for breach of contract. *Dorten, Inc. et al v. Maison Grande Condominium Association, Inc.*, Case No. 75-33791 (27), Eleventh Judicial Circuit, Dade County, Florida. The Association counterclaimed in the state action, claiming that the rent-escalation provision was unconscionable, and that it violated a recently-enacted provision of the Condominium Act requiring that all condominium leases be "fair." The Honorable Herbert Stettin directed a verdict for the plaintiffs herein (Dorten, etc.) on the Association's statutory claim, concluding that the new provisions of the Condominium Act "simply may not be applied retroactively."[1/] The question of unconscionability was tried before a jury for five days; the jury returned a verdict for the plaintiffs herein (Dorten, etc.); the District Court of Appeal, Third District, affirmed their judgment on all grounds, 358 So.2d 851; and this Court denied *certiorari*, 366 So.2d 883.

The federal antitrust action took seven years to conclude. After a week-long trial, the jury returned a verdict for the plaintiffs herein (Dorten, etc.) and against the Association, in Case No. 75-56-Civ-EPS; and in 1982, the United States Court of Appeals

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[1/] In his Memorandum Order of February 10, 1977, Judge Stettin explained his ruling as follows: "If any other view were held, especially in light of performance as agreed for several years after the making of the contract, no contracting party could rely upon his agreement; financing based upon future performance would never be made; and ultimately, no belief in the certainty of commercial transactions would exist."

for the Eleventh Circuit affirmed the judgment, Case No. 81-5685.

The current dispute began in December of 1988, when the Association brought an action in state court seeking to compel the plaintiffs herein (Dorten, etc.) to sell to the Association their fee interest in the recreational facilities. *Maison Grande Condominium Association, Inc. v. Dorten, Inc.*, Case No. 88-53047 (12), Eleventh Judicial Circuit, Dade County, Florida. The Association based the action upon § 718.401(3)(f)(1), Fla.Stat.--as amended effective October 1, 1988, to apply to pre-existing leases--which permitted a condominium association, any time after the expiration of ten years from the making of a recreation lease, to force the sale of the leased property at an agreed price, or in the absence of an agreement, at a price set by mandatory arbitration. About two weeks after it filed the action, however, the Association voluntarily dismissed it without prejudice. At the same time, it withheld all further recreation lease rental payments, thus inducing the plaintiffs herein to file the instant action.[2]

B. The Factual Predicate for the Plaintiffs' Challenge to the Retroactive Application of § 718.4015, Fla.Stat. (1988). The plaintiffs herein have raised no challenge to the facial validity of § 718.4015. We question only the Association's contention that the statute should apply retroactively to invalidate a rent-escalation provision which was perfectly lawful at the time the 99-year lease was made in November of 1971. In its prospective application, the statute advises landowners that if they wish to account for inflation--that is, to protect the value of their leases over the long terms of those leases--they must do so through a mechanism other than automatic cost-of-living

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[2] Initially, the Association failed to make *any* rental payments to the plaintiffs--not simply that portion of the recreation lease rental representing post-October, 1988 cost-of-living increases. It was not until June 2, 1989, about a month after the plaintiffs had filed their compliant (R. 1), that the Association paid into the court's registry the entire amount of recreation lease rental due to the plaintiffs. And only after the plaintiffs filed a motion to release those funds which were not at issue--that is, those representing the rental due apart from the cost-of-living increases--did the Association agree to an order releasing those funds to the plaintiffs. Since that time, the Association has paid to the plaintiffs only the amount of base rent, plus the cost-of-living adjustments up to October of 1988.

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adjustments. One option is to charge a fixed rate over the 99 years of the lease, but to make up the difference in the original prices of the condominium units. Another is to simply sell the common-area land to the condominium owners at fair market value. If § 718.4015 had been on the books in November of 1971, the plaintiffs would have had those options; instead, they negotiated the rent-escalation clause in reliance upon the existing state of the law. Indeed, both the plaintiffs and the condominium owners received the benefit of the bargain struck under the law existing in 1971, because the original purchasers paid less for their units than they would have paid in the absence of the recreational rent-escalation clause.

As the Association has acknowledged, neither the statute nor any of its predecessors was on the books in 1971. *See Association of Golden Glades Condominium Club, Inc. v. Security Management Corp.*, 557 So.2d 1350, 1352-53 (Fla. 1990). Section 711.213 was enacted effective June 4, 1975, and declared the public policy of Florida to prohibit the inclusion or enforcement of escalation clauses. Effective January 1, 1977, Chapter 711 was replaced by Chapter 718, and § 718.401(8)(a) recodified the prior statutory declaration that escalation clauses are contrary to Florida's public policy. On July 1, 1988, § 718.401(8) was repealed, and reconstituted in identical material language as § 718.4015(1). In addition, § 718.4015(2) applied sub-section (1) to all existing or future contracts, but without divestment of any benefits or obligations which had arisen prior to October 1, 1988.

On October 1, 1988, the lease in question had been existence for approximately 17 years, and thus had approximately 82 years left to run. The effect of the statute would be to permit the plaintiffs to retain the rent escalations secured in the first 17 years, but to receive exactly the same rent for every year thereafter, regardless of inflation, over the remaining 82 years of the lease. Perhaps without intending to do so, the Association has quantified for us the substantial contracted-for cost-of-living adjustments which the retroactive application of the statute would take away from the plaintiffs (*see* the Association's district-court brief, Appendix A). In light of those

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numbers, it is fair to say that at the end of the 99 years, given the value of the dollar in the year 2070, the plaintiffs' lease will be worth virtually nothing. And by the same token, at the end of the 99 years, given the value of the dollar at that time, the Association will be paying virtually nothing for the use of the plaintiffs' land.

C. The District Court Appeal. The sole substantive thesis advanced by the Association in the district court was that even if *Fleeman v. Case,* 342 So.2d 815 (Fla. 1976) was correctly decided under the standards of contract-clause analysis applicable at the time, those standards had changed since *Fleeman*. As the Association put it (district-court brief at 5), *Fleeman* "has subsequently been modified by more recent decisions," which assertedly "receded from the sweeping statements of Yamaha[3] and Fleeman, and adopted instead a balancing test . . ." (district-court brief at 8). Thus, in its opinion (p. 6), the district court correctly stated the Association's position: "Maison Grande asserts that in [later cases], the supreme court receded from its broad holding in Fleeman and adopted a balancing test to determine under what circumstances the legislature may enact statutes that impair the obligation of the contract." At no time below did the Association argue that *Fleeman* was wrongly decided, because it failed to apply criteria in existence at the time, and still existent today. That argument has been raised for the first time in this Court.

The district court held that "[t]he criteria for contact clause analysis has [sic] not changed since Fleeman"; that this Court's decisions after *Fleeman* had endorsed its holding; and that the district court was "constrained to follow the clear mandate of the state's highest court" (opinion at 6-7). The district court did not remotely hold (Association's brief at 4) that *Fleeman* should be construed "as nullifying more recent Florida precedent requiring that the singular circumstances of each case be weighed, in order to determine whether a particular statute is capable of being constitutionally applied to a given set of circumstances." To the contrary, the district court held that

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[3] *Yamaha Parts Distributors, Inc. v. Ehrman,* 316 So.2d 557 (Fla. 1975).

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Fleeman is *consistent* with both prior and subsequent cases, and that the district court was bound to follow *Fleeman*. The question now is whether this Court should overrule *Fleeman*.

II
ISSUES ON APPEAL

A. WHETHER THE ESCALATION CLAUSE IN QUESTION, ENTERED INTO BEFORE 1975, IS ENFORCEABLE AFTER OCTOBER 1, 1988, FOR THE ENTIRE TERM OF THE 99-YEAR LEASE, WHERE THE LESSOR HAS NOT AGREED TO BE BOUND BY FUTURE CHANGES IN THE CONDOMINIUM ACT.[4/]

B. WHETHER F.S. 718.4015 VIOLATES THE DUE PROCESS (TAKINGS) CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS.[5/]

C. WHETHER THE COURT OF APPEAL PROPERLY AWARDED DORTEN TRIAL AND APPELLATE ATTORNEY'S FEES.

III
SUMMARY OF THE ARGUMENT

Throughout its brief, the Association repeatedly protests that it has never been given its day in court--that none of the courts below has been willing to apply the recognized three-part balancing test to the plaintiffs' contract-clause challenge to the retroactive application of the statute in question. As the Association puts it at one point (brief at 20), if everybody recognizes the balancing test, "why are those factors not being weighed now?"

The answer is that this Court has already weighed those factors, in *Fleeman v. Case,* 342 So.2d 815 (Fla. 1976). *Fleeman* concerned the predecessor statute, which was

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[4/] This formulation of the issue, which tracks the question certified by the district court, encompasses both the Association's Issue I ("Whether the three-prong balancing test should be applied to the circumstances of this case"), and its Issue III ("Whether the certified question should be answered in the negative").

[5/] The Association's brief addresses only the federal takings question. There is a substantial state-law takings question as well.

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identical in all substantive respects, except that it was silent on the question of retroactive application. The Court held that the legislature had not intended retroactive application, but that even if it had, any such application would constitute an unconstitutional impairment of the contract clauses of both the Florida and United States Constitutions. Without question, therefore, *Fleeman* is controlling of the precise issue now before the Court. And when a Supreme Court decision is controlling, under the principle of *stare decisis*, the parties to subsequent lawsuits do not get their day in court, because the issue has already been determined.

In an effort to revisit the issue, the Association has argued (for the first time in this Court) that *Fleeman* was wrongly decided, because it failed to apply the three-part contract-clause balancing test which the Court has recognized both before and after *Fleeman*. That contention is simply wrong. Not only did *Fleeman* apply the three-part test, but it applied that test properly, and thus the result would be no different if this Court were to revisit the substantive question here. The retroactive application of the statute would deprive the plaintiffs of substantial contracted-for benefits, over the 82 years remaining on this 99-year lease. It would assure the Association the full benefit of its bargain, in the form of the condominiums and the common areas, while depriving the plaintiffs of the full benefit of their bargain. It would do so in pursuit of governmental objectives which by no means are compelling (in the retroactive application of the statute, as opposed to its prospective application), because the original prices of the condominium units themselves were devalued in light of the prescribed recreational rent increases. In contrast, assuming that the prospective application of the statute would serve the stated governmental objectives, because it would prevent the perceived unfairness of cost-of-living increases, at least it would give all parties the right to negotiate alternatives. The Association would give the plaintiffs here no alternative; it would simply abolish a substantial percentage of the benefit of their bargain. And that outcome is especially unacceptable, in light of several less-restrictive alternatives which the legislature might have adopted, in dealing with pre-existing contracts. For all of

these reasons, *Fleeman* was correctly decided, and should not be revisited.

In addition, the Association's challenge to the attorneys'-fee awards is meritless. The lease agreement unquestionably entitled the plaintiffs to attorneys fees, for both trial-level and appellate-level work, and the challenge to the appellate fees was not timely raised in any event.

IV
ARGUMENT

A. THE ESCALATION CLAUSE AT ISSUE IS ENFORCEABLE FOR THE ENTIRE 99-YEAR TERM OF THE LEASE.

1. The Instant Case is Controlled by Fleeman v. Case, *342 So.2d 815 (Fla. 1976).* The most important point in this proceeding, which the Association can never quite acknowledge, is that the acceptance of its position would require this Court to overrule *Fleeman v. Case*. As the district court recognized (opinion at 7), *Fleeman* and its progeny represent "the clear mandate of the State's highest court," and are absolutely controlling of the issue on appeal. Therefore, the Association can prevail in this proceeding only by convincing this Court to overrule *Fleeman*.

Fleeman concerned the predecessor statute, § 711.231, Fla. Stat. (1975), which was identical in substance to the statute at issue here, except that it contained no provision for retroactive application. Instead, the statute was made effective June 4, 1975, and the question in *Fleeman* was whether the statute should be construed to apply "to recreation leases and management contracts entered into before the effective date of the statute, that is June 4, 1975." 342 So.2d at 817. Please note that the question before the Court was *not* whether the statute might permissibly be applied to rent increases called for after June 4, 1975, under contracts entered into before June 4, 1975. The question in *Fleeman* was whether the statute could apply at all to recreation leases "entered into" before June 4, 1975, regardless of when such increases might be prescribed.

The threshhold holding of *Fleeman* is that the legislature did not intend "to apply

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the law to pre-existing contracts." *Id.* As an alternative holding, the Court also declared that even if the legislature had intended retroactive application, the statute would be unconstitutional as applied retroactively, because it would violate the contract clauses of both the Florida and federal constitutions:

> Even were we to conclude that the Legislature intended retroactive application of this statute, we would be compelled to hold it invalid as impairing the obligation of contract under Article I, Section 10 of both the United States and Florida Constitutions. *Yamaha Parts Distributors, Inc. v. Ehrman*, 316 So.2d 557 (Fla. 1975). While we ordinarily do not reach constitutional questions not necessary to the disposition of the case, in this instance the principle [sic] contention of the parties and the rulings of the trial courts below are predicated on this constitutional issue. Therefore, we deem it appropriate to resolve this issue in this proceeding.[6/]

Thus, focusing exclusively upon the date of the contract at issue, and independent of when the rent increases prescribed by that contract might be called for, the Court declared unequivocally that any application of the statute to pre-existing contracts would be unconstitutional.[7/]

As the Court said explicitly in *Fleeman*, its pronouncement on the retroactivity question was not *dictum*, but rather constituted an alternative holding.[8/] As the Court

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[6/] 342 So.2d at 818. In *Yamaha*, 316 So.2d 557, the Court had forbidden the retroactive application of a statutory requirement that a motor-vehicle manufacturer give 90 days' notice to a franchisee prior to cancellation of the franchise contract. The Court ruled that such retroactive application was inconsistent with a pre-existing contract clause giving either party the right to terminate on 30 days' notice.

[7/] That holding reflects the recognition that any application (even post-statute) to a pre-statute contract would be classically retroactive. We will revisit the point on the merits in a moment.

[8/] *Compare Century Village, Inc. v. Wellington, etc. Condominium Ass'n*, 361 So.2d 128, 132-33 & n. 3 (Fla. 1978) (construing statute requiring rent deposits into court registry during litigation as prospective only; declining to reach the question of whether the statute would be constitutional if it were retroactive; holding that the parties agreed to be bound by future changes in the Condominium Act (*see infra* note 10)). The Court in *Century Village* followed the general rule of avoiding constitutional questions if possible. In *Fleeman*, in contrast, while acknowledging the general rule, the Court expressly reached and decided the constitutional question.

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put it in *Parsons v. Federal Realty Corp.*, 105 Fla. 105, 143 So. 912, 920 (1931): "Two or more questions properly arising in the case under the pleadings and proof may be determined, even though either one would dispose of the entire case on the merits, and neither holding is dictum, so long as it is properly raised, considered and determined."[9]

There can be no question that *Fleeman* is directly controlling of the instant case. The Association's position, therefore, necessarily requires this Court to overrule *Fleeman*. And that is a plea which embraces consequences beyond the merits of this particular dispute. Because of the vital importance of precedent, and the principle of *stare decisis*, the Association must do more than convince the present Justices of this Court that they might have acted differently if presented with the retroactivity question in the first instance. That question was presented to a different group of Justices, and that Court's mandate carries substantial weight. As the Court put it in *In Re Seaton's Estate*, 154 Fla. 446, 18 So.2d 20, 22 (Fla. 1944):

> In general, when a point has once been settled by judicial decision it should, in the main, be adhered to, for it forms a precedent to guide the courts in future similar cases. Especially is this so where a decision construing a statute affects the validity of a certain mode of transacting business or passing title to property, and a change of decision will necessarily confuse or invalidate transactions entered into and acted upon in reliance upon the law as judicially construed. Under such circumstances it has been held that when a point of law has been settled by judicial decision it forms a precedent which may not be departed from no matter what may be the personal predilections of the individual justices.

Accord, Old Plantation Corp. v. Maule Industries, Inc., 68 So.2d 180, 183 (Fla. 1953);

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[9] *See Clemons v. Flagler Hospital, Inc.*, 385 So.2d 1134, 1136 n. 3 (Fla. 5th DCA 1980) (The "holding [of a case] is authoritative on the point notwithstanding that the court also relied on another ground for its decision"), *citing Woods v. Interstate Realty Co.*, 337 U.S. 535, 537, 69 S.Ct. 1235, 1237, 93 L.Ed. 1524 (1949), ("[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum"). *Accord, Union Pacific R. Co. v. Mason City & F.T.D.R. Co.*, 199 U.S. 160, 166, 26 S.Ct. 19, 20, 50 L.Ed. 134 (1905) ("Of course, where there are two grounds upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is *obiter*, but each is the judgment of the court, and of equal validity with the other"); *United States v. Pierre*, 781 F.2d 329, 333 (2d Cir. 1986).

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McGregor v. Provident Trust Co. of Philadelphia, 119 Fla. 718, 162 So. 323 (1935).

It is respectfully submitted that these observations should end the inquiry. *Fleeman* is the controlling authority of this Court, and it should not be revisited.

2. *This Court Has Consistently Endorsed the Holding of* Fleeman. In the fifteen years since *Fleeman* was decided, this Court has consistently endorsed its holding, and all of its decisions on the subject of condominium recreational leases have proceeded on the assumption that *Fleeman* remains good law. In 1983, seven years after *Fleeman,* the Court confronted the question of whether the retroactive application of a predecessor of the statute might be permissible, on the ground that the parties had agreed in their contract to be bound by future changes in the Condominium Act. *Cove Club Investors, Ltd. v. Sandalfoot South One, Inc.*, 438 So.2d 354 (Fla. 1983). The Court's holding was that although the developer of the property had agreed in the declaration of condominium to be bound by future changes in the Condominium Act, the lessor of the recreational facilities, a subsidiary of the developer, was not a party to the declaration of condominium, and thus was not bound by it.[10/]

[10/] In *Century Village, Inc. v. Wellington, etc. Condominium Ass'n*, 361 So.2d 128, 131-32 (Fla. 1978), the Court had permitted the retroactive application of a statute requiring condominium owners to deposit rents into the registry of the court pending litigation about recreational leases, on the ground that the parties had agreed in their contract to be bound by all future changes in the Condominium Act. After the *Century Village* decision, both before and after the *Cove Club* decision in 1983, the Florida courts have often addressed this question of the circumstances under which the parties will be held to have bound themselves to future changes in the condominium law. *See, e.g.*, *Association of Golden Glades Condominium Club, Inc. v. Security Management Corp.*, 557 So.2d 1350 (Fla. 1990) (following *Cove Club*; declaration of condominium not binding on a non-party); *Condominium Ass'n of Plaza Towers North, Inc. v. Plaza Recreation Development Corp.*, 557 So.2d 1356 (Fla. 1990) (same); *Angora Enterprises, Inc. v. Cole*, 439 So.2d 832, 834-35 (Fla. 1983), *cert. denied*, 466 U.S. 927, 104 S.Ct. 1710, 80 L.Ed.2d 183 (1984) (permitting retroactive application of the statute forbidding rent-escalation clauses, because the parties had agreed to be bound by future amendments to the Condominium Act); *Sky Lake Gardens Recreation, Inc. v. Sky Lake Garden Nos. 1, 3 and 4, Inc.*, 574 So.2d 1135 (Fla. 3d DCA 1991) (lessor not bound by declaration signed by developer); *Wilderness Country Club Partnership, Ltd. v. Groves*, 458 So.2d 769 (Fla. 2d DCA 1984) (parties agreed to be bound); *Golden Glades Club Recreation Corp. v. Association of Golden Glades Condominium Club, Inc.*, 385 So.2d 103 (Fla. 3d DCA), *review denied*, 392 So.2d 1374 (Fla. 1980) (same); *Kaufman v. Shere*, 347 So.2d 627, 628

In the process of rendering that decision, the Court in *Cove Club* clearly and unequivocally endorsed both holdings of *Fleeman*: "As we pronounced in *Fleeman v. Case*, 342 So.2d 815 (Fla. 1976), this statute cannot be applied retroactively to leases signed prior to the inception of the statute, because the legislature did not intend retroactive application. Furthermore, we concluded that even had the legislature intended retroactive application, we would have been compelled to hold it invalid as impairing the obligation of contract absent any agreement to be bound by future amendments to the Act." 438 So.2d at 356. At least as of 1983, therefore, *Fleeman* remained good law.

In two 1990 decisions, the Court again endorsed the holding of *Fleeman*. In *Condominium Ass'n of Plaza Towers North, Inc. v. Plaza Recreation Development Corp.*, 514 So.2d 381 (Fla. 3d DCA 1987), *aff'd,* 557 So.2d 1356 (Fla. 1990), the district court had followed *Cove Club* in holding that a rent-escalation clause made before the effective date of a predecessor statute was enforceable, notwithstanding that the declaration of condominium incorporated future changes in the Condominium Act, because the lessor of the recreational lease was not a party to the declaration of condominium. In the process, the district court acknowledged the continued validity of the *Fleeman* holding, 514 So.2d at 382:

> First, the subject lease was entered into prior to the effective date of Section 711.231, Florida Statutes (1975) [now § 718.401(8) Fla.Stat. (1985)] which invalidates rent escalation clauses in condominium recreational leases, and, consequently,

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(Fla. 3d DCA 1977), *cert. denied*, 355 So.2d 517 (Fla. 1978) (same). *See generally Florida State Lodge v. City of Hialeah,* 815 F.2d 631, 636 (11th Cir. 1987) (parties contracted to be bound by future amendments regarding sick leave and vacations); *Florida Sheriffs Ass'n v. Department of Administration*, 408 So.2d 1033, 1036-37 (Fla. 1981) (statutory changes in retirement benefits retroactively applicable, because the contract contemplated such changes); *Anders v. Nicholson*, 111 Fla. 849, 150 So. 639 (1933) (agreement to be bound by future statutory changes built into contract); *State of Florida, Dept. of Transportation v. Cone Bros. Contracting Co.*, 364 So.2d 482, 486 (Fla. 2d DCA 1978) (statute in effect at time of contract contemplated limitations upon price adjustments; therefore subsequent statutory amendment was merely a refinement of the law in existence at the time of the contract, which was a part of the contract).

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> the said statute cannot be applied retroactively to invalidate the rent escalation clause contained in the rent recreational lease presented in the instant case, *Fleeman v. Case*, 342 So.2d 815 (Fla. 1976), unless the parties herein have by contract agreed to the contrary in the declaration of condominium or the subject long-term lease by binding themselves to any future amendments to the Condominium Act.

The district court then held in *Plaza Towers* that the declaration of condominium was not binding on the non-party lessor. And in *Association of Golden Glades Condominium Club v. Security Management Corp.*, 518 So.2d 967 (Fla. 3d DCA 1988), *approved*, 557 So.2d 1350 (Fla. 1990), the same court reached the identical conclusion, and certified the issue to this Court.

This Court reviewed both cases, and its lead opinion is found in the *Golden Glades* case, 557 So.2d 1350. Most of that opinion addresses and endorses the district court's reasoning that the lessor was not bound by a declaration of condominium to which it was not a party. But in the course of reaching that conclusion, the Court invoked and ratified the *Fleeman* holding, 557 So.2d at 1353-55:

> In 1976, this Court addressed the enforceability of section 711.231 to leases entered into prior to its effective date, June 4, 1974, in *Fleeman v. Case*, 342 So.2d 815 (Fla. 1976). There, we held that the statute could not be given retroactive application because there was no showing that such was the intent of the legislature. *Id.* at 818. Further, we stated: "Even were we to conclude that the Legislature intended retroactive application of this statute, we would be compelled to hold it invalid as impairing the obligation of contract under Article I, Section 10 of both the United States and Florida Constitutions."
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> In *Cove Club Investors*, we determined that Sandalfoot Cove Country Club, Inc. was not bound by the declaration of condominium. In doing so, we reaffirmed our holding in *Fleeman* that the statutory prohibition of escalation clauses could not be retroactively applied and held that, since the lessor had not agreed to be bound by the declaration or the Condominium Act, "[t]here is no way to tie up this petitioner with the declaration and the language contained therein."

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Thus, after endorsing both the *Fleeman* and *Cove Club* decisions, the Court "approve[d] the decision of the district court of appeal." *Id.* at 1356. And in that light, the Court likewise affirmed *Plaza Towers,* holding that "[w]e approve the Third District Court of Appeal's decision." 557 So.2d at 1356. It was in that decision, as we have noted, that the district court had invoked and endorsed the earlier *Fleeman* holding. Thus, both in the language of its leading decision in *Golden Glades*, and by approving the district court's decision in *Plaza Towers*, the Court clearly endorsed its earlier decision in *Fleeman v. Case*.[11/]

The Association has discussed *Golden Glades* under its Argument III (brief at 33-37), contending that it "partially receded from, and modified, that portion of Fleeman" which addressed the retroactivity issue (brief at 34).[12/] First (brief at 33-34), the

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[11/] Similarly, virtually every district court since *Fleeman* has recognized and enforced its holding. *See, e.g.*, *Garden Isles Apts. No. 3, Inc. v. Connolly*, 546 So.2d 38, 40 (Fla. 4th DCA 1989) ("Appellants' contention that section 718.401(8), Florida Statutes (1985) renders the subject lease provisions void and unenforceable as being against public policy fails in view of *Fleeman v. Case*, 342 So.2d 815 (Fla. 1976), which held that the said statute, and its predecessor . . . were enacted after the subject leases were executed and, accordingly, could not be applied retroactively"); *Island Manor Apartments of Marco Island, Inc. v. Division of Florida Land Sales, Condominiums and Mobile Homes*, 515 So.2d 1327, 1329 (Fla. 2d DCA 1987), *review denied*, 523 So.2d 577 (Fla. 1988) (no retroactive application of statute requiring condominium unit owners to pay condominium fees according to their respective percentages of ownership); *Wilderness Country Club Partnership, Ltd. v. Groves*, 458 So.2d 769, 770-71 (Fla. 2d DCA 1984) (*Fleeman* good law, but the developer agreed to be bound by future changes in the law); *Commodore Plaza at Century 21 Condominium Ass'n, Inc. v. Cohen*, 378 So.2d 307 (Fla. 3d DCA 1979) (forbidding retroactive application of statute providing that whenever a contract allows the developer to secure attorney's fees in litigation, the condominium unit-owner should be entitled to receive such fees as well); *Buckley Towers Condominium, Inc. v. Buchwald*, 356 So.2d 1306 (Fla. 3d DCA 1978) (forbidding retroactive application of a statute giving condominium associations the right to repurchase the lesser's interest in the lease); *Point East One Condominium Corp., Inc. v. Point East Developers, Inc.*, 348 So.2d 32 (Fla. 3d DCA 1977) (forbidding retroactive application of the Florida Deceptive and Unfair Trade Practices Act to a pre-existing 99-year recreational condominium lease); *Fincher Motors, Inc. v. Northwestern Bank & Trust Co.*, 166 So.2d 717, 719 (Fla. 3d DCA 1964) ("We have been unable to find where this rule by the Supreme Court of Florida has been modified or receded from").

[12/] We can put aside at the outset the Association's fanciful contention (brief at 34) that *Golden Glades* attributed to *Fleeman* the *holding* that the legislature did not intend the

Association attributes to *Golden Glades* an acknowledgment by this Court that the dispositive focus, for purposes of determining the permissible application of the statute, is not upon the time at which the contract in question was made, but rather the time at which the contracted-for rent escalation will take place. The Association finds in *Golden Glades* the suggestion that the legislature can permissibly prohibit all rent escalations after October 1, 1988 (the operative date of § 718.4015(2)), even if the contract prescribing those increases was made before that date.[13]

In light of the foregoing discussion, and a review of the *Golden Glades* decision, the Association's contention is simply indefensible. Of course, the Court in *Golden Glades* recognized that on its face, the language of § 718.4015, Fla. Stat. (1988) purported to prohibit all rent escalations after October 1, 1988, regardless of whether those escalations were prescribed by contracts made before or after that date. But after acknowledging that language, the question in *Golden Glades* was the extent to which it could be (and was intended to be) enforced; and the answer to that question depended upon the extent to which the parties to the contract had agreed to be bound by future changes in the Condominium Act. Consistent with the line of cases which we have

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retroactive application of the predecessor statute, but only the *statement* that such retroactive application would be unconstitutional. *See Fleeman*, 342 So.2d at 1354. As we have established already, there can be no question that both of the Court's pronouncements in *Fleeman* were a part of its holding. Indeed, later in the *Golden Glades* opinion itself, the Court pointed out that in an earlier case discussed above--*Cove Club Investors, Ltd. v. Sandalfoot South One, Inc.*, 438 So.2d 354, 355 (Fla. 1983)--"we reaffirmed our *holding* in *Fleeman* that the statutory prohibition of escalation clauses could not be retroactively applied . . . ." *Golden Glades,* 557 So.2d at 1354-55 (emphasis added).

[13] Please note that this contention concedes a point which we made earlier--that *Fleeman* itself clearly held that the statute could not constitutionally be applied retroactively to contracts made before its effective date, regardless of whether or not the prescribed increases took place before or after that date. *See Cove Club Investors, Ltd. v. Sandalfoot South One, Inc.*, 438 So.2d 354, 356 (Fla. 1983) ("As we pronounced in *Fleeman v. Case*, 342 So.2d 815 (Fla. 1976), this statute cannot be applied retroactively to leases signed prior to the inception of the statute . . ."). Indeed, the Association concedes as much, by contending (brief at 34) that in *Golden Glades* and other decisions, "this Court partially receded from, and modified, that portion of Fleeman."

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discussed, *supra*, pp. 10-12, the Court recognized in *Golden Glades* that the legislature *could* constitutionally prohibit post-October, 1988 rent escalations, even under pre-existing contracts, *if* the parties had agreed to be bound by such legislation. Thus, virtually the entirety of the *Golden Glades* opinion is devoted to the question of whether or not the parties in *Golden Glades* in fact had agreed to be bound by future changes in the Condominium Act.

The centrality of that issue necessarily assumed the correctness of *Fleeman*'s retroactivity holding. If the Association were correct, and if *Golden Glades* stands for the proposition that the legislature could constitutionally forbid all rent escalations after October 1, 1988, even under contracts entered into before that date, no matter what such contracts say, then why did *Golden Glades* not simply make that declaration? Any such holding would have been dispositive of the entire issue. Instead, after repeatedly re-affirming the *Fleeman* holding, the Court had to decide whether the parties in *Golden Glades* had agreed to be bound by the new statute. The necessity of that decision necessarily rebuts the Association's thesis.

The same point serves to answer the Association's second argument on this issue (brief at 35-37)--that in *Golden Glades* and the many other cases on this question of contract interpretation, *see supra* note 10, "this Court recognized that under certain circumstances, retroactive application would not constitute an impermissible impairment to contractual obligations." That is correct, but the Association has completely lost sight of what those "circumstances" are. In the line of cases cited, the only circumstance which would permit the retroactive application of the statute was the parties' contractual agreement to be bound by new incarnations of the statute. These decisions unquestionably establish the continued viability of *Fleeman*. If the only circumstance in which the new statute can be applied retroactively is when the parties have agreed to be bound by such changes, then it follows *a fortiori* that in the absence of such a contractual agreement, as *Fleeman* held, the new statute cannot be applied retroactively. That is the fundamental assumption of all of these cases, and thus it is not surprising

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that all of them restate and endorse the *Fleeman* holding. There can simply be no question that from the time of *Fleeman* to the present time, this Court has consistently recognized and endorsed the *Fleeman* holding. And that observation only re-enforces our contention that this Court should not disturb established precedent.

3. Fleeman *Properly Applied the Three-Prong Balancing Test Which the Association Has Advocated.* We believe that the foregoing discussion should end the inquiry. The holding of *Fleeman* is clear, and it repeatedly has been endorsed by this Court, and by all of the district courts. A body of law has developed around that holding, which should not be disturbed. Nevertheless, in an abundance of caution, we consider next the Association's primary contention (brief at 6-28)--that although "the criteria for contract clause analysis have not changed since Fleeman" (brief at 16), "[i]n Fleeman . . . no balancing test was conducted" (brief at 17).

At the outset, we cannot stress too strongly that this is *not* the argument which the Association presented to the trial court, and it is *not* the argument which the Association presented to the district court. As the Association itself acknowledged in its district-court brief (p. 6), its argument to the trial court was that "Fleeman had been modified by more recent Florida precedent which seemed to restrict the Fleeman analysis." And on appeal, the Association's repeated contention was that *Fleeman* "has subsequently been modified by more recent decisions" (brief at 5) which have "receded from the sweeping statements of Yamaha[14/] and Fleeman, and adopted *instead* a balancing test . . ." (*id.* at 8) (our emphasis). The Association's repeated contention below was that *Fleeman* had been overruled by subsequent cases which applied a new test to the question of retroactive application. And as we noted, the district court, in its opinion, devoted a fair amount of time to rebutting the Association's contention "that Fleeman has been modified" (opinion at 6), holding that "[t]he criteria for contract clause analysis has [sic] not changed since Fleeman" (opinion at 6-7).

[14/] *Yamaha Parts Distributors, Inc. v. Ehrman,* 316 So.2d 557 (Fla. 1975).

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And yet, the Association now contends (brief at 15) that the district court "may have misapprehended Maison Grande's argument" (brief at 15; *see id.* at 16, 18-19). The Association's "real" argument, it now says, is that the three-prong balancing test existed well before *Fleeman*, but that *Fleeman* failed to apply it. That was not the Association's argument in the trial court, and it was not the Association's argument in the district court, and it is not properly before this Court. This Court has stated repeatedly that it will not consider arguments raised for the first time in this Court.[15/] This observation should end the inquiry.

Moreover, the Association is wrong on the merits in contending that the *Fleeman* decision is not faithful to the traditional criteria for evaluating a contract-clause challenge--that is, that *Fleeman* was wrongly decided.

a. The Criteria for Contract-Clause Analysis. At the outset, we should note our general agreement, with only a few exceptions, with the Association's extensive discussion (brief at 6-21), premised on the Florida and analogous federal decisions, of the three-part test for evaluating contract-clause cases. The Association's general point, with which we take no issue, is that the criteria for contract-clause analysis are not absolute, but are applied on a case-by-case basis, and essentially focus on the governmental objectives of the legislation in question; on the extent to which it impinges upon pre-existing contract rights; and on the extent to which it is necessary to achieve the governmental objective, in the light of possible less-restrictive alternatives. At bottom, as the Association has pointed out (brief at 12-13), this breaks down to a three-part test, asking 1) whether the law in question represents a substantial impairment of the plaintiff's contract rights; 2) whether the law reflects a sufficiently significant governmental purpose to warrant such an impairment; and 3) whether the impairment

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[15/] *See Dober v. Worrell,* 401 So.2d 1322, 1323-24 (Fla. 1981); *In Re Beverly,* 342 So.2d 481, 489 (Fla. 1977); *Northeast Polk County Hospital District v. Snively,* 162 So.2d 657, 660 (Fla. 1964); *Carillon Hotel v. Rodriguez,* 124 So.2d 3, 5 (Fla. 1960); *Stein v. Brown Properties, Inc.,* 104 So.2d 495, 500 (Fla. 1958); *Condery v. Condery,* 92 So.2d 423, 425 (Fla. 1957).

is necessary to achieve that purpose--that is, whether there are less-restrictive alternatives (*see* authorities cited *infra* p. 36). *See generally United States Fidelity and Guaranty Co. v. Department of Insurance,* 453 So.2d 1355, 1360-61 (Fla. 1984), *quoting Energy Reserves Group, Inc. v. Kansas Power and Light Co.,* 459 U.S. 400, 411-413, 103 S. Ct. 697, 74 L. Ed. 2d 569, 580-81 (1983). We agree with the Association's description of the general criteria, and we will ventilate our differences in the course of applying those criteria.

b. The Fleeman *Decision is Solidly Located Within the Tradition of the Balancing Test.* The Association's position is that although "the criteria for contract clause analysis have not changed since Fleeman" (brief at 16), "no balancing test was conducted" in *Fleeman* (brief at 17). To the contrary, the Association contends, *Fleeman* merely declares that the retroactive application of the statute would be unconstitutional, citing *Yamaha Parts Distributors, Inc. v. Ehrman,* 316 So.2d 552 (Fla. 1975), without itself engaging in an extensive three-part analysis. Thus, the Association complains (brief at 18), "if the balancing test is to have any meaning at all, it must be applied to the facts of this and all other impairment of contract cases, and proper consideration must be given to the unique circumstances surrounding each one." In contrast, the Association argues, *Fleeman* merely announced its decision, and "[i]t is hard to fathom how a balancing test may be 'implicit'" (brief at 20).

All of this reduces to the contention that the Association is unhappy with the manner in which Justice Boyd wrote the opinion for the Court in *Fleeman,* and would have preferred it if the Court had explained its underlying reasoning in a longer opinion. Of course, there is no rule requiring the Court to write any opinion at all, *see School Board of Pinellas County v. District Court of Appeal, Second District,* 467 So.2d 985 (Fla. 1985); *Whipple v. State,* 431 So.2d 1011, 1015-16 (Fla. 2d DCA 1983), and in that context the Association's criticism is simply inappropriate. There is certainly nothing in the *Fleeman* opinion which suggests that the Court was unaware of the proper criteria to apply, or failed to apply them, and the Association's objection must therefore fail at the threshold.

Moreover, notwithstanding the Association's belated concession that the three-part balancing test existed both before and after *Fleeman*, it has failed to appreciate the significance of that concession. Indeed, the *Fleeman* holding, no matter how conclusory, can only be explained in the context of the history of contract-clause analysis in which it was made. As early as 1954, this Court had emphasized that the "right to contract . . . is only a part of the Constitution and it must be construed in connection with other provisions of the Constitution. . . . [Constitutional] freedoms and rights are not absolute--each of them is subject to lawful restraints and limitations. . . . There is no such thing under our constitutional system of government as absolute liberty or freedom, without limitation and restraint." *Shavers v. Duval County*, 73 So.2d 684, 689-90 (Fla. 1954). In 1958, the Court said that "there is no such thing as an absolute freedom of contract." *Larson v. Lesser*, 106 So.2d 188, 191 (Fla. 1958). And in *Springer v. Colburn*, 162 So.2d 513, 516 (Fla. 1964), the Court again applied the balancing test, in holding that the retroactive application of an insurance statute would be impermissible not because the pre-existing contract rights were sacrosanct, but only because the statute had provided "inadequate substitutes for those available to petitioner at the time of the contract."

Thus, the balancing test was well established by the time of the Court's decision in *Yamaha Parts Distributors Inc. v. Ehrman*, 316 So.2d 557 (Fla. 1975), upon which the Court later relied in *Fleeman*, 342 So.2d at 818. And in forbidding the retroactive application of a statute which would have modified pre-existing franchise-termination provisions of a contract, *Yamaha* clearly acknowledged the balancing test. After pointing out that a statute which survives minimal due-process scrutiny will not necessarily survive the contract clause,[16/] *Yamaha* forbid retroactive application only because the state's

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[16/] "To justify retroactive application it is not enough to show that this legislation is a valid exercise of the state's police power because that power, however broad in other contexts, here collides with the constitutional ban on laws impairing contracts." 316 So.2d at 559.

proffered justification was "not so great as to override the sanctity of contracts." *Id.* at 559. Thus, in relying upon *Yamaha*, the *Fleeman* court could only have intended to strike a similar balance--that is, to hold that the governmental objectives proffered for retroactive application of the statute forbidding rent-escalation clauses were insufficient to overcome pre-existing contract rights.

From *Fleeman* until this date, the Court has consistently recognized this balancing approach. In *Department of Business Regulation v. National Manufactured Housing Federation, Inc.*, 370 So.2d 1132, 1136 (Fla. 1979), the Court stated explicitly that although the legislation in question "put in jeopardy" a number of constitutional rights, including the "right to contract," "[t]hese are not, of course, absolute rights." And in *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So.2d 774 (Fla. 1979), after tracing the evolution of the federal decisions on the issue, *id.* at 776-79, the Court attributed to *Yamaha* the holding that "some impairment is tolerable, although perhaps not so much as would be acceptable under traditional federal contract clause analysis." *Id.* at 780. It then applied a balancing test, as it had before in *Yamaha* and *Fleeman*, in forbidding the retroactive application of a statute requiring the deposit of rent into the registry of the court during the pendency of litigation involving a condominium lease, *id.* at 780-82:

> To determine how much impairment is tolerable, we must weigh the degree to which a party's contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy. Obviously, this becomes a balancing process to determine whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the state's objective, or whether it unreasonably intrudes into the parties' bargain to a degree greater than is necessary to achieve that objective.
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> We believe that the balance between the state's probable objectives and its method of implementation, on the one hand, and the degree of contract impairment inflicted in furtherance of its policy, on the other, favors preservation of

> the contract over this exercise of the police power. Bearing on our view is the fact that the manner in which the police power has been wielded is not the least restrictive means possible.
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> Therefore, in the face of an express constitutional prohibition against any law "impairing the obligation of contracts," the state's justification for an exercise of the police power to impair the lessor's contractual bargain does not, in our opinion, provide sufficient countervailing considerations. As applied retroactively, absent a lessor's express consent to its incorporation into the terms of the contract, the statute is invalid.

A year after *Pomponio*, the Court again relied upon *Yamaha* in upholding a contract-clause challenge, *State Dept. of Transportation v. Chadbourne*, 382 So.2d 293, 297 & n. 6 (Fla. 1980); and the same year, in *Park Benziger & Co. v. Southern Wine & Spirits, Inc.*, 391 So.2d 681, 683 (Fla. 1980), the Court cited both *Yamaha* and *Pomponio* in holding that "[e]xceptions have been made to the strict application of [the state and federal contract-clause] provisions when there was an overriding necessity for the state to exercise its police powers, but virtually no degree of contract impairment has been tolerated in this state." And in 1981, the Court cited both *Fleeman* and *Yamaha* in forbidding the retroactive application of a statute regulating management and maintenance contracts for condominiums. *Rebholz v. Metro Care, Inc.*, 397 So.2d 677, 679 (Fla. 1981).

It is only in the context of the pre-*Fleeman* and post-*Fleeman* contract-clause decisions that *Fleeman* itself can be appreciated. Although the opinion is conclusory, there is no evidence to support the Association's contention (brief at 17) that "[i]n Fleeman . . . no balancing test was conducted." All of the evidence points the other way.

4. Even if This Court Were to Consider De Novo *the Permissibility of a*

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Retroactive Application of § 718.4015, it Would Ratify the Fleeman *Holding.*[17] Although *Fleeman* has already considered all of the substantive points raised by the Association, there is always the possibility that the Court will decide to revisit the question. Therefore, in an abundance of caution, we will revisit the substantive question decided in *Fleeman*. We will do so through the three-part test which the Association has articulated.

a. The Retroactive Application of the Statute Would Deprive the Respondents of Significant Contracted-For Benefits. As we have noted, the Association has demonstrated for us the substantial economic benefits which the rent-escalation clause provides under the contract, and the retroactive application of the statute would assure the plaintiffs' loss of those benefits for the remaining 82 years of the lease. Although the Association is correct (brief at 27) that retroactive application of the statute would not leave the plaintiffs "totally deprived of [their] contractual rights," there can be no question (the Association has provided the numbers) that the deprivation would be substantial. It would freeze a 99-year lease at year 17, forcing the plaintiffs to receive the same rent every year for 82 years, while everything else continues to go up. Even the Association has admitted (brief at 6) that the contract clause preserves "a certain reliance that an individual's affairs will not be disturbed by future changes . . . ." The plaintiffs made this contract in reliance upon its validity, and they priced the units which they sold accordingly. The Association's position is that the rent-escalation provision should be stricken, but the remainder of the contract enforced, so that the Association will receive the benefit of its bargain for the remaining 82 years of the lease, while the plaintiffs are deprived of their side of the deal. *See Beeman v. Island Breakers, A Condominium, Inc.*, 577 So.2d 1341 (Fla. 3d DCA 1990).

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[17] As we have noted, *Fleeman* forbade retroactivity under "both the United States and Florida Constitutions." 342 So.2d at 818. In the following discussion, we will focus primarily upon the Florida decisions, and we will cite the relevant federal cases primarily in footnotes, with an occasional discussion in text.

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At best for the plaintiffs (and the more equitable outcome, because the rent-escalation clause represents a substantial and material portion of the consideration to the plaintiffs), the "courts will invalidate the entire contract rather than reform any particular contract term." *United Gas Pipe Line Co. v. Bevis*, 336 So.2d 560, 564 n. 18 (Fla. 1976).[18] That was the outcome of *Wilderness Country Club Partnership, Ltd. v. Groves*, 458 So.2d 769, 772 (Fla. 2d DCA 1984), which retroactively applied a predecessor of the statute invalidating rent-escalation clauses (because the parties had agreed to be bound by future changes in the Condominium Act), and voided the entire contract as a result:

> Where one contractual provision is void, the balance of the contract is also void unless the balance fairly reflects the original intent of the parties to the contract. *Brooks v. Palm Bay Towers Condominium Ass'n, Inc.*, 375 So.2d 348 (Fla. 3d DCA 1979).
>
> Judged by this standard, we think the sublease was nondivisible and therefore appellants were entitled to rescission of the entire recreational facility sublease. Without rescission, appellants would receive only the base rent, a portion of the rent originally contemplated in the sublease. The benefits granted to appellees under the sublease are nondivisible--the sublease does not assign monetary values to separate rights and privileges enjoyed by appellees under the sublease. Hence, the base rent and the periodic increases pursuant to the escalation clause relate to one object or purpose, the use and enjoyment of all recreational facilities. . . . Generally, the price term in a contract is vital; severing the price term eliminates the essence of the contracting parties' agreement.

Even if the recreational lease should be voided, however, the plaintiffs will be left without the benefit of their bargain. They will be left in possession of common areas which are marketable only to the condominium owners, with no assurance that a new agreement will be struck. As the Court put it in *Trustees of Tufts College v. Triple*

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[18] *Accord*, *High Ridge Management Corp. v. State*, 354 So.2d 377 (Fla. 1977); *Local No. 234 v. Henley & Beckwith*, 66 So.2d 818 (Fla. 1953); *In re Guardianship of Gamble*, 436 So.2d 173, 181 (Fla. 2d DCA 1983), *rev'd on other grounds*, 450 So.2d 850 (Fla. 1984). *See generally Patrizi v. McAninch*, 153 Tex. 389, 269 S.W.2d 343, 348 (1954).

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R. Ranch, Inc., 275 So.2d 521, 526 (Fla. 1973): "If [the statute] should be applied retroactively, it would give the affected persons no opportunity to avoid the consequences thereof by rearranging their affairs." There can be no question that the retroactive application of this statute would constitute a substantial impairment of the plaintiffs' pre-existing contract rights.[19/]

Nor is there any question, as *Fleeman* recognized, that the application of the statute even to future rent increases would constitute a retroactive impairment of pre-existing contract rights, because the right to those increases derives from a contract which was made before the statute was in effect. As the court noted in *Commodore Plaza at Century 21 Condominium Ass'n, Inc. v. Cohen*, 378 So.2d 307, 309 (Fla. 3d DCA 1980): "The obligation of contract is impaired in the constitutional sense when the substantive rights of the parties thereunder are changed . . . or where new and different liabilities are imposed," *citing Hardware Mut. Cas. Co. v. Carlton*, 151 Fla. 238, 9 So.2d 359 (1942), *and Manning v. Travelers Ins. Co.*, 250 So.2d 872, 874 (Fla. 1971) (any legislation "changing the substantive rights of the parties to existing contracts"). As this Court put it in *Dewberry v. Auto-Owners Ins. Co.*, 363 So.2d 1077, 1080 (Fla. 1978), the contract clause implicates any legislation "which diminishes the value of a contract . . . .[20/] Thus, in *Point East One Condominium Corp. v. Point East Developers, Inc.*, 348 So.2d

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[19/] *Compare Yellow Cab Co. of Dade County v. Dade County*, 412 So.2d 395, 396-97 (Fla. 3d DCA 1982), *review denied*, 424 So.2d 764 (Fla. 1983) (retroactive abolition of contracts granting exclusive service rights to taxi companies did not deprive them of the substantial benefits of their livelihood). On the federal question, see *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 19, 97 S.Ct. 1505, 52 L.Ed. 92 (1977) (elimination of important contract provision is substantial impairment); *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 431, 54 S.Ct. 231, 78 L.Ed. 413 (1934); *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 55 S.Ct. 555, 79 L.Ed. 1298 (1935); *Coombes v. Getz*, 285 U.S. 434, 441-42, 52 S.Ct. 435, 76 L.Ed. 866, 871-72 (1932); *Superior Motors, Inc. v. Winnebago Industries, Inc.*, 359 F.Supp. 773, 777 (D.S.C. 1973).

[20/] *Accord, Manning v. Travelers Ins. Co.*, 250 So.2d 872, 874 (Fla. 1971) ("In order for a statute to offend the constitutional prohibition against enactment of laws impairing the obligation of contracts, the statute must have the effect of rewriting antecedent contracts, that is, of changing the substantive rights of the parties to existing contracts"); *State ex. rel. Stringer v. Lee*, 2 So.2d 127, 132-33 (Fla. 1941) (statutory compensation and retirement

32, 34 (Fla. 3d DCA 1977), the court quoted with approval the trial court's declaration that enforcement of a predecessor of the statute at issue "'would result in the destruction of the pre-existing vested rights of the defendants . . . .'" And in *Condominium Ass'n of Plaza Towers North, Inc. v. Plaza Recreation Development Corp.*, 514 So.2d 381, 382 n. 1 (Fla. 3d DCA 1987), *aff'd*, 557 So.2d 1356 (Fla. 1990), the district court held that application of the rent-escalation statute to a pre-existing contract "constitutes a retroactive application of the statute because it completely abrogates a previously entered-into lease provision authorizing the rent escalations in question--a result which the *Fleeman* case specifically precludes."

We are not speaking here about inchoate potential common-law principles, or about potential statutory privileges.[21] We are speaking about bargained-for rights under a pre-existing contract, which unquestionably constitute vested constitutional rights. The

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system for judges constitutes a contractual relationship with the state, and is a vested right); *City of Sanford v. McClelland*, 12 Fla. 253, 163 So. 513, 514-15 (Fla. 1935) ("A vested right has been defined as 'an immediate, fixed right of present or future enjoyment' and also as 'an immediate right of present enjoyment, or a present, fixed right of future enjoyment'"), *quoting Pearsall v. Great Northern R. Co.*, 161 U.S. 646, 16 S.Ct. 705, 40 L.Ed. 838 (1896); *Div. of Workers' Compensation v. Brevda*, 420 So.2d 887, 891 (Fla. 1st DCA 1982); *Heberle v. P.R.O. Liquidating Co.*, 186 So.2d 280 (Fla. 1st DCA 1966). *See generally Nat'l Wildlife Federation v. Interstate Commerce Commission*, 271 U.S.App.D.C. 1, 850 F.2d 694, 704 (1988) (contingent future reversionary interest is a vested right); *Lawson v. State of Washington*, 107 Wash.2d 444, 730 P.2d 1308, 1315-16 (1986) (same).

[21] *Compare Clausell v. Hobart Corp.*, 515 So.2d 1275, 1275-76 (Fla. 1987) (expectation that the present status of the common law will continue), *appeal dismissed, cert. denied,* 485 U.S. 1000, 108 S. Ct. 1459, 99 L. Ed. 2d 690 (Fla. 1988); *Village of El Portal v. City of Miami Shores*, 362 So.2d 275, 278 (Fla. 1978) (same); *Ryan v. Ryan*, 277 So.2d 266, 269-70 (Fla. 1973) (statutory dower, courtesy and alimony rights are not created by contract, and constitute a mere inchoate expectancy subject to modification); *Coast Cities Coaches, Inc. v. Dade County*, 178 So.2d 703, 709 (Fla. 1965) (potential future business lost as a result of new legislation a mere expectancy); *McCord v. Smith*, 43 So.2d 704, 708-09 (Fla. 1950) (no vested rights in procedures for submitting estate claims); *Neal v. McMullian*, 98 Fla. 549, 124 So. 29, 30 (1929) (dower rights); *In re Will of Martell*, 457 So.2d 1064, 1066-67 (Fla. 2d DCA 1984) (no vested right in statute governing inheritance); *Florida Power & Light Co. v. First Nat'l Bank*, 448 So.2d 1141 (Fla. 4th DCA 1984) (payment for taking of property does not include prospective lost profits and other business damages); *Div. of Worker's Compensation v. Brevda*, 420 So.2d 887, 891 (Fla. 1st DCA 1982) (no vested right in statute authorizing attorney's fees).

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U.S. Supreme Court made the point eloquently in *Coombes v. Getz*, 285 U.S. 434, 441-42, 52 S.Ct. 435, 76 L.Ed. 866, 871-72 (1932), forbidding retroactive application of a state constitutional amendment relieving corporate directors of pre-existing contractual liability to creditors:

> The authority of a state under the so-called reserved power is wide; but it is not unlimited. The corporate charter may be repealed or amended, and, within limits not now necessary to define, the interrelations of state, corporation and stockholders may be changed; but neither vested property rights nor the obligation of contracts of third persons may be destroyed or impaired. . . . The right of this petitioner to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provision. His cause of action was not purely statutory. It did not arise upon the constitutional rule of law, but upon the contractual liability created in pursuance of the rule. Although the latter derived its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth. The repeal put an end to the rule for the future, but it did not and could not destroy or impair the previously vested right of the creditor (which in every sense was a property right . . .) to enforce his cause of action upon the contract.

Notwithstanding these authorities (which all were cited below), the Association has argued (brief at 21-23; *see* the State's brief at 7) that the rights in question are essentially inchoate, because they are dependent upon future increases in the Consumer Price Index, whose amounts cannot be anticipated, and thus are merely "windfalls."[22] As a general proposition, of course, that suggestion is a non-sequitur. Even if the parties' rights under a contract are not fixed, but rather are adjusted according to certain criteria, which depend upon future events, that hardly means that the payments are "windfalls." This case is a perfect illustration, because the payments are pegged to inflation, as measured by the Consumer Price Index. How can it possibly be a "windfall"

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[22] We remind the Court that after a 5-day trial, a jury found that the contract at issuse here was not unconscionable (*see supra* p. 1). We think that finding, which of course is res judicata, goes a long way toward rebutting the Association's argument at the threshold.

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to a landlord to adjust his tenant's rental payments to the Consumer Price Index, over a 99-year lease?

By definition, the payments received by the landlord at any given time, when adjusted for inflation, are identical to the payments which the landlord received on the first day of the lease. If the cost of living goes up 10% in the first year, then the landlord is losing money if the rent does not increase by 10% in the first year--and he is only even if it does. And if the cost of living goes up another 5% in the second year, then the landlord's initial 10% increase will not be sufficient to keep him even; only an additional 5% increase will produce rents which are equal in value, when adjusted for inflation, to the original rent. By definition, the landlord can never be ahead. The most he can do is stay even--and if he does not receive a cost-of-living increase, then he is losing money, because the value of the rental payments is less to him than it was on the first day of the lease. From this perspective, it is inconceivable to us that the contract in question here could be said to produce a "windfall" to the landlord. And there is certainly no support for the Association's contention that a contracted-for payment whose amount is dependent upon future events is by definition a "windfall."

The Association has cited three cases which assertedly stand for the proposition that there is no constitutional barrier to the retroactive divestment of pre-existing contract rights to "windfall profits." The first case cited, however--*United States Fidelity & Guaranty Co. v. Department of Ins.*, 453 So.2d 1355, 1361 (Fla. 1984)--did not deal with retroactive legislation at all. To the contrary, this Court concluded that because of legislative provisions in effect *at the time of the contract* in question, the application of an amended statute was *not* retroactive:

> Moreover, when chapter 77-468, Laws of Florida, was enacted, the insurers were put on notice that any funds received exceeding five percent out of their anticipated profit under the statute might be subject to refund orders and therefore they did not obtain a vested right to those funds. . . . Since section 627.066(13) allows insurers to keep their anticipated profits plus five percent and since the insurers knew when they entered into these contracts that excess profits might

> have to be refunded, the [amended] statute does not operate as a substantial impairment of a contractual relationship."

The central holding of *Fidelity* is that the insurers were on notice "when they entered into these contracts" of the restriction, as subsequently amended, to which they were subject.

Likewise, in *Department of Ins., State of Fla. v. Teachers Ins. Co.,* 404 So.2d 735, 741 (Fla. 1981), the Court upheld the application of an insurance-reform and tort-reform statute to all pre-existing contracts made after 1977, because the law in effect in September of 1977 had put all contracting parties on notice of potential future statutory changes, which thus could not be considered retroactive. At the same time, however, this Court held that the reform legislation could *not* apply to contracts made before September of 1977, because contracting parties before that date had no such notice. Like the *Fidelity* case, *Teachers* perfectly supports the argument which we are making.

The same is true of the third case cited by the Association on this point--a federal decision which the Association concedes (brief at 14) is not controlling on the state-law question[23/]--*City of El Paso v. Simmons,* 379 U.S. 497, 85 S. Ct. 577, 13 L. Ed. 2d 446 (1965). *Simmons* dealt with a state statute regarding the foreclosure and forfeiture of land purchased from the state, but giving the purchaser a right of redemption upon payment of the full amount of interest due, with no time limitations on that right of redemption. In 1941, however, the statute was amended to require redemption within five years of the date of forfeiture; and six years *after* the amendment, when the amended law had been on the books for six years, the plaintiff suffered forfeiture of his property, but then waited more than five years to redeem it. The key to the decision,

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[23/] *See Geary Distributing Co. v. All Brand Importers, Inc.,* 931 F.2d 1431, 1434 (11th Cir. 1991) ("Although the wording of both [the Florida and federal] contract clauses is almost identical, the interpretation of the clauses has not been identical"), *quoting Pomponio v. Claridge of Pompano Condominium, Inc.,* 378 So.2d 774, 779-80 (Fla. 1979) ("[T]his Court, when construing a provision of the Florida Constitution, is not bound to accept as controlling the United States Supreme Court's interpretation of a parallel provision of the federal Constitution"; federal contract clause only "similar").

of course, is that the new statute created no significant impairment of the plaintiff's original contract rights, because it put him on notice of the new five-year redemption period well before he forfeited: "The measure taken to induce defaulting purchasers to comply with their contracts, requiring payment of interest in arrears within five years, was a mild one indeed, hardly burdensome to the petitioner who wanted to adhere to his contract of purchase, but nonetheless an important one to the State's interest. The Contract Clause does not forbid such a measure." 379 U.S. at 516-17, 85 S. Ct. 577, 13 L. Ed. 2d at 459.

In addition, the Court in *Simmons* noted that the regulatory system in effect at the time of the original contract "clearly indicates that the right of reinstatement was not conceived to be an endless privilege conferred on a defaulting buyer. A contrary construction would render the buyer's obligations under the contract quite illusory while obliging the State to transfer the land whenever the purchaser decided to comply with the contract, all this for a nominal down payment." *Id.* at 514-15, 85 S. Ct. 577, 13 L. Ed. 2d at 458.[24] It was only in this context that the court noted that its "decisions have never given a law which imposes unforeseen advantages or burdens on a contracting party constitutional immunity against change." *Id.* at 515, 85 S. Ct. 577, 13 L. Ed. 2d at 458. And on top of all of that, the court also held that the original right of redemption "was not the central undertaking of the seller nor the primary consideration for the buyer's undertaking," but only a tangential element of the contract. *Id.* at 514, 85 S. Ct. 577, 13 L. Ed. 2d at 457-58.

None of these cases remotely holds that, unless a contractual entitlement to future

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[24] *See also Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 415, 103 S. Ct. 697, 74 L. Ed. 2d 569, 583 (1983) ("Price regulation existed and was foreseeable as the type of law that would alter contractual regulation"; because of that regulatory background, the plaintiff had no reasonable expectation of the contract benefit which he claimed); *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357, 28 S. Ct. 529, 531, 52 L. Ed. 828 (1908) (the parties to a contract cannot immunize themselves from governmental regulation, but only to the extent of laws in effect at the time of the contract; thus, "the contract, the execution of which is sought to be prevented here, was illegal when it was made").

payments can be quantified with specificity, such payments represent mere "windfalls," in which a contracting party can claim no vested rights. As the Association itself acknowledges elsewhere (brief at 8-9), quoting *City of El Paso v. Simmons,* 379 U.S. 497, 515, 85 S. Ct. 577, 587, 13 L. Ed. 2d 446, 458 (1965), the question is whether the governmental action has deprived a party of "the gains reasonably to be expected from the contract . . . ." In sharp contrast to the cases discussed above, the bargained-for cost-of-living increases in the instant contract were certainly "reasonably to be expected." Indeed, as we have demonstrated, those increases were absolutely necessary if the plaintiffs were merely to stay even--that is, to avoid a diminution in the value of the rental payments, and thus in the value of the lease, as a result of inflation.

It is one thing to say, as the above-discussed cases suggest, that in light of regulations existing at the time of the contract in question, and in light of economic factors which are totally unrelated to the original purpose of the contract clause in question, the conclusion is permissible in proper cases that the retroactive application of a statute will not significantly impair the contract in question--that is, will not significantly affect its central purpose. But that conclusion can hardly be reached in the instant case. The contract in this case specifically called for cost-of-living adjustments, pegged to the Consumer Price Index. The rent escalation is called for in the contract, and is an integral element of that contract--not some kind of unforeseen windfall. And although the precise amount of such increases varies from year to year, the formula does nothing more than to maintain the value of the contract--not to enhance it. Thus, regardless of the amount of each year's increase, that increase represents the precise amount necessary--no more and no less--to adjust the value of the lease for inflation--that is, to make sure that the payments to the landlord are worth exactly the same at the time of the increase as they were on the first day of the lease.

Moreover, any uncertainty in the prospective amount of increases necessarily figured into the original contract price. It is an economic fact that the original prices of the condominium units reflected in part the uncertainties in future amounts of

recreational payments. In a classic sense, those payments were bargained for, and they were reflected in the price of the units. They were not unforeseen or collateral windfalls, in the sense envisioned in the cases discussed above.

For similar reasons, and on the basis of the same cases, there is no merit to the Association's contention (brief at 11; *see* the State's brief at 6-7) that the value of the rights taken away from the respondents must be reduced to some extent in the recognition that condominium leases were "already subject to state regulation when the contractual obligations were originally undertaken . . . ." *See generally Century Village, Inc. v. Wellington, etc. Condominium Ass'n*, 361 So.2d 128, 133 (Fla. 1978). The short answer is that condominiums were no less heavily regulated at the time of this Court's decision in *Fleeman*; thus the legislative environment in which this Court addresses the issue is no different. Moreover, if the Association's contention were correct, then why was it necessary for the Court to decide the series of cases, *see supra* note 10, asking whether the parties had agreed in their contract to be bound by future changes in the Condominium Act? If those parties should have known that condominiums are heavily regulated, and thus were on notice that their contracts could be changed at will, why did this Court, and all of the district courts, spend so much time deciding whether they had agreed to be bound by such changes?

The answer, as the Court's decisions make clear, is that the presence of governmental regulation can work both ways. In a heavily regulated industry, in which the parties' economic fortunes may be significantly constricted by economic regulations, their contracts are crafted with special attention to the effects of existing regulations, and the benefits of those contracts are prescribed in the light of those regulations. In a classic sense, therefore, the parties in heavily-regulated industries make their contracts in reliance upon both the limits and the opportunities which are created by the specific regulations in effect. Those contracts would be virtually meaningless if the areas which are left for private negotiation by the parties could be subject to divestment at any future time.

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Thus, although we acknowledge that every contract necessarily incorporates (and is subject to) all existing laws, *see Dept. of Ins., State of Fla. v. Teachers Ins. Co.*, 404 So.2d 735, 741 (Fla. 1981), it is equally settled, as the cases discussed above make clear, that unless the parties explicitly agree to be bound by future changes in the law, "[t]he citizens of this state cannot be charged reasonably with notice of the consequences of impending legislation before the effective date of that legislation, for it is generally accepted that a statute speaks from the time it goes into effect."[25] There can simply be no contention that the plaintiffs lost their contractual rights to future rent increases, because they should have known that 17 years later, the legislature might retroactively abolish rent-escalation clauses. The entire history of this Court's decisions on this question is to the contrary.

b. The Governmental Interest in Question is Not Sufficient to Override the Respondents' Vested Contract Rights. As the Association has acknowledged (brief at 12-13), the three-part balancing test requires the Court to weigh the governmental interest in question against the contractual rights taken away. Inherent in such a balancing approach is the recognition that a statute will not withstand contract-clause analysis merely because it represents a valid exercise of the state's police power. As this Court declared in *Yamaha Parts Distributors Inc. v. Ehrman,* 316 So.2d 557, 559 (Fla. 1975), "[t]o justify retroactive application, it is not enough to show that this legislation is a valid exercise of the state's police power because that power, however broad in other contexts, here collides with the constitutional ban on contracts."[26] As the Court noted

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[25] *Dewberry v. Auto-Owners Ins. Co.*, 363 So.2d 1077, 1080 (Fla. 1978) (and cases cited). *Accord*, *Franz Tractor Co. v. J.I. Case Co.*, 566 So.2d 524 (Fla. 2d DCA 1990). *See Aerojet-General Corp. v. Askew*, 366 F.Supp. 901, 906 (N.D. Fla. 1973), *aff'd*, 511 F.2d 710 (5th Cir.), *cert. denied*, 423 U.S. 908, 96 S.Ct. 210, 46 L.Ed.2d 137 (1975).

[26] *Accord*, *United Gas Pipe Line Co. v. Bevis*, 336 So.2d 560, 564 (Fla. 1976) (even if a valid exercise of the police power, a statute regulating utility rates wrongfully impaired existing contracts); *Springer v. Colburn*, 162 So.2d 513, 514-15 (Fla. 1964) (notwithstanding valid exercise of police power in regulating insurance, retroactive statute can alter only existing contract remedies, but cannot impair existing substantive contract rights or

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in *United States Fidelity and Guaranty Co. v. Dept. of Ins.*, 453 So.2d 1355, 1360 (Fla. 1984), a contract-clause challenge "requires a balancing of a person's interest not to have his contracts impaired with the state's interest in exercising its legitimate police power."[27] The same is true under the federal decisions.[28]

The question, therefore, is whether the substantial impairment is warranted by overriding governmental interests. As the Association has described it (brief at 26; *see* the State's brief at 8), the statute in question reflects the object of protecting "a large segment of Florida's elderly population" against rental increases which will "quite possibly depriv[e] them of the acquisition of essential needs such as food, clothing and health services." Of course we acknowledge that condominium owners will be better off financially if they are not required to pay cost-of-living increases (or no rent at all, for

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obligations), *citing State ex. rel. Payson v. Chillingsworth*, 122 Fla. 339, 345, 165 So. 264, 267 (1936); *Commodore Plaza at Century 21 Condominium Ass'n, Inc. v. Cohen*, 378 So.2d 307, 309 (Fla. 3d DCA 1979) (quoting *Yamaha*).

[27] *Accord*, *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So.2d 774, 781, 780 (Fla. 1980) (while the statute's justification "rests on the state's exercise of its police power," "we must weigh the degree to which a party's contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy"). *See Geary Distributing Co. v. All Brand Importers, Inc.*, 931 F.2d 1431, 1436 (11th Cir. 1991) (Florida law) (Florida contract clause requires "balancing the impairment of the contract against the authority for the statute and the evil it seeks to eradicate").

[28] "[T]he contract clause limits otherwise legitimate exercises of state legislative authority, and the existence of an important public interest is not always sufficient to overcome that limitation." *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 21, 97 S.Ct. 1505, 52 L.Ed. 92 (1977). *See id.* at 22 ("[P]rivate contracts are not subject to unlimited modification under the police power"). *Accord*, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 1252, 94 L.Ed.2d 472 (1987) ("Of course, the finding of a significant and legitimate public purpose is not, by itself, enough to justify the impairment of contractual obligations"); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242, 98 S.Ct. 2716, 57 L.Ed.2d 727, 734 (1978); *Coombes v. Getz*, 285 U.S. 434, 441, 52 S.Ct. 435, 76 L.Ed.2d 866, 871 (1932); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S.Ct. 158, 67 L.Ed. 322 (1922) ("[S]ome values . . . must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone"); *Hudson Water Co. v. McCarter*, 209 U.S. 349, 355, 28 S.Ct. 529, 52 L.Ed. 828 (1908); *Aerojet-General Corp. v. Askew*, 366 F.Supp. 901, 907-08 (N.D. Fla. 1973), *aff'd*, 511 F.2d 710 (5th Cir.), *cert. denied*, 423 U.S. 908, 96 S.Ct. 210, 46 L.Ed.2d 137 (1975).

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that matter). And perhaps the statute is permissible in its *prospective* application, because the landlords have other means of valuing the total package which they convey to the unit owners.

But in its retroactive application, this legislation must be balanced not only against the landlords' pre-existing contract rights, but also against the recognition that the condominium owners made a bargain, and they knew what they were bargaining for, and they necessarily paid less for their units than they would have paid in the absence of the total package originally negotiated. When these matters are factored into the calculus, it is clear that the retroactive application of the statute would not serve a compelling governmental purpose. To the contrary, it would do nothing more than to give the condominium owners an enormous windfall. After paying rents over 17 years which do nothing more than track the Consumer Price Index--that is, which simply insure that the value of the rental payments in every year is identical, in real terms, to the value of those rental payments on year one--it would give the owners a fixed-rate lease over a period of 82 years! While the cost of living continues to go up, the owners will pay the same rent every year for 82 years. What better example of a windfall than an 88-year lease at a fixed rate?

We recognize that because of the balancing test, every case depends upon its unique facts. Even putting aside *Fleeman*, and the numerous cases which rely upon *Fleeman*, we offer the following additional decisions by analogy. In *Yaffee v. Int'l Co.*, 80 So.2d 910, 912 (Fla. 1955), the usury statute, which reflects a legislative judgment that the interest rates in question are unfair, was insufficiently important to overcome pre-existing contract rights. In *Springer v. Colburn*, 162 So.2d 513, 514-16 (Fla. 1964), the legislative objectives warranting the regulation of insurance were insufficient to overcome pre-existing contract rights. In *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So.2d 801, 804 (Fla. 1972), the governmental objective of protecting renters, including the elderly residents of Miami Beach, from cost-of-living rent increases, was insufficient to sustain retroactive application of a rent-control ordinance. In *Trustees of*

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Tufts College v. Triple R. Ranch, Inc., 275 So.2d 521, 526 (Fla. 1973), the important governmental interest of securing rights of entry over the property in question were insufficient to overcome pre-existing contract rights on that property. In *Dewberry v. Auto-Owners Ins. Co.*, 363 So.2d 1077, 1080 (Fla. 1978), the governmental objectives reflected in a new statute prohibiting the stacking of insurance policies were insufficient to supplant the pre-existing value of insurance policies which could be stacked. In the *Pomponio* case, 378 So.2d 774, the governmental interest in requiring rent deposits during the pendency of litigation was insufficient to overcome pre-existing contract rights. In *Park Benziger & Co., Inc. v. Southern Wine & Spirits, Inc.*, 391 So.2d 681, 683-84 (Fla. 1980), the importance of governmental regulations governing the labeling and distribution of liquor were insufficient to overcome pre-existing contract rights. And in *Rebholz v. Metro Care, Inc.*, 397 So.2d 677, 679 (Fla. 1981), the important objectives reflected in a new statute governing condominium management contracts were insufficient to overcome pre-existing contract rights.[29] In light of these decisions, putting aside the asserted governmental objectives served by the *prospective* application of this statute, it is clear that if this Court should strike the same balance as it did in *Fleeman*.

The same conclusions follow under the federal decisions. We have quoted already (*supra* p. 26) from the Supreme Court's decision in *Coombes v. Getz*, 285 U.S. 434, 441-42, 52 S.Ct. 435, 76 L.Ed. 866, 871-72 (1932), forbidding the retroactive application of

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[29] *Accord*, *Geary Distributing Co. v. All Brand Importers, Inc.*, 931 F.2d 1431 (11th Cir. 1990) (Florida law) (retroactive application of beer distribution statute); *City of Miami Beach v. Forte Towers, Inc.*, 305 So.2d 764, 771-72 (Fla. 1974) (rent control); *Keystone Water Co., Inc. v. Bevis*, 278 So.2d 606 (Fla. 1973) (new methodology for valuing utility company holdings for purposes of computing rates); *Phillips v. City of West Palm Beach*, 70 So.2d 345 (Fla. 1953) (amendments to the workers'-compensation statute); *Mahood v. Bessemer Properties*, 154 Fla. 710, 18 So.2d 775 (1944) (regulation of realty purchases); *State ex rel. Warren v. City of Miami*, 153 Fla. 644, 15 So.2d 449 (1943) (regulation of pensions); *Hamilton v. Williams*, 145 Fla. 697, 200 So. 80 (1941) (retroactive amendment of hunting licenses); *Beddell v. Lassiter*, 143 Fla. 43, 196 So. 699 (1940); *Myrick v. Battle*, 5 Fla. 345 (1853) (regulation of interest rates); *Gans v. Miller Brewing Co.*, 560 So.2d 281 (Fla. 4th DCA) (retroactive application of beer distribution statute), *review denied*, 574 So.2d 140 (Fla. 1990); *In re Jeffcott's Estate*, 186 So.2d 80 (Fla. 2d DCA 1966) (amendment of probate code).

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a state constitutional amendment immunizing corporate directors from pre-existing liabilities. Similarly, in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), notwithstanding a severe housing shortage which induced legislation prohibiting coal mining on properties containing houses, the Supreme Court forbid its retroactive application to a property in which the seller had by contract reserved rights to remove coal. And in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978), notwithstanding the important governmental interest of assuring accountability in the administration of pension plans, the Supreme Court forbid the retroactive application of a state statute imposing penalties upon plan administrators which either terminated pension plans or closed offices in the state.[30/]

c. *The Retroactive Application of the Statute is Unwarranted in Light of Less-Restrictive Alternatives.* The final question is whether, even assuming *arguendo* that the governmental objectives of the statute were sufficiently important to overcome pre-existing contract rights, the legislature could have achieved those objectives through less-restrictive means. *See Pomponio v. Claridge of Pompano, Inc.*, 378 So.2d 774, 782 (Fla. 1980); *Yellow Cab Co. of Dade County v. Dade County*, 412 So.2d 395, 397 (Fla. 3d DCA 1982), *review denied*, 424 So.2d 764 (Fla. 1983); *State of Florida, Dept. of Transportation v. Cone Brothers Contracting Co.*, 364 So.2d 482, 487 (Fla. 2d DCA 1978).[31/] A corollary of the same principle is that the statute will survive constitutional

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[30/] *See also Treigle v. Acme Homestead Ass'n*, 297 U.S. 189, 56 S.Ct. 408, 80 L.Ed. 575 (1936) (state law modifying existing withdrawal rights from building & loan association); *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 55 S.Ct. 555, 79 L.Ed. 1298 (1935) (statute diluting rights and remedies of existing mortgage bond holders); *W.B. Worthen Co. v. Thomas*, 292 U.S. 426, 54 S.Ct. 816, 78 L.Ed. 1344 (1934) (statute protecting life-insurance proceeds from the beneficiary's judgment creditors); *Northshore Cycles, Inc. v. Yamaha Motor Corp.*, 919 F.2d 1041 (9th Cir. 1990) (forbidding retroactive application of statute requiring repurchase of inventory after dealer terminations).

[31/] *Accord, Geary Distributing Co. v. All Brand Importers, Inc.*, 931 F.2d 1431, 1436 (11th Cir. 1991) (Florida law) (under Florida Constitution, "the impairment is significantly greater than necessary"). The federal rule is the same: "[A] state is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1,

scrutiny if it provides some new remedy, or some compensation, as a quid-pro-quo for the remedy which it takes away. As the Court put it in *Shavers v. Duval County*, 73 So.2d 684, 689 (Fla. 1954): "Every person must recognize that . . . the obligation of the contract may be impaired with the limitation that when so impaired by taking private property for public use, the sovereign shall pay '*just* compensation.'"[32] At the least, therefore, the statute is defective because it abolishes pre-existing contract rights without providing any compensation.

And beyond that, it is clear that the statute is overbroad in its retroactive application, because the legislature could have achieved its objectives by less restrictive means. For one thing, the purely-prospective application of this statute would largely serve its objectives; as we have noted, the retroactive application of this statute would do nothing more than provide a huge windfall. And beyond that, there are certainly alternatives less restrictive than the total abolition of pre-existing rent-escalation clauses, which would leave the landlords without any recourse at all, requiring them at best to renegotiate from a position of total weakness. For example, the legislature could have adopted alternative formulae for such increases, at least with respect to pre-existing contracts, adjusting them to more tolerable limits without abolishing them altogether. As the Association describes it, the problem is that unexpected increases in the Consumer Price Index "loaded" unfair increases into each year's formula. As we have

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31, 97 S.Ct. 1505, 52 L.Ed. 92 (1977). *See id.* at 29 (statute must be "reasonable and necessary").

[32] *See Palm Beach Mobile Homes, Inc. v. Strong*, 300 So.2d 881 (Fla. 1974) (A "sufficient remedy [must] be left or another sufficient remedy be provided"); *Springer v. Colburn*, 162 So.2d 513, 516 (Fla. 1964) (retroactive application of insurance statute impermissible because it provided "inadequate substitutes for those available to petitioner at the time of the contract"). *Accord*, *State of Nevada Employees Ass'n, Inc. v. Keating*, 903 F.2d 1223, 1227-28 (9th Cir.) (overturning retroactive application of statute governing pension plans, absent compensating advantages or reasonable alternatives), *cert. denied*, _____ U.S. _____, 111 S. Ct. 558, 112 L. Ed. 2d 565 (1990); *Public Employees' Retirement Board v. Washoe County*, 96 Nev. 718, 615 P.2d 972, 974-75 (1980) (necessity of benefits offsetting those taken away). *Compare Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934) (alternatives provided).

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noted, that contention is non-sensical; by definition, the most that each year's increase can do is to keep the landlord even--that is, to achieve a level of rent which is equivalent, in real terms, to the amount of rent paid at the beginning--and under that system the landlord can never get ahead. But even accepting *arguendo* the Association's definition of the problem, then one possible alternative is somehow to adjust or defer such "unexpected" increases, by limiting the increase which is permissible in any given year. Although we are not certain that such a statute would survive the other constitutional challenges raised here, such an alternative at least would provide the owners with a part of the benefit of their bargain, without abolishing rent escalations entirely, and thus would clearly be a less-restrictive alternative. For this reason alone, it is clear that the retroactive application of the statute cannot survive constitutional scrutiny, and that the Court should re-affirm the *Fleeman* holding.[33]

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

The plaintiffs repeatedly argued below, at both the trial and district-court levels, that the retroactive application of the statute would violate not only the contract clauses of the Florida and federal Constitutions, but also the takings clauses of both constitutions, because it would constitute the taking of property without just compensation. Although the district court's holding on the contract-clause issue made

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[33] In addition to the cases cited *supra* pp. 36-37, see *Pomponio v. Claridge of Pompano, Inc.*, 378 So.2d at 782 ("[T]he manner in which the police power has been wielded here is not the least restrictive alternative"). On the federal question, see *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 247, 98 S.Ct. 2716, 57 L.Ed.2d 727, 738 (1978) ("[T]here is no showing in the record before us that this severe disruption of contractual expectations was necessary to meet an important general social problem"); *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 29-30, 97 S.Ct. 1505, 52 L.Ed. 92 (1977) ("[I]t cannot be said that total repeal of the covenant was essential; a less drastic modification would have [sufficed] . . . . [T]he states could have adopted alternative means"). *Compare Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 412, 418-19, 103 S.Ct. 697, 74 L.Ed.2d 569, 581, 585 (1983) (no less-restrictive alternative available); *Yellow Cab Co. of Dade County v. Dade County*, 412 So.2d 395, 397 (Fla. 3d DCA 1982), *review denied*, 424 So.2d 764 (Fla. 1983) (same).

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it unnecessary to reach this question, it is available as a basis for affirmance under a right-for-the-wrong-reason theory.[34] As we noted in discussing the contract-clause challenge, the issue is not the black-or-white question of whether a governmental action is forbidden or not, but rather whether the government has complied with all constitutionally-required conditions for such an action. Thus, for example, as we noted, in proper cases "the obligation of the contract may be impaired with the limitation that when so impaired by taking private property for public use, the sovereign shall pay '*just* compensation.'" *Shavers v. Duval County*, 73 So.2d 684, 689 (Fla. 1954) (emphasis in original).

The same is true of the "takings" clauses of the U.S. and Florida Constitutions.[35] Even if the governmental action is rationally related to a legitimate governmental purpose, and thus constitutes a valid exercise of the police power, the "takings" clauses may require compensation as a condition of the exercise of such power. As this Court put it in the *Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc.*, 521 So.2d 101, 103 (Fla.), *cert. denied*, 488 U.S. 870, 109 S.Ct. 180, 102 L.Ed.2d 149 (1988), "it is a settled proposition that a regulation or statute may meet the standards necessary for exercise of police power but still result in a taking." Thus, a governmental action may be "both proper and confiscatory." *Key Haven Associated Enterprises, Inc. v. Board of Trustees of Internal Improvement Fund*, 427 So.2d 153, 159 (Fla. 1982).[36] Or

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[34] *See In Re Estate of Yohn,* 238 So.2d 290 (Fla. 1970); *Cohen v. Mohawk, Inc.,* 137 So.2d 222 (Fla. 1962); *Escarra v. Winn-Dixie Stores, Inc.,* 131 So.2d 483 (Fla. 1961).

[35] The due process clause of the 14th Amendment of the U.S. Constitution prohibits uncompensated takings by the states. *Chicago B & Q. R. v. City of Chicago,* 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897), *cited in Joint Ventures v. Dept. of Transportation*, 563 So.2d 622, 624 n. 8 (Fla. 1990)

[36] *Accord, Dept. of Agriculture and Consumer Services v. Polk*, 568 So.2d 35, 39 (Fla. 1990) (quoting *Mid-Florida*); *id.* at 48 (Barkett, J., concurring); *Joint Ventures, Inc. v. Dept. of Transportation*, 563 So.2d 622, 624, 626, 627 (Fla. 1990) ("[T]he state must pay when it regulates private property under its police power in such a manner that the regulation effectively deprives the owner of the economically viable use of that property"; "We do not question the reasonableness of the state's goal to facilitate the general

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as Justice Holmes put it in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416, 43 S.Ct. 158, 67 L.Ed. 322, 326 (1922): "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Accord*, *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601, 55 S.Ct. 854, 79 L.Ed. 1593 (1935); *Fornaris v. Ridge Tool Co.*, 423 F.2d 563, 567 (1st Cir.) ("'Police power' is not a magic word that permits the legislature to adjust any and every found economic ill without payment"), *rev'd on other grounds*, 400 U.S. 41, 91 S.Ct. 156, 27 L.Ed.2d 174 (1970).

From this perspective, the "takings" clauses do not simply proscribe governmental conduct, but rather are "designed to bar Government from forcing some people to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960), *quoted in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318-19, 107 S.Ct. 2378, 96 L.Ed.2d 250, 266 (1987).[37/] Therefore, when the court declares a statute invalid under the "takings" clauses because it fails to provide for compensation, the government has the option either to withdraw the legislation in question, or to pay such compensation. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. at 321, 107 S.Ct. 2378, 96 L.Ed.2d at 268 (1987). The question, then, is whether the retroactive application of this statute sufficiently deprived the plaintiffs of a property right as to condition the constitutional

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welfare. Rather we are concerned here with the means by which the legislature attempts to achieve that goal"; "A reasonable regulation [under the police power] may . . . amount to a 'taking'"); *Dade County v. National Bulk Carriers, Inc.*, 450 So.2d 213, 215 (Fla. 1984); *Albrecht v. State*, 444 So.2d 8, 12 (Fla. 1984); *Graham v. Estuary Properties, Inc.*, 399 So.2d 1374, 1381 (Fla.), *cert. denied*, 454 U.S. 1083, 102 S.Ct. 640, 70 L.Ed.2d 618 (1981); *Glisson v. Alachua County*, 558 So.2d 1030, 1035 (Fla. 1st DCA), *review denied,* 570 So.2d 1304 (Fla. 1990).

[37/] *Accord*, *Joint Venturers, Inc. v. Dept. of Transportation*, 563 So.2d 622, 624 n. 7 (Fla. 1990), *quoting Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 3147 n. 4, 97 S.ct. 677 (1987); *Glisson v. Alachua County*, 558 So.2d 1030, 1036 (Fla. 1st DCA), *review denied,* 570 So.2d 1304 (Fla. 1990).

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exercise of such a power upon the payment of just compensation.[38]

Although it is axiomatic that every "takings" challenge depends upon its unique facts,[39] there can be little question that the retroactive divestment of the plaintiffs' pre-existing contractual entitlement to cost-of-living increases, over the remaining 82 years of the lease, would represent a taking of their property. As we have demonstrated in discussing the contract clauses, *supra* pp. 24-26, there is no question that the plaintiffs' contractual entitlement to cost-of-living increases is a property right of constitutional dimension. As the U.S. Supreme Court put it in *Lynch v. United States*, 292 U.S. 571, 579, 54 S.Ct. 840, 78 L.Ed. 1434 (1934): "Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States." *Accord*, *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 19 n. 16, 97 S.Ct. 1505, 52 L.Ed.92 (1977) ("Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid.") And in this case we need not debate the question of when a partial or temporary deprivation of property may constitute a taking,[40] because the statute here does not simply modify or reduce the

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[38] From this perspective, we can ignore entirely the Association's argument (brief at 28-31) that the statute in question survives minimal due-process and equal-protection scrutiny, because it is rationally related to a legitimate governmental purpose. The plaintiffs have never contended otherwise. Our position is that even if the retroactive application of the statute constitutes a valid exercise of the police power, it violated the "takings" clauses because the government failed to provide compensation.

[39] *See Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc.*, 521 So.2d 101, 104 (Fla.), *cert. denied*, 488 U.S. 870, 109 S.Ct. 180, 102 L.Ed.2d 149 (1988); *Glisson v. Alachua County*, 558 So.2d 1030, 1034 (Fla. 1st DCA), *review denied*, 570 So.2d 1304 (Fla. 1990). *Accord*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979); *Andrus v. Allard*, 444 U.S. 51, 65, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979); *Nat'l Wildlife Federation v. Interstate Commerce Commission*, 271 U.S.App.D.C. 1, 850 F.2d 694, 705 (1988).

[40] *See generally First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318-20, 107 S.Ct. 2378, 96 L.Ed.2d 250, 266-67 (1987) (temporary taking is compensable); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 1242-48, 94 L.Ed.2d 472 (1987) (statute must deprive plaintiff of the use of the property in question); *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138,

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property right in question--that is, the contractual right to cost-of-living increases--but abolishes that right entirely. *See Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 411, 103 S.Ct. 697, 74 L.Ed.2d 569, 580 (1983) ("The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected").

Notwithstanding these authorities, which all were cited below, the Association argues (brief at 31-33) that the takings clauses are not implicated in this case, because the respondents have been deprived only of a part of their "bundle" of contractual rights--not the entire contract. Thus, the Association argues (brief at 33), "the statute would still leave the lessor with a proprietary interest in the leased property and would not deprive it of the rental payments altogether. . . . Dorten's 'bundle' may thus not remain perfectly intact, but if one 'strand' be destroyed, such is not a taking."

None of the authorities cited by the Association remotely supports its sweeping allegation that a governmental action can constitute a taking only if it deprives a plaintiff of all possible uses of his property, or all possible aspects of his contract. The authorities cited at pages 31-32 of the Association's brief support precisely the opposite conclusion--that a partial taking, if significant, must indeed be compensated. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304,

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2141, 65 L.Ed.2d 106 (1980); *Andrus v. Allard*, 444 U.S. 51, 65-66, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979) (no taking if significant alternative uses of property remain); *Penn. Central Transp. Co. v. City of New York*, 438 U.S. 104, 138 n. 36, 98 S.Ct. 2646, 2666 n. 36, 57 L.Ed.2d 61 (1978); *Estate of Himelstein v. City of Ft. Wayne, Indiana*, 898 F.2d 573, 577 n. 4 (7th Cir. 1990) (governmental action must substantially usurp viable uses of the property in question); *Joint Ventures, Inc. v. Dept. of Transportation*, 563 So.2d 622, 625 (Fla. 1990) (compensation required when the "interference deprives the owner of substantial economic use of his or her property"); *Albrecht v. State*, 444 So.2d 8 (Fla. 1984) (diminution in value or lack of alternative use); *Key Haven v. Board of Trustees of Internal Improvement Fund*, 427 So.2d 153, 160 (Fla. 1982) (reasonable economic uses). *See generally* 2 *Nichols' The Law of Eminent Domain* § 6.09, at 6-55 (rev. 3d ed. 1983) ("The modern, prevailing view is that any substantial interference with private property which destroys or lessens its value (or by which the owner's right to its use or enjoyment is in any substantial degree abridged or destroyed) is, in fact and in law, a 'taking' in the constitutional sense, to the extent of the damages suffered, even though the title and possession of the owner remains undisturbed").

318-20, 107 S. Ct. 2378, 96 L. Ed. 2d 250, 266-67 (1987), the Supreme Court held that even a temporary taking may be compensable, if it constitutes a significant deprivation. In *Keystone Bituminous Coal Ass'n v. DiBenedictis,* 480 U.S. 470, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987), contrary to the Association's representation, the question was not whether the alleged taking had totally deprived the landowner of all uses of his property, but rather whether he had shown a "deprivation significant enough" to demonstrate that the statute in question "makes it commercially impracticable for [petitioners] to continue mining," or whether "their mining operations, or even any specific mines, have been unprofitable since the [statute] was passed." *Id.* at 493, 496, 107 S. Ct. 1232, 94 L. Ed. 2d at 493, 495. The case supports precisely the opposite proposition for which it was cited.

And similarly, in *Andrus v. Allard,* 444 U.S. 51, 100 S. Ct. 318, 62 L. Ed. 2d 210 (1979), the court held only that the "strand" taken by the government from the appellees' "bundle" of property rights was not significant enough to constitute a taking--not that a single strand could never suffice. To the contrary, the *Andrus* court affirmed that "[t]here is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate. Formulas and factors have been developed in a variety of settings. . . . Resolution of each case . . . ultimately calls as much for the exercise of judgment as for the application of logic." 444 U.S. at 65, 100 S. Ct. 318, 62 L. Ed. 2d at 222. As the authorities cited in footnote 40, *supra*, make clear, the question in every case is whether the deprivation is substantial; if it is, the government may be permitted to proceed, but it must pay just compensation.

In the instant case, there can be no question, and the Association has demonstrated for us, that the "strand" which would be taken by this statute from the plaintiffs' "bundle" of contract rights--that is, the loss of contracted-for rent increases over 82 of the 99 years of the lease--is a substantial, fundamental and material aspect of this contract. Indeed, as we have noted in a different context, *supra* p. 23, at least one Florida court has held that the loss of that "strand" is so material to such contracts that

it voids the contract entirely. *Wilderness Country Club Partnership, Ltd. v. Groves,* 458 So.2d 769, 772 (Fla. 2d DCA 1984).

Under the Florida and federal decisions, there can be no question that the retroactive application of the statute in question, without compensation, would be violative of the "takings" clauses of the United States and Florida Constitutions.[41] In light of these authorities, if the State of Florida does wish to serve a public purpose by abolishing pre-existing contractual rights to cost-of-living increases, it must pay just compensation to the plaintiffs.

C. THE COURT OF APPEAL PROPERLY AFFIRMED DORTEN'S AWARD OF TRIAL-LEVEL ATTORNEY'S FEES, AND PROPERLY AWARDED APPELLATE ATTORNEY'S FEES.

At the outset, we should note that the issue of attorneys' fees was not a question certified to this Court. Moreover, because it depends upon the particular language of the contract in question, it is not an issue which implicates any conceivable inter-district conflict, or any question of public importance. Therefore, we would urge the Court, in the exercise of its discretion, to decline to address this issue.

As the Association acknowledges, ¶ 24 of the lease agreement (copy attached to complaint, R. 1) provides in relevant part:

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[41] *See Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc.*, 570 So.2d 892 (Fla. 1990); *Joint Ventures, Inc. v. Dept. of Transportation*, 563 So.2d 622 (Fla. 1990); *Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc.*, 521 So.2d 101, 103 (Fla.), *cert. denied*, 488 U.S. 870, 109 S.Ct. 180, 102 L.Ed.2d 149 (1988); *State Plant Bd. v. Smith*, 110 So.2d 401 (Fla. 1959); *Thompson v. Nassau County*, 343 So.2d 965, 966 (Fla. 1st DCA 1977); *Kirkpatrick v. City of Jacksonville*, 312 So.2d 487, 489 (Fla. 1st DCA 1975) (per curium); *Elliott v. Hernando County*, 281 So.2d 395, 396 (Fla. 2d DCA 1973); *Kendry v. State Road Dept.*, 213 So.2d 23, 26 (Fla. 4th DCA 1968), *cert. denied*, 222 So.2d 752 (Fla. 1969) (per curium). *See also Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677, 685-86 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979); *Allgeyer v. State of Louisiana*, 165 U.S. 578, 589-91, 17 S.Ct. 427, 41 L.Ed. 832 (1897); *Pinewood Estates of Michigan v. Barnegat Township Leveling Bd.*, 898 F.2d 347, 352-53 (3d Cir. 1990) (rent control ordinance); *Nat'l Wildlife Federation v. Interstate Commerce Commission*, 271 U.S.App.D.C. 1, 850 F.2d 694, 706 (1988).

> XXIV. <u>Costs and Attorney's Fees</u>. In any proceeding arising by reason of an alleged failure of the Lessee to perform any of its duties and obligations pursuant to the provisions hereof, or by reason of an alleged breach of any of the terms and/or conditions or covenants of this Lease, or by reason of any default in the payment of any monies, rentals or sums due or becoming due under the terms and provisions hereof, or by reason of any action by the Lessor to require the Lessee to comply with its duties and obligations hereunder, the Lessor shall, in the event it shall prevail in such action, be entitled to recover its reasonable attorney's fees incurred, together with all costs, including those not normally allowable in actions at law, such as but not limited to [depositions, travel expenses, expert-witness fees, and subpoenas].

Without question, the instant "proceeding"--which sought a declaratory judgment that the rent-escalation clause was valid because the retroactive application of § 718.4015 would be unconstitutional, and which also claimed breach of contract in the Association's refusal to pay the cost-of-living increases (*see* R. 1)--arose "by reason of an alleged failure of the Lessee to require the Lessee to comply with its duties and obligations hereunder." Even apart from the claim for money damages for breach of contract, in seeking a judicial declaration that retroactive application of the statute would be unconstitutional, and thus that the rent-escalation provision is valid and enforceable, the action unquestionably constituted a "proceeding arising by reason of an alleged failure of the Lessee to perform," "by reason of an alleged breach" of the contract, "by reason of [a] default in the payment of any monies," and "by reason of [an] action . . . to require the Lessee to comply . . . ." Thus, the plaintiffs sought attorneys' fees in their complaint (R. 4), and the trial court awarded fees and costs in its Final Judgment (R. 161-62).

1. The Contractual Right to Fees. The Association's argues first (brief at 37-41) that it is not liable for fees because it is not liable for breach of contract under Count II of the complaint, because it withheld the escalated rental payments in a good-faith reliance upon the retroactive application of § 718.4015. Thus, the Association's entire argument consists of an extended discussion of the concept of breach of contract, and of the extent to which its reliance upon the statute constituted a legal excuse for

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its non-performance.

We acknowledge that a *valid* statute may constitute a dispositive defense to an action for breach of contract. As the Court said in *Local No. 234 of United Ass'n of Journeymen v. Henley & Beckwith, Inc.*, 66 So.2d 818, 821 (Fla. 1953) (our emphasis), "an agreement that is violative of a provision of a constitution or a *valid* statute, or an agreement which cannot be performed without violating such a constitutional or statutory provision, is illegal and void." But if the retroactive application of the statute in question here would be unconstitutional, and thus the statute is not valid in its proposed application, the Association obviously has no defense to the action for breach of contract. Whether or not it acted in good-faith reliance upon the statute, the Association violated the contract. Is the Association really contending that a good-faith reliance upon an unconstitutional statute constitutes a valid defense in a contract action? Does the Association contend that it does not owe the plaintiffs the cost-of-living increases even if the statute in question is unconstitutional as applied? Any such contention would be absurd. If the trial court was correct that the statute would be unconstitutional as applied, then the Association unquestionably was in breach of the contract.

Moreover, the Association's entire argument depends upon the assumption that the lease agreement called for attorneys' fees only in an action for breach of contract, and only if the lessor establishes a breach of contract. As we have noted, however, the lease agreement does not merely award fees to the prevailing party in an action for breach of contract. It awards fees if the lessor prevails "[i]n *any* proceeding arising *by reason of*" the lessee's non-performance of the contract (our emphasis), and this action clearly arose "by reason of" the Association's non-performance, *whether or not* the Association was in breach of contract. It awards fees in an "action by the Lessor to require the Lessee to comply with its duties" under the contract, and this is unquestionably such an action, *whether or not* the Association was in breach.

Contrary to the Association's assertion (brief at 39-40), the plaintiffs' complaint (R. 1) did not only allege breach of contract; it also sought a declaratory judgment that

the Association was obligated to make future payments, which implicated the Association's future obligations, independent of whether or not it had earlier committed a breach of contract (in light of its asserted good-faith reliance on the statute). And contrary to the Association's assertion (brief at 40), the entirety of the plaintiffs' time and effort below was devoted to establishing the Association's obligation of performance under the contract (the declaratory-judgment count), because precisely the same arguments applied to that count as applied to the contract count. Because the plaintiffs were the prevailing parties in this action, they were entitled to their fees and costs.

As the Association has pointed out (brief at 41), that was the holding of *Brickell Bay Club Condominium Ass'n, Inc. v. Forte*, 397 So.2d 959, 960 (Fla. 3d DCA 1981), *review denied*, 408 So.2d 1092 (Fla. 1981), in which the contract likewise provided that "'[i]n connection with any litigation arising out of this Contract, the prevailing party shall be entitled to recover all costs incurred, including reasonable attorney's fees.'" In reversing the trial court's order disallowing fees, the court rejected precisely the argument which the Association makes here:

> The trial court apparently made its determination because the action had been brought in good faith and on fairly debatable grounds. This ruling was erroneous. The agreement which has been quoted gave those of the appellees who were parties to it, since they prevailed in the litigation below, a clear and unequivocal right to the recovery of both attorney's fees and costs. The courts have no discretion to decline to enforce such an undertaking, any more than any other contractual provision. *Ritter's Hotel, Inc. v. Sidebothom*, 142 Fla. 171, 194 So. 322 (1940); *Kendall East Estates, Inc. v. Banks*, 386 So.2d 1245, 1247 (Fla. 3d DCA 1980); *Silver Blue Lake Apts. No. 3, Inc. v. Manson*, 334 So.2d 48 (Fla. 3d DCA 1976).

The Association argues (brief at 41) that *Brickell Bay* is distinguishable, because the appellant's good-faith position in *Brickell Bay* was not based upon a statute presumed to be valid until declared otherwise, and because the *Brickell Bay* decision presumes the existence of a valid and enforceable contract. The first argument is a distinction without a difference. Regardless for the reason for the defendant's good faith, such good faith

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is no defense to a contractual provision which allows fees to the prevailing party. Notwithstanding its good faith, for whatever reason, in both *Brickell Bay* and the instant case, the losing party lost the lawsuit, and thus the winning party was entitled to fees. And the Association's second argument is a concession of the point. It concedes that the plaintiffs' entitlement to fees depends upon the validity of the trial court's ruling on the constitutional question. If that ruling is upheld, then the cost-of-living provision remains a valid and enforceable contract, as the trial court held, and the plaintiffs are entitled to fees.

The bottom line is that the lease agreement must be enforced according to its plain meaning, and it allows attorney's fees and costs to the prevailing party. That is the sole criterion in any action brought "by reason of" a breach, default or failure of performance, and this was unquestionably such an action.

2. The Appellate Fees. The Association argues (brief at 41-46) that the plaintiffs were not entitled to appellate-level fees, because the contract in question does not specifically call for such fees. The short answer is that the Association did not raise this argument in its initial brief in the district court, in its reply brief in the district court, or in any response to the plaintiffs' motion for appellate attorneys fees in the district court. To the contrary, the Association filed no response to that motion, and its briefs merely argued the substantive question which we have discussed above. It was only after the district court's decision, and only after the district court had entered an order awarding appellate fees, that the Association filed a motion for rehearing, in which it contended for the first time that appellate-level fees were not authorized by the contract. In response to that motion, the plaintiffs reminded the district court that "[i]t has been repeatedly held that a party cannot present arguments in a motion for rehearing that have not been presented to the court in the appellate briefs or oral

argument."[42] Although the district court denied the motion for rehearing without explanation, its order may be affirmed for this reason alone.

On the merits, we acknowledge the authorities cited by the Association for the proposition that, concerning notes and mortgages entered into before October 1, 1977--which was the effective date of § 59.46(1), Fla. Stat. (1977) (the instant lease was made in 1971)--contractual provisions prescribing an award of attorneys' fees should not be construed to apply to appellate-level fees unless they unambiguously cover such fees. All of these cases, however, established that principle only in the context of claims for enforcement of mortgages and promissory notes--and not in any other context. In any event, those cases would not apply to the lease agreement in the instant case, because the lease agreement is unambiguous. Paragraph 24 of the lease (*supra* p. 45) prescribes an award of fees "[i]n any proceeding arising by reason of an alleged failure of the Lessee to perform any of its duties . . . ." That language is not at all ambiguous; it says "any proceeding," and that means exactly what it says. Therefore, consistent with the line of authorities relied upon by the Association, the contractual language at issue here is clear and unambiguous. And in any event, the Association raised this point only in a motion for rehearing, which was too late. The award of fees, trial and appellate-level, should be affirmed.

V
CONCLUSION

It is respectfully submitted that the decision of the district court should be approved.

VI
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was

[42] *Sag Harbour Marine, Inc. v. Fickett,* 484 So.2d 1250, 1256 (Fla. 1st DCA), *review denied,* 494 So.2d 1150 (Fla. 1986), *citing Price Wise Buying Group v. Nuzum,* 343 So.2d 115 (Fla. 3d DCA 1977), *and Sarmiento v. State,* 371 So.2d 1047 (Fla. 3d DCA 1979), *aff'd,* 397 So.2d 643 (Fla. 1981).

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mailed this 24th day of September, 1991, to: MICHAEL HYMAN, ESQ. and EDOARDO MELONI, ESQ., Hyman & Kaplan, P.A., 14th Floor Courthouse Tower, 44 West Flagler Street, Miami, Florida 33130; KARL M. SCHEUERMAN, ESQ., Department of Business Regulation, 725 South Bronough Street, Tallahassee, Florida 32399; ROBERT J. BORRELLO, ESQ., Floyd, Pearson, Richman, Greer, Weil, Zack & Brumbaugh, P.A., Courthouse Center, 26th Floor, 175 N.W. First Avenue, Miami, Florida 33128-1817, Counsel for Amici Schreiber, Pearl, Gordon, and Gesundheit; and to CHARLES A. FINKEL, ESQ., Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, Florida 32399-1050.

Respectfully submitted,

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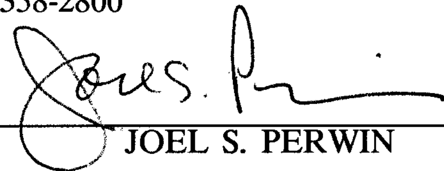

By: ______________________
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