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IN THE SUPREME COURT OF FLORIDA

CASE NO: 78,197

3d DCA Case No. 90-529

FLA. BAR NO. MLH - 111830
EM - 836842

MAISON GRANDE CONDOMINIUM ASSOCIATION, INC.,

Petitioner,

vs.

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

Respondents.
_____/

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

INITIAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Petitioner, MAISON GRANDE CONDOMINIUM ASSOCIATION, INC., will be referred to as "Maison Grande". Respondents, DORTEN, INC. and ROBERT SIEGEL as Successor Trustee under the Siegel Family Trust, will be referred to, collectively, as "Dorten".

All references to the record will be preceded by (R.____).

STATEMENT OF THE CASE

On May 3, 1989, Dorten filed a two-count Complaint against Maison Grande in Dade County Circuit Court. Count I sought a Declaratory Judgment declaring Section 718.4015, Florida Statutes, unconstitutional as violative of Article I, Section 10 of the Florida and United States Constitutions, and the Fourteenth Amendment of the United States Constitution. Count II alleged breach of contract for failure to pay the cost of living adjustments due after January 1, 1989, and sought recovery of costs and attorneys' fees pursuant to the terms of the lease agreement. (R. 61-88)

By Final Judgment dated February 7, 1990, (R. 161-162) the trial court granted Summary Judgment as to Count I of the Complaint and declared Section 718.4015, Florida Statutes (1988) unconstitutional as violative of the Contract Clauses of the United States and Florida Constitutions, Article I, Section 10, in both documents. The lower court based its decision on

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Fleeman v. Case, 342 So.2d 815 (Fla. 1976), finding its language to be "strong and definitive". The trial court recognized, however, that Maison Grande had presented persuasive arguments tending to show that **Fleeman** had been modified by more recent Florida precedent which seemed to restrict the **Fleeman** analysis of impairment of contract cases. The final judgment also awarded Dorten interest in the amount of $2,708.47, costs in the amount of $1,087.47 and attorneys' fees in the amount of $27,718.75, following the trial court's determination that Maison Grande was in breach of contract. On March 5, 1990 Maison Grande filed a Notice of Appeal. (R. 156)

The Third District Court of Appeal affirmed. (R.163-170) In its decision, **Maison Grande Condominium Association, Inc. v. Dorten, Inc.**, 580 So.2d 859 (Fla. 3d DCA 1991), the Appellate Court specifically found that the recreation lease provided Dorten with "extraordinary windfall profits" and that the Florida Legislature had declared escalation clauses void as against public policy. Nevertheless, the Court of Appeal found itself constrained to affirm the decision below, holding that **Fleeman**, **Cove Club Investors, Ltd. v. Sandalfoot South One, Inc.**, 438 So.2d 354 (Fla. 1983) and **Association of Golden Glades Condominium Club, Inc. v. Security Management Corp.**, 557 So.2d 1350 (Fla. 1990) rendered section 718.4015, Florida Statutes, unconstitutional and held that this Court's decisions, **Pomponio v. Claridge of Pompano Condominium, Inc.**, 378 So.2d 774 (Fla. 1979) and **United States Fidelity and Guaranty Company v. Dept. of Insurance**, 453 So.2d 1355 (Fla.

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1984) were not applicable to the instant controversy. The Third District, however, certified the following question to this Court, as one of great public importance:

> Is an escalation clause in a condominium recreation lease that was entered into before 1975 enforceable after October 1, 1988, for the entire term of the ninety-nine-year lease, where the lessor has not agreed to be bound by future changes in the condominium act?

On June 27, 1991, Maison Grande filed a Notice of Appeal with this honorable Court.

STATEMENT OF THE FACTS

On November 24, 1971, Dorten and Maison Grande entered into a ninety-nine-year, net-net-net recreational lease for a parcel of land adjacent to the Maison Grande Condominium, together with improvements thereon. (R. 61-88) The improvements consisted, essentially, of a pool deck.

The initial monthly rental payments for the pool deck were in the amount of $20,160.00, or $241,920.00 annually. The lease provided that the base rent would be pegged to a nationally recognized Consumer Price Index ("CPI"), and that it would be adjusted annually by a percentage equal to the previous year's rate of inflation. For the year in which the lease was signed the CPI was 4.34%. In 1973 and 1974 the CPI rose to 20.08% and 12.16%, respectively. Similarly abnormal increases in the CPI took place during the years 1977 through 1980. By 1988 Maison Grande was paying for the pool deck a monthly rent

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of $58,871.00, or $706,452.00 annually.

By a 1975 enactment, the Florida Legislature declared escalation clauses in recreational leases prospectively illegal as against public policy. Subsequent legislative actions culminated, in 1988, in the enactment of Section 718.4015, Florida Statutes, prohibiting the enforcement of escalation clauses in agreements for recreational facilities serving residential condominiums, entered into before 1975, and declaring them void as against public policy. Pursuant to the statutory prohibition, on January 1, 1989, the first escalation date after the effective date of the statute, Maison Grande paid the full amount of the previously escalated rental and did not include the cost of living adjustment for the year 1989.

SUMMARY OF THE ARGUMENT

This Court has adopted a precise method of analysis to determine whether legislation which may have retroactive application violates the contract clause of the Florida Constitution. While the Third District Court of Appeal recognized the existence of a balancing test in impairment of contract cases, it nevertheless interpreted **Fleeman v. Case**, 342 So.2d 815 (Fla. 1976), 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. **Pomponio v. Claridge of Pompano Condominium,**

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Inc., 378 So.2d 774 (Fla. 1979); **United States Fidelity & Guaranty Company, Inc. v. Department of Insurance**, 453 So.2d 1355 (Fla. 1984). While the District Court specifically found that in the instant case the escalation clause provides the lessor with "extraordinary windfall profits", **Maison Grande Condominium Association, Inc. v. Dorten, Inc.**, 580 So.2d 859, 861 (Fla. 3d DCA 1991), it failed to heed this Court's emphatic rejection of the notion that windfall profits are constitutionally protected. **Dept. of Insurance, State of Florida v. Teachers' Insurance Company**, 404 So.2d 735 (Fla. 1981).

Moreover, acts of the legislature are presumed constitutional and any reasonable doubt as to the validity of a legislative enactment must be resolved in favor of its constitutionality. Any attack brought against this statute under the Fourteenth Amendment of the United States Constitution must be evaluated under the "rational basis" level of scrutiny.

The courts below awarded Dorten trial and appellate attorneys' fees pursuant to the "breach of contract" count of the complaint, despite the fact that only a small percentage of the attorneys' fees were attributable to the issue of default in the payment of the escalated rent and none of the fees in the handling of the Appeal were incurred due to a default by Maison Grande. However, an agreement that cannot be performed without violating a statutory provision is illegal and void. **Local No. 234 v. Henley & Beckwith, Inc.**, 66 So.2d 818 (Fla. 1953). In addition, the award of appellate fees is not proper

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unless specifically provided for by contract or by statute and absent the express contractual language necessary for the recovery of such fee. **Ohio Realty Investment Corp. v. Southern Bank of West Palm Beach**, 300 So.2d 679 (Fla. 1974).

ARGUMENT

I. WHETHER THE THREE-PRONG BALANCING TEST SHOULD BE APPLIED TO THE CIRCUMSTANCES OF THIS CASE.

It has been said that the Constitution of the United States "was principally, indeed [...] overwhelmingly, dedicated to concerns of process and structure and not to the identification and preservation of specific substantive values". 1/ The prohibition against impairment of contract, then, is not so much aimed at protecting the value of the instrument itself, but rather, at preserving a certain reliance that an individual's affairs will not be disturbed by future changes in the political thought of the legislative body. 2/

When social or economic legislation is enacted that might impair existing contractual obligations, potential conflicts arise between the inherent power of the state to safeguard and promote the public welfare, and private contractual rights. Courts are consequently asked to weigh the

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1/ **J.H. Ely**, **Democracy and Distrust**, at 92 (1980)

2/ **Id.**

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police power of the state against the restriction to enact legislation that would impair contractual obligations in light of the unique circumstances of each case, so as to construe the two constitutional doctrines in harmony with each other. 3/

A. This Court and the Supreme Court of the United States have adopted a precise methodology for the analysis of impairment of contract cases.

Modern-day contract clause analysis has its genesis in the landmark decision of the United States Supreme Court, **Home Building & Loan Association v. Blaisdell**, 290 U.S. 398, 54 S. Ct. 231, 78 L.Ed. 413(1934), a case which this Court has defined as "the most important case in the history of contract clause analysis". **Pomponio v. Claridge of Pompano Condominium, Inc.**, 378 So.2d 774, 776 (Fla. 1979). Maison Grande does not wish to burden the Court with an unnecessary restatement of the **Blaisdell** opinion, but would respectfully suggest that the decision has had a substantial impact on contemporary American jurisprudence, for two reasons.

First, **Blaisdell** contains a comprehensive analysis of all the major decisions which had theretofore addressed the constitutional prohibition against the impairment of contractual obligations. As it traced the judicial history of contract clause interpretation, the Court set forth fundamental principles of judicial and political philosophy and demonstrated

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3/ See, **The Contract Clause: The Use of a Strict Standard of Review for State Legislation that Impairs Private Contracts, Allied Structural Steel Co. v. Spannaus**, 28 De Paul L.R.502 (1979).

that legal thought undergoes a constant, continuing evolution. Individual expectations are thus seen as interacting with the necessary powers retained by the state to promote the common good, consistent with the constitutional limitations of those powers so that, by virtue of the "growing appreciation of public needs" evidenced by the Court's decisions, a "rational compromise" may emerge out of this apparently irreconcilable conflict. **Blaisdell**, 290 U.S. at 442, 54 S.Ct. at 241, 78 L.Ed. at 431. And it must also be noted that the analysis of its prior contract clause decisions led the **Blaisdell** Court to conclude that it was by then "beyond question that the prohibition is not an absolute one and is not to be read with literal exactness as a mathematical formula." **Id**. at 428, 54 S.Ct at 236, 78 L.Ed. at 423.

Second, **Blaisdell** announced the rule that the state can properly exercise its police power, even to the detriment of existing contractual obligations, if "the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end." Id. at 438. A new constitutional approach to contract clause cases was therefore established, and by applying the newly-devised standard to the facts of the case before it, the Court was able to conclude that although it may have had an impairing effect on existing obligations, the legislation was nevertheless valid.

The principles and rationale expressed in **Blaisdell** were reaffirmed in **City of El Paso v. Simmons**, 379 U.S. 497, 85 S.Ct. 577, 13 L.Ed.2d 446 (1965). However, while the

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legislation which had come under attack in **Blaisdell** was sustained partially because it had addressed an emergency situation, no exigent circumstances were present in **Simmons**. The absence of an emergency notwithstanding, the Court held that the statute before it did not impair the obligation of contract, even though it had the effect of altering a pre-existing contractual relationship. As evidenced by **Simmons**, the approach to contract clause analysis continued its evolution. Of particular importance to the facts of the instant case is the recognition, in **Simmons**, that if legislation has the effect of limiting one's gains to those that may have reasonably been foreseen under a contract, it does not offend the contract clause even if, technically, the contractual obligation has been altered. As the Court put it,

> [l]aws which restrict a party to the gains reasonably to be expected from the contract are not subject to attack under the Contract Clause, notwithstanding that they technically alter an obligation of a contract.

Id. 379 U.S. at 515, 85 S.Ct. at 587; 13 L.Ed.2d 458, **Pomponio**, 378 So.2d at 777-778. In accordance with the **Simmons** principle quoted above, it is Maison Grande's position that, because the lessor herein could not have reasonably anticipated that the 1971 lease would bestow upon it extraordinary windfalls, the constitutional protection afforded by a fair interpretation of the contract clause is not applicable to it. Conversely, if F.S. Section 718.4015 is found to restrict Dorten to a reasonable profit expectation, it is not subject to an impairment of contract attack.

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The evolving approach to contract clause cases continued with **United States Trust Co. of New York v. New Jersey**, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977). Whereas in **Blaisdell** the Court had upheld state legislation enacted for emergency reasons and in **Simmons** the emergency factor was not addressed, in **United States Trust**, the Court expressly pointed out that post-**Blaisdell** decisions had receded from the emergency and temporary requirements that might in some cases be determinative of the statute's constitutional validity. **United States Trust Co.**, 431 U.S. at 23 n.19, 97 S.Ct. at 1518 n.19, 52 L.Ed.2d at 110 n.19. Significantly, however, the Court reaffirmed the **Blaisdell** interpretation that the Contract Clause is not to be read with "literal exactness like a mathematical formula" and expanded on the "technical impairment" notion previously expressed in **Simmons** by stating:

> a finding that there has been a technical impairment is merely a preliminary step in resolving the more difficult question whether that impairment is permitted under the Constitution. [emphasis supplied].

United States Trust Co., 431 U.S. at 21, 97 S.Ct. at 1517, 52 L.Ed.2d at 109; **Pomponio**, 378 So.2d at 778.

One year prior to this Court's **Pomponio** decision, the United States Supreme Court had , once again, the opportunity to consider an impairment of contract case, **Allied Structural Steel Co. v. Spannaus**, 438 U.S. 234; 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978). **Spannaus** continued the trend of refining the standard for judicial review of impairment of contract cases and clarified further the "technical impairment" statements of

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United States Trust and **Simmons**, by specifying that the first analytical step consists of determining whether the legislative act constitutes "a substantial impairment of a contractual relationship." **Spannaus**, 438 U.S. at 244 98 S.Ct. at 2722, 57 L.Ed.2d. at 736; **Pomponio**, 378 So.2d at 779. This initial determination serves the purpose of measuring the scope of judicial review, because

> [m]inimal alteration of contractual obligations may end the inquiry at the first stage. [...] Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation. [footnotes omitted].

Id. 438 U.S. at 245, 98 S.Ct. at 2723, 57 L.Ed.2d at 737; 378 So.2d at 779. If the inquiry must consist of a careful examination into the nature and purpose of the legislation, courts will consider whether the law was enacted to deal with a broad, generalized economic or social problem, whether it operated in an area already subject to state regulation when the contractual obligations were originally undertaken and whether the law constituted a severe permanent and immediate change in the parties' relationships, immediately and retroactively. **Id**. at 250, 98 S.Ct. at 2725, 57 L.Ed.2d at 740; 378 So.2d at 779.

However, while **Spannaus** had required that legislation severely impairing contractual obligations must be "necessary to meet an important general social problem", the next major contract clause decision, **Energy Reserves Group, Inc. v. Kansas Power and Light Co**., 459 U.S. 400, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983), relaxed the level of scrutiny even further by requiring that if the legislation constitutes a substantial impairment,

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the State must only have "a significant and legitimate public purpose." **Id.** at 411, 103 S.Ct. 704, 74 L.Ed.2d at 581.

As it readopted and further refined the fundamental principles of contract clause analysis it had set forth in **Blaisdell**, **Simmons**, **United States Trust** and **Spannaus**, with **Energy Reserves** the Court provided a precise methodology for judicial review of impairment of contract cases, complete with factors properly to be considered by the reviewing court. In its entirety, the constitutional approach consists of the three following steps:

> [1] The threshold inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." [...] The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected. [...] Total destruction of contractual expectations is not necessary for a finding of substantial impairment. [...] On the other hand, state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment. [...] In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past. [...] ("When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic"). The Court long ago observed: "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them."
>
> [2] If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, [...] such as the remedying of a broad and general social or economic problem. [...] Furthermore, since **Blaisdell**, the Court

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> has indicated that the public purpose need not be addressed to an emergency or temporary situation. [...] One legitimate state interest is the elimination of unforeseen windfall profits. [...] The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests.
>
> [3] Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of "the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption. [...] Unless the State itself is a contracting party, "[a]s is customary in reviewing economic and social regulation, ... courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." [...] [citations omitted].

Id., 459 U.S. AT 411 - 413, 103 S.Ct. at 704-705, 74 L.Ed.2d at 580, 582; **United States Fidelity & Guaranty Trust Co. v. Department of Insurance**, 453 So.2d 1355, 1360-1361 (Fla. 1984).

Energy Reserves represents the current federal constitutional standard for judicial review of impairment of contract cases. As noted above, the instant case involves issues arising out of both the federal and Florida Constitutions. Indeed, Count I of the complaint alleged that F.S. Section 718.4015 violates Article I, Section 10 of both documents and the Fourteenth Amendment of the United States Constitution. (R. 1-4) In addition, the final judgment (R. 161-162) and the decision of the Court of Appeal (R. 163-170) agreed with the plaintiff's allegations and held that the statute violated the federal and Florida constitutional prohibitions against the impairment of contractual obligations.

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As the Third District Court of Appeal stated in **Miami Herald Publishing Co. v. Ane**, 423 So.2d 376, 384-385 (Fla.3d DCA, 1984, approved, 458 So.2d 239 (Fla.1984),

> [i]t is a fundamental principle of federal constitutional law that no state court is authorized to interpret any provision of the United States Constitution [...] in a manner which is contrary to United States Supreme Court decisions interpreting the same provision of the United States Constitution, See e.g., **Lego v. Twomey**, 404 U.S. 477, 489, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972); **Henry v. City of Rock Hill**, 376 U.S. 776, 84 S.Ct.1042, 12 L.Ed.2d 79 (1964).

Accord: **House v. State**, 177 So. 705 (Fla. 1937); **Miles Laboratories, Inc. v. Eckerd**, 73 So.2d 680 (Fla. 1954); **State of Florida v. Board of Control**, 83 So.2d 20 (Fla. 1955); **McClaskey v. E.B. Leatherman**, 261 So.2d 137 (Fla. 1972); **Board of County Commissioners of Lee County v. Dexterhouse**, 348 So.2d 916 (Fla. 2d DCA 1977); **Spencer v. State**, 389 So.2d 652 (Fla. 1st DCA 1980); **Gioia v. Gioia**, 435 So.2d 367 (Fla. 4th DCA 1983).

At the same time, it is also well established that when construing a provision of the state constitution, this Court is not bound by the decisions of its federal counterpart. **Pomponio**, 378 So.2d, at 779. In accordance with the foregoing principles, it would therefore appear that , at a minimum, the federal prohibition against impairment of contractual obligations must be construed and applied consistently with the most recent standard announced by the United States Supreme Court. If parallel provisions of the state and federal constitutions were to be construed under different standards, the result would clearly consist of an undesirable dichotomy.

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In Florida, however, as is the case in many other jurisdictions, 4/ contract clause analysis is conducted in accordance with the method used by the Supreme Court of the United States. **Pomponio**, 378 So.2d at 779-780; **United States Fidelity and Guaranty Co. v. Department of Insurance**, 453 So.2d 1355, 1360 (Fla. 1984). "Such an approach is the one most likely to yield results consonant with the basic purpose of the constitutional prohibition." **Pomponio**, 378 So.2d at 780.

Any balancing process must consider the unique circumstances attending to a given situation. Such is the spirit and the letter embodied by the evolution undergone by American jurisprudence in contract clause analysis within the last three-quarters of a century. Maison Grande, however, has so far been deprived of the opportunity to demonstrate that if the constitutional standard mandated by this Court, rather than the "mathematical formula", were applied to the facts of the instant case, as to the parties herein, F.S. Section 718.4015 is constitutionally valid.

B. The Court of Appeal's decision is internally inconsistent.

1. Recognition of the existence of a balancing test requires its application. It should be noted initially that the Court of Appeal may have misapprehended Maison Grande's argument

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4/ See e.g., **Los Quatros, Inc. v. State Farm Life Ins. Co.**, 800 P.2d 184, 110 N.M. 750 (N.M. 1990); **Edgewater Investment Associates v. Borough of Edgewater**, 510 A.2d 1178, 103 N.J. 227 (N.J. 1986); **Sonoma County Organization of Public Employees v. County of Sonoma**, 591 P.2d 1; 23 Cal 3d 296 (Cal 1979); **Chappy v. Labor & Industry Review Commission**, 401 N.W. 2d 568, 136 Wis.2d 172 (Wis.1987)

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regarding the impact of **Pomponio**, and of **United States Fidelity** in impairment of contract cases. In its argument below, Maison Grande suggested that in deciding **Yamaha Parts Distributors, Inc. v. Ehrman**, 316 So.2d 557 (Fla. 1975) and in **Fleeman v. Case**, 342 So.2d 815 (Fla. 1976), this Court did not have the benefit of the three-step balancing test adopted after those two cases were decided.

It is clear that the criteria for contract clause analysis have not changed since **Fleeman**, and that in conducting such analysis courts must reconcile the conflict between the state's inherent police power and individual rights, a conflict that courts have identified in the early days of this country's judicial history. Thus, for example in **Yamaha**, this Court held that "[u]nder the circumstances of this case [...] the state's interest in policing franchise agreements [...] is not so great as to override the sanctity of contracts." **Id**. at 559.

Yamaha involved legislation effective January 1, 1971, requiring a motor vehicle manufacturer to give ninety days notice to a franchisee and to the state's motor vehicle regulatory agency, prior to the cancellation of a franchise contract. A lawsuit was brought by a franchisee following the manufacturer's attempt to cancel the contract without the ninety-day notice, in accordance with the terms of a contract entered into before the effective date of the statute. In holding that the statute could not be constitutionally applied to the franchise contract before it, this Court balanced the state's interest in regulating motor vehicle franchise

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agreements and a manufacturer's right to maintain the integrity of its trade name in the marketplace. The Court concluded that the former did not outweigh the latter. **Yamaha**, 316 So.2d at 559-560. (It might be noted, in passing, that if the current balancing test were applied to the **Yamaha** statute, in all likelihood, the same result would obtain.)

In **Fleeman**, on the other hand, no balancing test was conducted. In that case this Court held that F.S. Section 711.231 was inapplicable to the contracts before it because the statute did not contain an "express and unequivocal statement" regarding its application to pre-existing leases and management contracts. This Court recognized that in the absence of such a statement it would not engage in divining legislative intent, and further 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. **Yamaha Parts Distributors, Inc. v. Ehrman**, 316 So.2d 552 (Fla. 1975). [emphasis supplied].

Id. at 818. The Appellate Court's statements that "[i]n **Fleeman** the supreme court expressly premised its constitutional holding in **Yamaha**" and that "[t]he balancing test predated **Fleeman**" 5/ do not justify its holding that under the facts of this case this statute is unconstitutional. It is respectfully submitted that because the Third District's holding is grounded on the

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5/ **Maison Grande**, 580 So.2d at 862

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Fleeman rationale quoted above, its approach simply consists of prospectively declaring unconstitutional this and all future legislation which may have a backward reach, whether it be addressed to the condominium, or any other industry. Moreover, it is respectfully offered for this Court's consideration that the **Yamaha** citation in **Fleeman** was in support of the proposition that "[v]irtually no degree of impairment has been tolerated in this state." **Yamaha**, 316 So.2d at 559. According to the Third District's interpretation, however, it would appear that the **Yamaha** circumstances were applied to, and justified, the **Fleeman** rationale. If such were the case and if such were the law in the state of Florida, then nearly three hundred years of American jurisprudence might as well be swept under the rug. Indeed, **Blaisdell** and its progeny, including this Court's most recent pronouncements on contract clause analysis, would have been exceedingly futile, academic exercises. Yes, the balancing test predates **Fleeman**, and this Court did apply it to the facts of **Yamaha** but not to **Fleeman**'s. But if the balancing test is to have any meaning at all, it must be applied to the facts of this and of all other impairment of contract cases, and proper consideration must be given to the unique circumstances surrounding each one.

Contrary to what Maison Grande had argued below, the Court of Appeal stated that with

> **Pomponio** and **U.S.F.&G.** [this Court] did not announce a new approach to testing the constitutionality of a statute that impaired contracts; it merely specified the factors to be weighed in balancing the interest of the

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> state and the parties to the contract.... [emphasis supplied].

Maison Grande, 580 So.2d at 862. It is respectfully submitted that the Third District's reading of **Pomponio** and **U.S.F & G** is at once inaccurate and inconsistent. In **Pomponio**, this Court expressly decided "to adopt an approach to contract clause analysis similar to that of the United States Supreme Court..." **Id**. at 779-780. The approach adopted in **Pomponio** was derived directly from **Allied Structural Steel Co. v. Spannaus**, 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1974). In **U.S.F. & G.**, this Court reaffirmed its prior determination and stated

> [i]n contract clause cases such as this, we have decided to adopt a method of analysis used by the United States Supreme Court. **Pomponio v. Claridge of Pompano Condominium, Inc.**, 378 So.2d 774 (Fla. 1979). [emphasis supplied]

Id., at 1360. This, also, is such a case.

Without wishing to engage in a discussion over semantics as to whether the approach consists "merely of the factors" to be weighed, it is respectfully brought to this honorable Court's attention that in addition to the presence of different factors in **Pomponio** and **U.S.F. & G**., a qualitative difference exists between those two cases. In **Pomponio**, for example, the intermediate level of scrutiny required that for a retroactive statute to be constitutionally valid, it must have been "enacted to deal with a broad, generalized economic or social problem". **Id**. at 779. **U.S.F. & G.**, patterned after **Energy Reserves Group, Inc. v. Kansas Power & Light**, 459 U.S. 400, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983), only required that

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there be a "significant and legitimate public purpose behind the regulation." **U.S.F. & G.**. 453 So.2d at 1360.

However, even if it is true that **Pomponio** and **U.S.F.&G.** "merely specified the factors to be weighed" 6/ then the question is truly begged: why are those factors not being weighed now? Maison Grande has argued both at the trial and appellate levels that if the method of analysis announced in **U.S.F.& G.** were applied to the circumstances of this case, it would be able to demonstrate that F.S. Section 718.4015 passes the constitutional test with flying colors.

As noted, the Third District's decision was based principally on **Fleeman** and on this Court's subsequent treatment of **Fleeman** in **Cove Club Investors, Ltd. v. Sandalfoot South One, Inc.**, 438 So.2d 354 (Fla. 1983) and in **Association of Golden Glades Condominium Club, Inc. v. Security Management Corp.**, 557 So.2d 1350 (Fla. 1990). In support of the proposition that **Pomponio** and **U.S.F.& G.** did not announce a new approach to contract clause cases, the appellate court stated:

> [i]mplicit in **Cove Club** and **Golden Glades**, therefore, is the conclusion that, as in **Fleeman**, the scales tipped to prohibit the impairment of the pre-existing contract. [emphasis supplied]

Maison Grande, 580 So.2d at 862. It is hard to fathom how a balancing test may be "implicit". In its narrow interpretation of **Pomponio** and **U.S.F.& G.** the Court of Appeal recognized that, if nothing else, those two cases specified which factors are to

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6/ **Maison Grande**, 580 So.2d at 862

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be weighed in impairment of contract cases. However, if the Third District is correct in stating that in **Cove Club** and **Golden Glades** the "scales tipped" to prohibit the impairment of pre-existing contracts, Maison Grande asserts that, if given the opportunity in this case to make such a showing, the scales would tip in favor of the statute's constitutionality. To date, however, in the case at bar, nothing has been weighed and the scales remain, indeed, idle.

For the foregoing reasons it is respectfully submitted that in instant case the balancing process has been short-circuited. If this Court's adoption of the **U.S.F.& G.** method of Contract Clause analysis is to retain any significance, F.S. Section 718.4015 must be tested against that constitutional standard. Only then will a pronouncement as to its constitutionality have any validity.

2. Windfall profits are not constitutionally protected.

Maison Grande has vigorously argued below that Dorten's impairment of contract argument must fail because the escalation clause contained in the lease showers the lessor with unforeseen windfalls. The Court of Appeal specifically agreed with Maison Grande's assertion and expressly found that

> the escalation clause provides Dorten with extraordinary windfall profits...

Maison Grande, 580 So.2d at 861.

Had the Third District remanded the case to the trial court so that this legislation may be tested against the constitutional standard, the statute would have been found constitutionally valid because "[o]ne legitimate state interest

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is the elimination of unforeseen windfall profits." **U.S.F.& G.**, 453 So.2d at 1360. Moreover, prior to the adoption of the current balancing test, this Court had the opportunity to consider another impairment of contract case, **Department of Insurance v. Teachers Insurance Company**, 404 So.2d 735 (Fla. 1981), in which it stated:

> [w]e emphatically reject the assertion that windfall profits are protected by the impairment of contract clause.

Id. at 742. As noted earlier, in **City of El Paso v. Simmons**, 379 U.S. 497, 515, 85 S.Ct. 577, 587, 13 L.Ed.2d. 446, 458 (1965), the Supreme Court of the United States had made it quite clear that the contract clause cannot be invoked to attack laws which restrict a party to reasonably expected gains. Maison Grande argued below that by virtue of the unexpected and extraordinary effect that the inflation of the early nineteen-seventies and eighties had on the annual increments provided for in the recreation lease, Dorten could not have foreseen that from a 1971 base rent of $20,160.00 per month, or $241,920.00 annually, by 1988 it would be collecting the monthly rent of $158,871.00, or $706,452.00 per annum.

In its initial and reply briefs to the Third District, as well as in the Memorandum of Law submitted to the trial court, (R. 98-143) Maison Grande has argued extensively that Dorten could not have bargained for the unforeseen double-digit inflation which occurred during the first few years of the ninety-nine-year lease, the net effect of which was to bestow upon Dorten extraordinary profits. In fact, it is respectfully

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submitted that in 1971, the year the recreation lease was entered into, no one could have foreseen that the CPI would sky-rocket from 4.34% to 20.08% within one year. Additional, unforeseen double-digit increases over the first seventeen years of the lease have had the effect of further compounding the rental payments. Similar future unpredictable increases in the CPI may effectively compound the rental payments ad infinitum. The indefinite nature of the escalated rental amounts, subject to the country's economic vicissitudes, do not rise to the dignity of a vested, protected interest.

Should this honorable Court find that Dorten was in a position to bargain for and to foresee the extent of the profits which it has been collecting, then Maison Grande's windfall argument must fail. However, while the Third District, was persuaded that the escalation clause has provided Dorten with "extraordinary windfall profits", it nevertheless concluded that the Florida legislature cannot constitutionally adjust the parties' relationship even if the legislation is enacted pursuant to the state's legitimate interest of eliminating such profits. **U.S.F. & G.**

It is therefore respectfully submitted that in addition to denying Maison Grande the opportunity to demonstrate the validity of the statute as it applies to the unique circumstances of this case, the Appellate Court gave windfalls its constitutional blessing. It is, accordingly, respectfully requested that this Court remove this glaring inconsistency from the annals of Florida jurisprudence, in accordance with its

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Teachers holding.

3. **All reasonable doubts as to validity of statute must be resolved in favor of constitutionality.**

It is a fundamental principle of Florida constitutional law that all legislative enactments are clothed with the presumption of constitutionality 7/ Courts are obligated to construe them in such a way as to render them constitutional if there is any reasonable basis for doing so 8/. The party challenging the validity of the legislation has the burden of establishing its invalidity 9/ and every reasonable doubt must be resolved in favor of the statute's constitutionality. 10/

At this stage of the proceedings, F.S. Section 718.4015 has been declared unconstitutional based on this Court's statement in **Fleeman**, that a retroactive application of this

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7/ **State v. State Board of Education of Florida**, 467 So.2d 1047 Fla. 1986) (legislative enactments are presumed to be valid unless clearly erroneous, arbitrary or wholly unwarranted); **Gardner v. Johnson**, 451 So.2d 477 (Fla. 1984) (presumption of constitutionality, inherent in any statutory analysis); **Griffin v. State**, 396 So.2d 152 (Fla. 1981) (every presumption is to be indulged in favor of validity of statute); **Gluesenkamp v. State**, 391 So.2d 192, cert. den 454 U.S. 818, 102 S.Ct. 98, 70 L.Ed.2d 88 (Fla. 1980) (acts of legislation are presumed valid); **Scullock v. State**, 377 So.2d 682 (Fla. 1979) (presumption of constitutionality inherent in any statutory analysis).

8/ **Vildbill v. Johnson**, 492 So.2d 1047 (Fla. 1985) (Supreme Court is obligated to adopt construction that comports with dictates of constitution); **Gulfstream Park Racing Ass'n v. Dept. of Business Regulation**, 441 So.2d 627 (Fla. 1983) (Statutes are presumed to be constitutional and should be so construed if possible); **VanBibber v. Hartford Accident and Indemnity Insurance Co.**, 439 So.2d 880 (Fla. 1983) (if a statute can be construed to be constitutional it should be) **Dept. of Insurance v. Southeast Volusia Hospital District**, 438 So.2d 815 (Fla. 1983) (when an interpretation upholding constitutionality of a statute is available to Supreme Court, Court must adopt that interpretation); **Miami Dolphins Ltd., v. Metropolitan Dade**

statute's predecessor would be in violation of the contract clause of the Florida and United States Constitutions. In practical terms, this means that the statute has been found facially unconstitutional. The lower courts' decisions are devoid of any indication that this statute's constitutionality was ever presumed, and no attempt has been made below to construe it in a manner that would render it constitutionally valid. Furthermore, it is respectfully brought to the Court's attention that Dorten, the party charged with the burden of establishing the invalidity of this legislation, has not done so beyond a reasonable doubt.

The social purposes behind the enactment of F.S.

County, 394 So.2d 481 (Fla. 1981) (if an interpretation upholding constitutionality of statute is available to the Supreme Court, the Court must adopt that interpretation); **Aldana v. Holub**, 381 So.2d 231 (Fla. 1980) (Supreme Court is obliged to construe statute in such a way as to render it constitutional if there is any reasonable basis for doing so); **State v. Cormier**, 375 So.2d 852 (Fla. 1979) (when reasonably possible all doubts as to validity of statute are to be resolved in favor of constitutionality); **Yoo Kun Wha v. Kelly**, 154 So.2d 161 (Fla. 1963) if there is a reasonable basis for giving a statute constitutional validity courts should do so); **Pinellas County v. Laumer**, 94 So.2d 837 (Fla. 1957).

9/ **Peoples Bank of Indian River County v. State of Floridar Dept. of Banking and Finance**, 395 So.2d 521 (Fla. 1981); **Gluesenkamp v. State**, 391 So.2d 192 (Fla. 1980); **Brewer v. Gray**, 86 So.2d 799 (Fla. 1956); **Boynton v. State**, 64 So.2d 536 (Fla. 1953); **Gaulden v. Kirk**, 47 So.2d 567 (Fla. 1950); **May v. Texas Co.**, 188 So. 206, 137 Fla. 218 (Fla. 1939).

10/ **Horseman's Benevolent and Protective Ass'n v. Division of Pari-Mutuel Wagering**, 397 So.2d 692 (Fla. 1981); **Falco v. State** 407 So.2d 203 (Fla. 1981); **State v. Cormier**, 375 So.2d 852 (Fla. 1979); **State v. Gale Distributors, Inc.**, 349 So.2d 150 (Fla. 1977); **Corn v. State**, 332 So.2d 4 (Fla. 1976); **Holley v. Adams**, 238 So.2d 401 (Fla. 1970); **Robinson v. Florida Dry Cleaning and Laundry Board**, 194 So.2d 269, 141 Fla. 899 (Fla. 1940)

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718.4015 are several and compelling. In its preamble to House Bill 45, the legislature articulated those purposes by recognizing that a large segment of Florida's elderly population is subject to escalation clauses in land and recreational leases; that a large number of Florida's elderly population, comprised of many retirees living on a fixed income, resides in condominiums and cooperatives, and that the inflationary nature of escalation clauses compels the state to take what measures it deems necessary in order to maintain the cost of living at a level which would afford a decent and healthful standard of life to its citizens. The net effect of rental adjustments such as the one contained in the subject recreational lease is to lessen the people's purchasing power, quite possibly depriving them of the acquisition of essential needs such as food, clothing and health services. The exercise of control over the cost of housing is one of the few means available to the state to ensure that the rise in the cost of living remain within manageable limits. The state may legitimately exercise that power because in Florida the condominium industry is not only highly regulated by the state but because it is indeed a creature of the state. **Century Village, Inc. v. Wellington, etc.**, 361 So.2d 128, 133 (Fla. 1979). The Florida legislature has determined that these and other factors constitute a "broad and pressing social and economic need", and has acted in accordance with that determination.

The elimination of unforeseen windfall profits is a legitimate state interest pursuant to which the legislature is

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empowered to act, even if the statute has the effect of operating retroactively. **U.S.F. & G.**, 453 So.2d 1355; **Teachers**, 404 So.2d 735. As noted earlier, Maison Grande has argued, and the District Court has found, that in this case Dorten's windfalls are "extraordinary" and it should be beyond dispute that the state's inherent police power authorizes it to remedy economic problems of this sort.

In addition, the statute is reasonable. Indeed, it is respectfully brought to the Court's attention that if the balancing test were applied to the facts of this case, it would become apparent that Dorten would not be totally deprived of its contractual rights, because the statute does not seek to restore the parties to the positions they occupied in 1971. Instead, this legislation would "freeze" Dorten's annual profits on a net-net-net-lease at the 1988 level, thereby avoiding the continued and outrageous gains provided by the compounded adjustments. The legislative means were properly tailored to the goal it sought to reach: Dorten's Annual Profits would be "capped" at the 1988 level, with the gains realized by the lessor until then remaining intact.

The statute is likewise necessary. The Florida legislature has determined long ago that escalation clauses such as the one contained in this subject lease are as congenitally defective as they are patently unfair. Even a cursory review of the economic projections submitted by Maison Grande in its Affidavit in Opposition to Summary Judgment (R. 131-141) reveals that, if not halted, the rental payments will reach truly

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astronomical proportions during the seventy years remaining in the life of the lease.

In sum, every presumption favors the constitutional validity of F.S. Section 718.4015. Yet the lower courts have held it facially invalid. Maison Grande is asking only that established tenets of Florida jurisprudence, as outlined above, be fairly applied to the instant controversy and that proper consideration be given to all of the factors at play, rather than resolving this case in a purely mechanical fashion.

II. WHETHER F.S. 718.4015 VIOLATES THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Issues dealing with eminent domain, due process and equal protection are made applicable to the States through the Fourteenth Amendment of the United States Constitution. **Keystone Bituminous Coal Association v. De Benedictis**, 480 U.S. 470 at 481 n.10, 107 S.Ct. 1232 at 1240 n.10, 94 L.Ed.2d 472 at 486 n.10 (1987). It must also be pointed out that

> when a state court reviews state legislation challenged as violative of the Fourteenth Amendment, it is not free to impose greater restrictions as a matter of federal constitutional law than this court has imposed.

Minnesota v. Clover Leaf Creamery Company, 449 U.S. 456, 461 n.6, 101 S.Ct. 715, 722 n.6 , 66 L.Ed.2d 659, 665 n.6 (1981).

With respect to the possibility that this statutory regulation is in violation of due process, the Supreme Court

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noted that

> [t]he Due Process Clause of the Fourteenth Amendment generally does not prohibit retrospective legislation, unless the consequences are particularly "harsh and oppressive".

United States Trust Company of New York v. New Jersey, 431 U.S.1, 18 n.13, 97 S.Ct. 1505, 1515 n.13, 52 L.Ed.2d 92, 106 n.13 (1977). In keeping with the constant evolution and refinement of American legal thought, the "harsh and oppressive" standard was significantly relaxed, however, in a later opinion, the Court held that

> [t]he retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.[...]But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose. [Citations omitted, emphasis supplied].

Pension Benefit Corp. v. R.A. Gray & Co., 467 U.S. 717 at 731, 104 S.Ct.2709 at 2718, 81 L.Ed.2d 601 at 612 (1984). In addition, the courts' review of legislative acts must have indeed a very limited and well defined scope because

> it is, by now, absolutely clear that the Due Process Clause does not empower the judiciary "to sit as a 'superlegislature to weigh the wisdom of the legislation'".

Exxon Corp. v. Governor of Maryland, 437 U.S. 117 at 124, 98 S.Ct. 2207 at 2213, 57 L.Ed.2d 91 at 99 (1978).

Unless the legislation is patently irrational and arbitrary, it must survive the due process challenge. There should be no doubt about the rationality of F.S. 718.4015. Sixteen years ago, the Florida Legislature had already

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recognized the existence of the legitimate public purpose of eliminating the social and economic evils embodied by escalation clauses in condominium and cooperative recreational leases, by declaring them prospectively illegal. The more recent initiatives of Florida's lawmakers invalidating escalation clauses retroactively, are imbued with the same rational legislative purpose and they represent, in fact, the logical culmination of what they had set in motion in 1975.

Similarly, an equal protection challenge must also fail. The same "rational relation" standard that is applied in the review of a due process challenge, must be used in determining the constitutionality of the statute when equal protection concerns are expressed. It must be emphasized that F.S. 718.4015 does not afford varying treatment to groups similarly situated. The statute applies equally to all lessors and to all lessees. Moreover, no fundamental rights are affected by the regulation, nor does it encompass a suspect classification. Under these circumstances, the challenged provision

> need only be tested under the lenient standard of rationality that this Court has traditionally applied in considering equal protection challenges to regulation of economic and commercial matters.

Exxon Corp. v. Eagerton, 462 U.S. 176 at 195-196, 103 S.Ct. 2296 at 2308, 76 L.Ed.2d 497 at 513 (1983).

As long as a rational relation exists between the legislation and the state's legitimate purpose of protecting its citizens from excessive prices, the statute must be upheld. **Id.**

It should be noted, in passing, that even if the subject regulation involved varying treatment of groups or person, it would fail the equal protection challenge only if it were concluded that the action of the legislature was irrational. **Vance v. Bradley**, 440 U.S. 93, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979).

Finally, the effect of F.S. 718.4015, must be considered as a proper exercise of this state's police power, and not as a "taking" requiring compensation. This conclusion is inescapable since, whatever rights may inure to Dorten under the lease agreement cannot be regarded in the aggregate, that is, as a single and indivisible entity. Rather, these rights may be several, forming a "bundle", each having its own value. As the Court made clear,

> when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia... or the States legislating concerning local affairs... This principle admits of no exception merely because the power of eminent domain is involved...

Hawaii Housing Authority v. Midkiff, 467 U.S. 229 at 239-240, 104 S.Ct. 2321 at 2329, 81 L.Ed.2d 186 at 196-197 (1984). Once the public purpose has been established, the "public use" requirement becomes "coterminous with the scope of a sovereign's police powers". **Id**. at 239, 104 S.Ct. at 2329, 81 L.Ed.2d. at 196. Of course, courts may still play a role in evaluating the legislative action. That role is, however, "an extremely narrow

one", and courts must defer to the legislative judgment "until it is shown to involve an impossibility". **Id.** at 239-240, 104 S.Ct. at 2329, 81 L.Ed.2d. at 196. The **Midkiff** Court went on to state:

> [a]ny departure from this judicial restraint would result in courts deciding on what is and what is not a governmental function and in their invalidating legislation on the basis of their view. [T]he Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use "unless the use be palpably without reasonable foundation". [Emphasis supplied].

Id. at 239-240, 104 S.Ct. at 2329, 81 L.Ed.2d at 196-197.

The "typical" taking has been defined as a condemnation of property by the government in the exercise of its power of eminent domain. **First English Evangelical Lutheran Church of Glendale v. County of Los Angeles**, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). However, the test established by the Court for a regulatory taking, requires a comparison of the value that has been taken with the value remaining in the property. **De Benedictis**, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987). Moreover,

> where an owner possesses a full "bundle" of property rights, the destruction of one "strand" is not a taking because the aggregate must be viewed in its entirety. [emphasis supplied]

Id., at 1248, quoting from **Andrews v. Allard**, 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979).

Applying the foregoing constitutional principles to the facts of instant case, it should become apparent that Dorten's

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rights, whatever they may be, are varied and severable. For example, if upheld, 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. The lessor would continue to receive rental income over the seventy years remaining in the life of the lease, even though capped at the 1988 level. Dorten's "bundle" may thus not remain perfectly intact, but if one "strand" be destroyed, such is not a taking.

III. WHETHER THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE NEGATIVE.

In **Association of Golden Glades Condominium Club, Inc. v. Security Management Corp.**, 557 So.2d 1350 (Fla. 1990), this Court had the opportunity to answer a question certified to it by the Third District Court of Appeal. In **Golden Glades**, after tracing the legislative history of the predecessor and successor statutes to F.S. 718.4015 (1988), this Court found that the legislature had not intended

> to change how escalation clauses entered into prior to June 4, 1975, are enforced prior to October 1, 1988, but did intend to recognize established case law and establish a statutory prohibition for those escalation clauses due after October 1, 1988. [emphasis supplied]

Id. at 1355. This Court further held that the most recent legislative enactments did not affect the enforceability of rent escalation clauses for rental payments due from June 4, 1975 to October 1, 1988. **Id.** at 1351.

In the instant case, Maison Grande is not seeking to

invalidate the escalation clause for the seventeen years prior to the effective date of F.S. 718.4015, nor is it seeking to be reimbursed for the escalated rent paid over that period. Instead, Maison Grande would respectfully suggest that in finding that the legislature had intended to establish a statutory prohibition for escalated rents due after October 1, 1988, **Golden Glades** sanctioned that prohibition thereby validating the amended statute. Further, Maison Grande respectfully offers for this honorable Court's consideration that, as Maison Grande argued below, **Golden Glades** distinguished the holding in **Fleeman** from the additional statement contained therein, characterized by the Third District as an "alternative holding". It is Maison Grande's assertion that in its subsequent decisions, this Court partially receded from, and modified, that portion of **Fleeman**.

First, in **Golden Glades**, this Court clearly expressed the distinction between the **Fleeman** holding and the additional statement in the following terms:

> [In **Fleeman**] we held that the statute could not be given retroactive application because there was no showing that such was the intent of the legislature.[...] 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." [emphasis supplied].

Id. at 1354. If the Court had intended to consider that entire paragraph as the **Fleeman** holding, the distinction between "we held" and "we stated" would have been superfluous.

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Second, in **Golden Glades**, this Court recognized that in **Century Village, Inc. v. Wellington E, F, K, L, H, J, M & G Condominium Association**, 361 So.2d 128 (Fla. 1978), retroactive application was permissible where the lessor had agreed to be bound by future amendments to the Condominium Act and the Declaration of Condominium. The same result obtained in **Angora Enterprises, Inc. v. Cole**, 439 So.2d 832 (Fla. 1983), cert. denied, 466 U.S. 927, 104 S.Ct. 1710, 80 L.Ed.2d 183 (1984), where the lessor was the signatory on both the lease and the Declaration of Condominium which included in its definition of the condominium act the terms "as the same may be amended from time to time." **Id**. at 834. [emphasis in original]. By carving an exception to the seemingly absolute ban on retroactive application contained in **Fleeman**, in **Century Village** and **Angora**, this Court recognized that under certain circumstances, retroactive application would not constitute an impermissible impairment to contractual obligations.

This exception gained further recognition in **Cove Club Investors, Inc. v. Sandalfoot South One, Inc.**, 438 So.2d 354 (Fla. 1983) where this Court restated its **Fleeman** holding in the following terms:

> 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 legislation 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 an agreement to be bound by future amendments of the Act. [emphasis

supplied].

Id. at 356. Admittedly, **Century Village**, **Angora** and **Cove Club** did not balance factors extrinsic to the documents before the Court and, in this sense, those cases did not conduct a balancing test. But it is crucial to note in those three decisions, as well as in **Golden Glades**, the constitutional question was not before this Court. In addition, in **Century Village** this Court made it quite clear that if the constitutionality of the legislation had been "squarely presented" to it, the statute could have either been upheld or stricken. **Century Village**, 361 So.2d at 132 n.3.

The logical inference from this Court's post-**Fleeman** decisions, including **Pomponio v. Claridge of Pompano Condominium Inc.**, 378 So.2d 774 (Fla. 1979) and **United States Fidelity & Guaranty Co. v. Department of Insurance**, 453 So.2d 1355 (Fla. 1984) is that the constitutionality of legislation may not be determined by simply considering whether a statute reaches backward or forward, but must be determined by its application to the peculiar facts of each individual case. In other words, a statute of the kind which is before the Court today may be constitutional as to parties A and B and constitutionally defective as to parties C and D. This, it is respectfully submitted, is the very purpose of the balancing test adopted by this Court in **U.S.F & G.** in impairment of contract cases.

For the foregoing reasons it is respectfully requested that the certified question be answered in the negative. Escalation clauses in recreation leases entered into before 1975

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are not enforceable after October 1, 1988 -even if the lessor has not agreed to be bound by future changes in the condominium act- if it is found that continued enforcement is a windfall for the lessor or if it is otherwise found that the state legislation was enacted pursuant to the legitimate exercise of the state's police power.

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

A. An agreement that cannot be performed without violating a valid statute is illegal and void.

In Count II of the complaint (R. 1-4) Dorten alleged that in refusing to include the escalated rent pursuant to the 1988 CPI, Maison Grande breached the escalation clause of the recreational lease agreement. It is important to note that Maison Grande paid all escalated rental amounts due under the lease up to January 1, 1989, when the additional escalation was voided by the newly-enacted statute.

Section 718.4015 Florida Statutes which became effective on January 1, 1989 provides:

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

In accordance with this statutory prohibition, Maison Grande continued to pay the rental amount escalated to the 1988

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level. However, it is Maison Grande's contention that its compliance with the directive of a prohibitory statute did not constitute breach. "Breach" has been defined as a "failure without legal excuse to perform any promise which forms a whole or part of a contract..." **11 Fla.Jur.2d Contracts**, Section 218. This must be so because it is a basic principle of Florida law that

> an agreement that is violative of a provision of a constitution or a valid statute, or an agreement that cannot be performed without violating such a constitutional or statutory provision is illegal and void. And when a contract or agreement, express or implied, is tainted with the vice of such illegality, no alleged right founded upon the contract or agreement can be enforced in a court of justice. Indeed there rests upon the court an affirmative duty of refusing to sustain that which by the valid statutes of the jurisdiction, or by the constitution, has been declared repugnant to public policy. [Citations omitted, emphasis supplied].

Local No. 234, etc. v. Henley & Beckwith, Inc., 66 So.2d 818, 821 (Fla. 1953). Applied to the circumstances of this case, this principle should exonerate Maison Grande from the alleged non-performance.

It is conceded that the escalation clause in the recreational lease provides for yearly adjustments in accordance with the CPI for the previous year. However, performance of this part of the agreement would have been in violation of a provision of a valid statute. Dorten's alleged right founded on the agreement now tainted with the vice of such illegality was incapable of being enforced in a Florida court of justice.

Maison Grande's position that it acted in conformance

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with a valid statute is corroborated by this Court's statements of what a valid statute is. In **City of Sebring v. Wolf**, 141 So. 736, 737 (Fla. 1932), this Court held that

> [i]t is well settled in this state that a statute found on the statute books must be presumed to be valid and given effect until it is judicially declared unconstitutional.

And again, in **Evans v. Hillsborough County**, 186 So. 193, 196 (Fla. 1936) it was held that

> [i]t is [...] settled in this and other jurisdictions that a statute found on a statute book must be presumed valid and must be given effect until it is judicially declared unconstitutional.

This long-standing principle of Florida Law has not lost, with age, any of its validity. It should therefore be beyond dispute that until the Honorable Steven D. Robinson issued an order on October 22, 1989, declaring F.S. Section 718.4015 unconstitutional, as it applied to Maison Grande, the statute was absolutely, and completely, valid.

Dorten argued below that the attorneys' fees provision of the lease agreement does not limit the award of such fees to the lessor for actions arising solely out of an alleged breach. While we agree with Dorten that Paragraph XXIV of the recreation lease contains language broad enough to encompass a multitude of circumstances under which the lessor may be awarded attorneys' fees, it is respectfully brought to the Court's attention that in the instant action the complaint alleged "breach of contract" and no other alleged failure to perform. Thus, the ensuing defenses, memoranda of law and argument of both parties before

the trial court were all aimed at determining whether Maison Grande had indeed breached the escalation clause of the lease. Had Dorten not limited its cause of action to "breach of contract" Maison Grande would have been able to raise all defenses appropriate to neutralize such a claim.

It is well settled in Florida that an issue cannot be raised for the first time on appeal, whether it be an issue from an order of dismissal, from a final judgment on the merits, or from an appeal from summary judgment. **Dober v. Worrell**, 401 So.2d 1322, 1323-24 (Fla. 1981). Accord: **Metropolitan Dade County v. Coats**, 559 So.2d 71 (Fla. 3d. DCA 1990) (failure to complain of court's dismissal of case may not be complained of for first time on appeal); **Harris v. Martin Regency, Ltd.**, 550 So.2d 1160 (Fla. 4th DCA 1989) (since trial court did not have the issue of appellee's alleged breach of statutory duties, this issue was not properly before the court on appeal); **United Bank of Pinellas v. Farmers Bank of Malone**, 511 So.2d 1078 (Fla. 1st DCA 1987) (plaintiff is bound by the allegations of the pleadings it framed and will not be permitted to alter its theory of the stated cause of action at the appellate stage in order to defeat defendant's venue privilege). Moreover, it is respectfully brought to the Court's attention that the greatest amounts of time and energy expended by counsel were aimed at obtaining a judicial determination as to the validity of F.S. Section 718.4015. No demand for attorneys' fees was made as to this count of the complaint. This was pointed out to the trial judge during the hearing on attorneys' fees (Transcript of

hearing of January 25, 1990, pp. 6-7).

The Third District affirmed the award of costs, interest and attorneys' fees to Dorten, relying on **Brickell Bay Club Condominium Association, Inc. v. Forte**, 397 So.2d 959 (Fla. 3d DCA), rev. denied, 408 So.2d 1092 (Fla. 1981), which held that "[t]he good faith of the parties and the debatable nature of the legal issues [...] do not override the contractual terms". **Maison Grande**, 580 So.2d at 862 n.5. Brickell Bay, however, should be distinguished.

In **Brickell Bay** the Court of Appeal held that "Courts have no discretion to enforce [a prevailing party's attorneys' fees provision] any more than any other contractual provision." Id. at 960. That holding, however, presumes that the court is in the presence of a valid, enforceable contract. But if it is true, as Maison Grande maintains, that until the trial court declared this prohibitory statute unconstitutional the statute was valid and the escalation clause void for public policy, then the court had nothing before it that it could enforce.

The instant case presents no issue of "good faith and fairly debatable grounds". The only issue before the courts below and before this Court is whether it would have been possible for Maison Grande to breach the lease agreement when until the time the trial judge declared it unconstitutional the statute was valid and the escalation clause void and unenforceable.

B. In the absence of express contractual language or statutory provisions, no grounds exist for the award of appellate fees.

By order stated July 11, 1991 the District Court of Appeal

denied Maison Grande's motion for rehearing asking the court to reconsider the award of appellate fees to Dorten (R. 171) pursuant to its motion for appellate fees. The basis for Dorten's motion was Paragraph XXIV of the lease agreement which, in its entirety, reads as follows:

> XXIV. Costs and Attorneys' Fees. 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 attorneys' fees incurred, together with all costs, including those not normally allowable in actions at law, such as but not limited to copies of depositions, whether or not used at trial; travel expenses for witnesses traveling from without Dade County for the purpose of testifying at trial or depositions; expert witness fees for testifying at trial or deposition, together with such additional fees as the expert witness may charge the lessor in connection with his preparation for giving such testimony; and witness subpoenas issued to insure the presence of witnesses at deposition or at trial whether or not the witness shall actually appear or be called upon to testify. In the event of any dispute or litigation between the lessor and the lessee in connection with any alleged breach of default upon the part of the lessee wherein the lessor deems it advisable or necessary to retain the services of an attorney and which is settled prior to a judicial determination of the issues, or prior to litigation, by the lessee paying the monies demanded, or by the lessee otherwise complying with the demands of the lessor as to the lessee's duties and obligations under

> the terms of this lease, the lessor will be deemed to have prevailed in such dispute or controversy, and to be entitled to the recovery of his reasonable attorney's fees incurred in connection therewith.

Dorten's motion was not founded on a statutory provision because none exists which would entitle it to the recovery of appellate fees. Thus, for example, F.S. Section 59.46 providing for the inclusion of such fees in any contract entered into after October 1, 1977, and containing a "prevailing party" clause, is not applicable to the instant case because this lease agreement was executed in 1971. The required strict construction of Paragraph XXIV of the lease agreement, in light of controlling precedent, should establish that Dorten is not entitled to appellate fees.

It is well-established that, in Florida, attorneys' fees cannot be imposed in any cause unless provided for by contract or statute. **Keys Lobster, Inc. v. Ocean Divers, Inc.**, 468 So.2d 360 (Fla. 3d DCA 1985). If the demand for attorneys' fees is based on a written agreement between the parties, such a provision must be construed strictly. **Id**. at 363. Accord: **Venetian Cove Club, Inc. v. Venetian Bay Developers, Inc.**, 411 So.2d 1323 (Fla. 2d DCA 1982); **Discount Drugs, Inc. v. Tulip Realty Co. of Florida**, 396 So.2d 764 (Fla. 4th DCA 1981).

The controlling authorities with respect to the propriety of awarding appellate fees are **Lake Killarney Apartments, Inc. v. Estate of Thompson**, 283 So.2d 102 (Fla. 1973) and **Ohio Realty Investment Corp. v. Southern Bank of West Palm Beach**, 300 So.2d 679 (Fla. 1974). In **Lake Killarney**, the

Supreme Court reversed the Fourth District Court of Appeal's decision to award appellate fees, finding that the instruments involved in that case did not contain any provision regarding attorneys' fees on appeal.

A year later, in **Ohio Realty**, the Court reaffirmed the principle expressed in **Lake Killarney**, and further held:

> Absent a clear indication in the promissory note that the parties intended the provision as to attorneys' fees to include attorneys' fees on appeal, allowance of fees on appeal is not proper [...] An attorney's fee on appeal is without the essential legal basis unless there is express language which meets the contractual prerequisite of "a meeting of the minds" required to provide the contractual basis necessary to recover such an attorney's fee [...]
> Therefore, we again hold that the award of attorney's fees on appeal was error in the absence of a clear contract for such fees. [emphasis in original].

Id at 682. Interestingly, **Ohio Realty** expressly overruled the award of appellate fees in **Empress Homes, Inc. v. Levin**, 201 So.2d 475 (Fla. 4th DCA 1967). In that case, having specifically found that the attorneys' fee provision in the instrument before it did not distinguish between fees at the trial and appellate levels, the Fourth District nevertheless erroneously construed it to include appellate fees. **Id**. at 478-479.

There is no doubt that **Ohio Realty** is the law in this state as regards the entitlement to appellate fees. Unless such fees are expressly provided for in the contract, they are not recoverable. **Goodfriend v. Druck**, 309 So.2d 236 (Fla. 4th DCA, 1975). Stated in different terms, appellate fees are allowable

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only if authorized by substantive law. **Israel v. Lee**, 470 So.2d 861 (Fla. 4th DCA, 1985); Accord: **Schoettle v. State of Florida Dept. of Admin.**, 522 So.2d 962 (Fla. 1st DCA 1988). See also, **Hart Land & Cattle Company, Inc. v. Outdoor Promotions, Inc.**, 382 So.2d 26 (Fla. 1st DCA 1975) in which, on rehearing, the First District reversed the award of appellate fees on the authority of **Ohio Realty**.

As broad as the language of Paragraph XXIV is, it does not contemplate the award of appellate fees. If the recovery of such fees had been contemplated, simple language to that effect, such as "including appellate fees", could have easily been included as one of the several circumstances under which recovery is allowed. There is no reason for the well-detailed attorneys' fees provision of the lease agreement to specifically address items such as the copying of deposition transcripts, travel expenses and expert witness fees, and not the recovery of appellate fees. If such recovery had been intended, the contract should have so stated. Further, it is clear that, without exception, all of the circumstances contemplated in Paragraph XXIV are in the nature of, and relate to, expenses which may reasonably be incurred by the lessor in preparing its case for trial. Thus, in enumerating the recoverable costs, the phrases "actions at law" and "at trial" are used no less than four times and, according to the plain language of the contract, it is only in the event that the lessor should prevail "in such action", namely at trial, that it would be entitled to the recovery of fees.

Additionally, even reading Paragraph XXIV in the light most favorable to Dorten, there is no question that at the time the appeal was initiated, Maison Grande was not in default, nor in breach of the lease agreement and that, consequently, it cannot be charged with failure of performance. In fact, the notice of appeal was filed on February 7, 1990, and by that time Maison Grande had been paying the full escalated rental amount in accordance with the provisions of the lease agreement. (See Agreed Order on Motion to Release Funds from the Court Registry, filed on July 25, 1989, R. 16-17.) Rather than being in default under the terms of the contract, by filing the instant appeal Maison Grande was merely attempting to assert its rights under a facially valid statute. See e.g. **Venetian Cove Club, Inc. v. Venetian Bay Developers, Inc.**, 411 So.2d 1323 (Fla.2d DCA 1982).

In sum, had the recovery of appellate fees been agreed to by the parties, the lease agreement should have so stated. However, by strictly construing the contractual language and in the absence of express language reflecting the required "meeting of the minds", or of an applicable statutory provision, the award of attorneys' fees on appeal is not permitted. **Ohio Realty**.

CONCLUSION

Following the Third District's finding that in the instant case the lease provides Dorten with extraordinary

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windfall profits, and in accordance with this Court's emphatic rejection of the notion that windfall profits are not constitutionally protected, the decision below should be reversed and, as it applies to the parties herein, F.S. Section 718.4015 should be held constitutionally valid. In the alternative, it is respectfully requested that the decision of the Court of Appeal be reversed and the case remanded to the trial court for a determination of whether F.S. 718.4015 may be constitutionally applied to the parties and to the circumstances of this case, with the certified question answered in the negative. The award of trial and appellate fees should, equally, be reversed.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 30th day of August, 1991, to: JOEL S. PERWIN, ESQ., Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., 25 West Flagler Street, Suite 800, Miami, Florida 32399-1050; KARL M. SCHEUERMAN, ESQ., Department of Business Regulation, 725 South Bronough Street, Tallahassee, Florida 32399; GERALD F. RICHMAN, ESQ., SCOTT J. FEDER, ESQ. and 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 Amicae Schreiber; Pearl, Gordon, and Gesundheit; and CHARLES A. FINKEL, ESQ., Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, Florida 32399-1050.

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