SUPREME COURT OF FLORIDA

MOONLIT WATERS APARTMENTS, INC.

Petitioner,

vs.

JOSEPH J. CAULEY,

Respondent.

_____/

Case No. 85,489

District Court of Appeal
4th District - No. 93-3050

INITIAL BRIEF OF PETITIONER

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CONSTITUTIONALY QUESTIONED STATUTE

Florida Statute Section 719.401(1)(f)1

A lease of recreational or other commonly used facilities entered into by the association or unit owners prior to the time the control of the association is turned over to unit owners other than the developer shall grant to the lessee an option to purchase the leased property, payable in cash, on any anniversary date of the beginning of the lease term after the 10th anniversary, at a price then determined by agreement. If there is no agreement as to the price, then the price shall be determined by arbitration. This paragraph shall be applied to contracts entered into on, before, or after January 1, 1977, regardless of the duration of the lease.

CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE

Certified by the Fourth District Court of Appeals of the State of Florida Opinion filed March 15, 1995

WHETHER SECTION 719.401(1)(f)1 APPLIES TO AN EXISTING LONG TERM GROUND LEASE ENTERED INTO AT ARM'S LENGTH UPON WHICH ALL IMPROVEMENTS OF A COOPERATIVE APARTMENT COMPLEX HAVE BEEN CONSTRUCTED

PREFACE

The petitioner is the plaintiff. The petitioner will sometimes be referred to as Moonlit Waters or plaintiff.

The respondent is the defendant. The respondent will sometimes be referred to as leaseholder or defendant.

The following symbols will be used:

R - Record on appeal

A - Appendix

B - Answer brief of respondent filed in the Fourth District Court of Appeal dated March 2, 1994.

T - Transcript of proceedings taken on 4/29/93

STATEMENT OF THE CASE AND FACTS

This is an appeal by Moonlit Waters Apartments, Inc., a Florida not for profit corporation, (plaintiff), originating from a final judgment in favor of respondent dated September 15, 1993, predicated on an order denying petitioner's motion to appoint arbitrator dated August 18, 1993, in which order, the trial court determined Florida Statute Section 719.401(1)(f)1 unconstitutional. The constitutionally questioned statute provides:

> **A lease of recreational or other commonly used facilities entered into by the association or unit owners prior to the time the control of the association is turned over to unit owners other than the developer shall grant to the lessee an option to purchase the leased property, payable in cash, on any anniversary date of the beginning of the lease term after**

> **the 10th anniversary, at a price then determined by agreement. If there is no agreement as to the price, then the price shall be determined by arbitration. This paragraph shall be applied to contracts entered into on, before, or after January 1, 1977, regardless of the duration of the lease. (A-1).**

Moonlit Waters Apartments, Inc., a not for profit Florida corporation is the governing association of a 20 unit cooperative apartment building located in Broward County, Florida.

On November 17, 1964, Moonlit Waters, while still under control of the developer, entered into a land lease for the real property where the cooperative building is located and all other land improvements and commonly used facilities such as the swimming pool, shuffleboard court, laundry rooms, extra toilet facilities, breezeways, etc. located at the cooperative. The current lessor under the lease, is the respondent in this case. The rent under the lease is tied to a cost of living index. (R-5-18).

On December 16, 1991, Moonlit Waters notified the leaseholder that they intended to purchase the lease in accordance with Florida Statute Section 719.401(1)(f)1. (R-19-20).

The defendant refused to enter into negotiations with Moonlit Waters to sell the lease. (R-21). After having met all conditions prerequisite, Moonlit Waters filed a petition to compel arbitration to determine a sale price of the land lease pursuant to the statute on July 29, 1992. (R-1-21).

The defendant filed an answer and affirmative defenses on October 6, 1992, (R-22-26), admitting the material facts of the case but denying that the plaintiff is entitled to relief predicated upon the argument that the statute was constitutionally deficient or inapplicable to the lease essentially because:

A. It allegedly does not apply to land leases;

B. It allegedly retroactively impaired the defendant's contract.

On January 11, 1993, Moonlit Waters filed its motion to appoint arbitrator pursuant to the statute. (R-50-63).

Oral argument on the motion was held on April 29, 1993.

On August 18, 1993, the trial court entered an order denying plaintiff's motion to appoint arbitrator predicated upon the trial court's determination the Florida Statute Section 719.401(1)(f)1 is unconstitutional. (R-28-37).

On September 15, 1993, the trial court entered final judgment for defendant predicated on its prior order denying plaintiff's motion to appoint arbitrator dated August 18, 1993. (R-74).

A notice of appeal to the District Court of Appeal, Fourth District of Florida, of the final judgment was timely filed on October 8, 1993. (R-75-76).

On March 15, 1995, the Fourth District Court of Appeal issued an opinion affirming the decision of the lower court. However, the opinion of the Fourth District Court of Appeal was decided on

grounds different from the final judgment for defendant in the trial court. The Fourth District Court of Appeal opinion did not reach the issue of constitutionality of the statute. The opinion was predicated upon a determination that the questioned statute did not apply to land leases. (A-2).

In its opinion dated March 15, 1995, the Fourth District Court of Appeal certified to the Supreme Court of Florida the following question as one of great public importance:

> **WHETHER SECTION 719.401(1)(f)1 APPLIES TO AN EXISTING LONG TERM GROUND LEASE ENTERED INTO AT ARM'S LENGTH UPON WHICH ALL IMPROVEMENTS OF A COOPERATIVE APARTMENT COMPLEX HAVE BEEN CONSTRUCTED**

A notice to invoke discretionary jurisdiction of the Supreme Court of Florida was timely filed on April 10, 1995.

SUMMARY OF ARGUMENT

In 1988, the Florida legislature amended Florida Statute Section 719.401 specifically providing, in addition to other amendments, a provision whereby lessees of a lease of recreational or other commonly used facilities could under certain circumstances compel the lessor to sell the lessor's interest in the lease to the lessees under the auspices of binding arbitration by an independent arbitrator appointed by the Circuit Court if the parties could not amicably agree on a sale price. Moonlit Waters, by petition to the trial court, sought to compel arbitration to determine a sale price

of a land lease for commonly owned facilities pursuant to Florida Statute §719.401(1)(f)1, and other relief.

I. FLORIDA STATUTE 719.401(1)(f)1 APPLIES TO THE MOONLIT WATERS LEASE AND THEREFORE THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE.

Florida Statute 719.401(1)(f)1 applies to the Moonlit Waters land lease because encompassed within the lease are numerous commonly used facilities. The legislature clearly intended the statute to apply to land leases of the type and nature of the Moonlit Waters lease. The Fourth District Court of Appeal did not properly interpret the statute because it failed to take into consideration the plain meaning of legislative intent.

The defendant proposes a narrow and technical interpretation of the statute clearly contrary to the legislative intent. The defendant will contend that although the lease in question encompasses recreation facilities, these facilities comprise only a small portion of the leased land and therefore the statute is inapplicable. The defendant further proposes that while recreation leases may be an appropriate "evil" which requires remedial action by the legislature, land leases are somehow exempt from such scrutiny because the legislature and the courts have found land leases to be somehow different than recreation leases and therefore permissible in similar residential condominium and co-operative

settings. There is no authority for either of these two propositions of the respondent and they should be rejected.

II. FLORIDA STATUTE §719.401(1)(f)1 IS CONSTITUTIONAL BECAUSE THERE IS NO RETROACTIVE IMPAIRMENT OF CONTRACT TO THE DEFENDANT'S SINCE HE IS BEING FULLY COMPENSATED FOR HIS PROPERTY UNDER A VALID EXERCISE OF THE STATE'S EMINENT DOMAIN POWER.

Although the statute as passed applies to leases signed prior to its enactment, the statute does not constitutionally impair any vested contract rights of the lessor. What is involved in this particular statute is a complete taking of private property for a valid public purpose and fully compensating the property owner for the value of the property taken. The constitutional safeguards of due process that are afforded under this statute clearly distinguish it from the type of statute reviewed in the case of Maison Grande Condominium Association, Inc. v. Dorten, Inc., 600 So. 2d 463 (Fla. 1992), and its progeny, those cases having involved a retroactive impairment of contract by the taking of property without due process of law and without compensation.

In passing the amendment, the legislature relied upon the United States Supreme Court precedent established by the Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 104 S.Ct 2321, 81 L.Ed 2d 186 (1984), 104 S.Ct 2321, 81 L.Ed 2d 186 (1984).

III. THE STATUTE IS A VALID EXERCISE OF THE POLICE POWERS AND EMINENT DOMAIN POWERS OF THE STATE.

The legislature followed the procedural guidelines set forth by the Hawaii Housing Authority v. Midkiff case, *supra*, in setting forth the parameters by which the lessor's property would be taken in a reasonable exercise of the police powers of the state via a constitutional taking under the eminent domain powers of the sovereign.

The contract clauses of the Federal and state constitutions are not absolute and may be required to yield to competing constitutional provisions, including the state's police power.

The subject statute is a constitutionally reasonable exercise of the eminent domain powers of the state. As held in the Hawaii Housing case, *supra*, the mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The courts have long ago rejected any literal requirement that condemned property be put into use for the general public. In such cases, the government does not itself have to use the property, and it is only the takings purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.

The trial court failed to recognize the stated legislative intent of the Florida legislature in the passage of the amendment for the public use and purpose of providing all citizens a decent

and healthful standard of life while at the same time establishing a reasonable and equitable administrative procedure to fully compensate the lessor for the value of the property taken.

IV. ALL PROCEDURAL AND SUBSTANTIVE CONSTITUTIONAL DUE PROCESS REQUIREMENTS OF LAW HAVE BEEN MET.

The administrative procedure to determine compensation provided in the subject statute satisfies all procedural and substantive due process requirements. The subject statute provides for full and fair compensation to the leaseholder after procedurally sufficient due process, notice, and opportunity to be heard. The statute provides for a compensation hearing in front of an independent arbitrator at which all relevant evidence as to value can be presented.

V. JUDICIAL DEFERENCE TO THE LEGISLATIVE INTENT AND THE PRESUMPTION OF CONSTITUTIONALITY REQUIRES THAT THE CONSTITUTIONALITY OF THE STATUTE BE UPHELD.

By denying Moonlit Water's motion to appoint arbitrator and subsequently declaring the subject statute unconstitutional, the trial court failed to give judicial deference to the legislature. In our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power. State legislatures are as capable as Congress of making such determinations within their respective spheres of authority. (See Hawaii Housing Authority v. Midkiff, *supra*).

Florida has long recognized that a statute found on the statute books must be presumed to be valid and given effect until judicially declared unconstitutional, (See Maison Grande Condominium Association, Inc. v. Dorten, Inc., *supra*).

In statutory construction, the legislative intent is the polestar by which the Courts must be guided and no literal interpretation should be given that leads to an unreasonable or ridiculous conclusion or purposes not designated by the legislature. (See State v. Miller, 468 So. 2d 1051 (Fla. 4th Dist. 1985)).

ARGUMENT

I. FLORIDA STATUTE 719.401(1)(f)1 APPLIES TO THE MOONLIT WATERS LEASE AND THEREFORE THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE.

The defendant incorrectly argued to the trial court and the Fourth District Court of Appeal that the statute does not apply to the Moonlit Waters lease because it is a land lease. The trial court did not specifically rule on this issue, but in its order denying petitioner's motion to appoint arbitrator commented that the argument was worthy of consideration. The Fourth District Court of Appeal decision appealed from did not rule on the constitutionality of the statute, but instead determined that the questioned statute did not apply to land leases. However, the

court of appeal recognized the importance of the issues involved in this case and the large number of Florida residents that are affected by its outcome when it certified the following question to the Supreme Court of Florida as one of great public importance:

> **WHETHER SECTION 719.401(1)(f)1 APPLIES TO AN EXISTING LONG TERM GROUND LEASE ENTERED INTO AT ARM'S LENGTH UPON WHICH ALL IMPROVEMENTS OF A COOPERATIVE APARTMENT COMPLEX HAVE BEEN CONSTRUCTED (A-2).**

The proposition that the statute does not apply to land leases is incorrect and should be rejected.

The legislature clearly stated its intent in the preamble to the statute as amended:

> **WHEREAS, ss. 718.401(8) and 719.401(8), Florida Statutes, declare that the public policy of this state "prohibits the inclusion or enforcement of escalation clauses in land leases or other leases or agreements for recreational facilities serving condominiums and cooperatives, and such escalation clauses are declared void, and... (at page 1270).**
>
> **WHEREAS, escalation clauses cause a rise in the cost of operations of recreational and common land and facilities which has no relation to the increase in costs of bringing those land and facilities to the unit owners, and... (at page 1271).**
>
> **WHEREAS, escalation clauses in leases for recreational facilities or other commonly used facilities or land serving condominiums are inflationary in nature, and... (at page 1271, Chapter 88-225 Senate Bill No. 1422). (A-3).**

In the answer brief of respondent filed in the Fourth District Court of Appeal, the respondent cites the case of Lloyd Citrus Trucking, Inc. v. State Department of Agriculture and Consumer Services, 572 So. 2d 977 (Fla. 4th Dist. 1990), for the proposition that rules of statutory construction dictate that words used by the legislature are to be given their plain meaning and a statute must be construed to avoid unreasonable consequences. However, the defendant has failed to cite to the court the sentence prior to the one quoted, which is in fact the very first sentence of the opinion, as follows:

> **"It is axiomatic that in ascertaining the meaning of statutory language the legislative intent is paramount." (572 So. 2d 977) (Fla. 4th Dist. 1990), (at page 978).**

The reason for the defendant's omission is obvious. The legislature could not have been clearer when expressing its intent as to the applicability of this statute to both recreational leases and land leases.

The argument of respondent on this issue consists mostly of conjecture and attempting to have this court construe the statute on a technical "Webster's Dictionary" form of statutory construction, unsupported by the record on appeal or any relevant case law. In spite of the legislature's unequivocal expressed intent cited above, the respondent persists in propounding to the court that the applicability of the statute to the Moonlit Waters

Lease should turn on grammatical technicalities and semantics rather than the substantive issues. Such reasoning has long ago been rejected by the courts of this state. This is the very point made in the Lloyd Citrus Trucking Inc. case, *supra*, when it was reiterated that statutes must be construed to avoid unreasonable consequences. It is only by following narrow technical interpretations as proposed by the defendant that such unreasonable consequences occur. On the bottom of page 7 and the beginning of page 8 of its lower court brief, the defendant makes the statement that to apply the statute to leaseholds of "any recreational or commonly used facilities, regardless of how small," would lead to unreasonable consequences. However, the defendant does not follow this proposition up by demonstrating to the court even one unreasonable consequence. It is interesting that the defendant concedes on page 6 of the lower court answer brief that the lease in addition to land, encompasses "a swimming pool and dock, which are presumably used by the unit owners for recreation," then proposes that the court should disregard the existence of these commonly used facilities because they are a "small" portion of the leased facilities. Again, the defendant fails to cite to the court any authority whatsoever for this proposition. The subject statute does not quantify such a percentage requirement. In addition, the legislature in the preamble to the legislative intent cited above

also does not in the slightest degree support the arguments so vehemently made by the defendant.

It is clear that the legislature intended the statute to apply to land leases. "The controlling factor of statutory construction is legislative intent." Winemiller v. Feddish, 568 So. 2d 483, (Fla. 4th Dist. 1990, at page 484). The Supreme Court of Florida has repeatedly stressed this point.

> **As the [Supreme] Court often has noted, our obligation is to honor the obvious legislative intent and policy behind an enactment, even where that intent requires an interpretation that exceeds the literal language of the statute. Byrd v. Richardson-Greenshields Securities, 552 So. 2d 1099 (Fla. 1989, at page 1102).**

Additionally, the Moonlit Waters lease specifically encompasses all improvements on the land. Paragraphs five and six of the lease specifically provide:

> **5. USE OF PREMISES:**
>
> **The Lessee covenants and agrees that said premises and any improvements hereafter constructed thereon shall be used for lawful purposes only, and it is further agreed that the Lessee will not use said premises for any purpose in violation of ordinances, regulations or statutes of either Federal, State or local Governments which may obtain to said land.**
>
> **6. MAINTENANCE AND REPAIR:**
>
> **The Lessees agrees to keep and maintain in good condition and repair any buildings and improvements which may at any time be situate**

> **on the demised premises during the term of this lease.**
>
> **In the event that said buildings and improvements are destroyed by fire or other instrument, the Lessee shall have ninety (90) days from the date of said destruction to begin reconstruction of said premises to their former condition, and the rent during said period shall not be abated. (R-6-7).**

As the court can see, the lease contemplates improvements to the property, requires the lessee to keep and maintain the improvements in good condition, and even rebuild them in the event they are destroyed. Much of these improvements are commonly used facilities. As demonstrated to the trial court at the hearing on plaintiff's motion to appoint arbitrator, the original sales brochure the developer used to induce people to purchase at Moonlit Waters referred to "land improvements, such as swimming pool, shuffleboard court, laundry rooms, extra toilet facilities, breezeways, etc., in which you have an interest as one of the cooperative's owners." (T-10). Clearly, these land improvements are commonly use facilities encompassed by the statute.

The defendant also proposes that while recreation leases may be an appropriate "evil" which requires remedial action by the legislature, land leases such as the Moonlit Waters Lease are somehow exempt from such scrutiny because the legislature and the courts have found such land leases to be somehow different than recreational leases and permissible in similar residential

condominium and co-operative settings. This is a totally incredulous argument made by the defendant, again unsupported by the record or any case or statutory authority as yet cited in this matter. In fact, the legislature addressed the evils of both types of leases clearly and distinctly in the preamble to the statute. The Florida judiciary has independently confirmed that land leases, as well as recreation leases, require significant scrutiny. One example of this is the landmark case of Steinhardt v. Rudolph, 422 So. 2d 884 (Fla. 3rd Dist. 1982):

> **We deal today with a typical long term 99-year condominium lease, here a ground lease, established by a condominium developer as part of a sales package for selling the individual condominium units. In recent years, these leases have come under increasing judicial and legislative scrutiny for their asserted unfairness to the individual unit owners. It is now recognized that a cause of action sounding in unconscionability lies against the enforceability of such leases. (at page 890).**

Therefore, assuming arguendo, that the Moonlit Waters Lease is only a lease of land, as the respondent would asks this court to believe, then even in that event, it is still indistinguishable for purposes of applicability to this statute from a recreation lease.

It is incomprehensible to believe that the legislature would have created a pair of statutes (718/719.401(1)(f)(1)) specifically designed to fairly tackle the problems of residential leases tied to cost of living indexes still affecting approximately sixty-thousand Florida residents and at the same time intend to carve out

a segment of this class of persons and not afford them relief because of the nature of the way the lease was originally prepared when the resulting burden is otherwise indistinguishable. This simple and basic point clearly demonstrates that the defendant's position and the District Court of Appeal's interpretation of the statute are incorrect. The opinion appealed from should be reversed on this issue, and the certified question should be answered in the affirmative.

Preamble to Constitutional Issues

As stated earlier, the Fourth District Court of Appeal did not rule on the constitutionality of the statute. The trial court held the statute to be unconstitutional. (R-28-37). The petitioner respectfully requests this court to rule on the issue of constitutionality of the statute in conjunction with this court's determination on the issue of applicability of the statute to the petitioner's lease. The petitioner recognizes that irrespective of this court's ruling as to the applicability of this statute to the Moonlit Waters lease, a significant number of Florida residents are in limbo as to their rights because there is no appellate judicial opinion on the constitutionality of this statute. Petitioner believes the Fourth District Court of Appeal by certifying this case to the Supreme Court, recognizes the importance of this particular statute and the great number of people who may wish to

avail themselves of its benefits. In addition, if this court upholds the constitutionality of this statute, there would be a basis to return to the legislature to correct any technical wording issues which might preclude this petitioner from relief. Petitioner therefore respectfully asks that this court to consider the constitutional issues raised in this case. In support of petitioner's position on these issues, petitioner tenders to this court the following argument and authority.

II. FLORIDA STATUTE §719.401(1)(f)1 IS CONSTITUTIONAL BECAUSE THERE IS NO RETROACTIVE IMPAIRMENT OF CONTRACT TO THE RESPONDENT'S SINCE THEY ARE BEING FULLY COMPENSATED FOR THEIR PROPERTY UNDER A VALID EXERCISE OF THE STATE'S EMINENT DOMAIN POWER.

In opposition to Moonlit Waters' motion to appoint arbitrator, the defendant argued to the trial court that the Florida Supreme Court has recently restated its position that a contract right may not be retroactively impaired. Maison Grande Condominium Association, Inc. v. Dorten, Inc., 600 So. 2d 463 (Fla. 1992). Plaintiff agrees that the ruling in Maison Grande is the current state of the law in Florida, regarding impairment of contracts. However, Maison Grande is not applicable to this case because there is no impairment of contracts issue in this case. The relief sought by Moonlit Waters does not seek to legally impair the defendant's contract rights in any manner. Impairment of contract necessarily requires a taking

without compensation. All of the cases cited by the defendant (and relied upon by the trial court in its ruling) including the recent holding in Maison Grande, involved attempts to change an existing contract right without any compensation whatsoever. (R-31-32). For example, in Maison Grande, the lessee association sought to prevent all future rent escalations under the terms of a lease entered into before such clauses were declared void by the Florida legislature in 1975 for public policy reasons. In return, the leaseholder would get nothing. In this case, Moonlit Waters is not seeking to change **any** terms of the lease. Moonlit Waters seeks only to purchase the lease for fair market value as authorized by the Florida legislature. Thus, no contract right is being impaired. What is occurring is the complete taking of the contract right in exchange for just compensation after the leaseholder has been afforded full due process and an opportunity to be heard. The legal principle permitting the taking of contract rights by the state is well established for over one hundred years.

The trial court misperceived this issue. The order denying petitioner's motion to appoint arbitrator states in part "Florida Statute 719.401(1)(f)1 runs contrary to the parties 1965 Lease agreement and diminishes its overall value." (R-32). However, the trial court cites no legal or factual basis for this determination. In fact, there is nothing in the statute to diminish value. The statute requires full and fair compensation to the property owner.

The trial court in its order incorrectly takes the position that even full compensation to the lessor for its property rights leaves the lessor impaired. However, there is no legal impairment when provision has been made for full compensation as provided by Florida Statute Section 719.401(1)(f)1. Additionally, the trial court failed to recognize that a contract right, like any other property right, is not absolute and may be required to yield to the State's police power. (R-154). (See also Yellow Cab Company of Dade County v. Dade County, 412 So. 2d 395 (Fla. 3d Dist. 1982) and United States Fidelity and Guaranty Company v. Department of Insurance, 453 So. 2d 1355 (Fla. 1984)). Therefore, assuming arguendo, that an eminent domain taking is an impairment of property rights, the "impairment" becomes de minimus because the property holder is fully compensated for the property taking. In this case, the alleged impairment is far outweighed by the important public purpose stated by the Florida legislature. This statute represents a valid exercise of the State's eminent domain powers. There was nothing which would exempt the beneficial property rights of a lessor's interest in a land lease of commonly used facilities from taking under a valid exercise of the State's eminent domain powers. The trial court's ruling in effect grants special exempt status to the respondent without basis and even after recognition that the respondent are to receive full compensation for their property rights. In this regard, the trial

court states in the order denying petitioner's motion to appoint arbitrator, "Thus the statute forces an individual to relinquish possession of titled land which may be worth more personally than monetarily." (R-35). There is no legal precedent for recognition of personal or sentimental values attributable to land ownership rights when adjudicating just compensation in eminent domain proceedings. The reasoning of the trial court on this issue is clearly in error. Accordingly, the trial court incorrectly determined that the statute retroactively impaired the contract rights of the respondent. The legislature has provided for full and fair compensation to the respondent in exchange for their property. There has been absolutely no impairment of any contract right of the respondent. The trial court should be reversed on this issue.

III. THE STATUTE IS A VALID EXERCISE OF THE POLICE POWERS AND EMINENT DOMAIN POWERS OF THE STATE.

The subject statute is somewhat novel and forward thinking, but not unique, in its approach to the exercise of the eminent domain powers of the State. The commonplace approach is the taking of private property for a general public purpose such as a public park or a public road right-of-way. In this case, the subject statute exercises the eminent domain power not for the general public purpose but for a limited public purpose to specifically benefit approximately sixty-thousand residents in the State of

Florida. The defendant incorrectly believes that because the subject statute goes beyond commonplace public use test of the property, that the statute cannot pass constitutional muster. The defendant's legal argument on this point is incorrect. The United States Supreme Court in the case of Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 104 S.Ct 2321, 81 L.Ed 2d 186 (1984), 104 S.Ct 2321, 81 L.Ed 2d 186 (1984), held:

> **"The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The Court long ago rejected any literal requirement that condemned property be put into use for the general public. "It is not essential that the entire community, nor even any considerable portion, ... directly enjoy or participate in any improvement in order [for it] to constitute a public use."" (at page 2331) citing *Rindge Co. v. Los Angeles,* 262 U.S., at 707, 43 S.Ct., at 692...**
>
> **"The Act advances its purposes without the State's taking actual possession of the land. In such cases, government does not itself have to use property to legitimate the taking; it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause (at page 2331) ...**
>
> **"Judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power. State legislatures are as capable as Congress of making such determinations within their respective spheres of authority." (at page 2331).**

In amending the F.S. Section 719.401, the Florida legislature specifically cited and relied upon the Hawaii Housing Authority v. Midkiff, case.

> **"WHEREAS, the United States Supreme Court has since decided the case of Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 104 S.Ct. 2321 (1984), wherein it upheld a Hawaiian statutory scheme which authorizes the State of Hawaii to purchase land being used for residential rental housing pursuant to its powers of eminent domain, and in turn sell the land to private citizens in order to attain the public good of land ownership being had by a broad spectrum of the citizenship. The court held that the public use requirement of an eminent domain taking is "coterminous with the scope of a sovereign's police power,"... (legislative intent Senate Bill No. 1422, Chapter 88-225 Laws of Florida at pages 1270-1271). (A-3).**

In the Hawaii Housing case, the United States Supreme Court formally recognized the right of the State to use its power of eminent domain to set up a statutory procedure by which the State compelled the sale of private property to other private citizens, (lessees), from the owners, (lessors), in order to more fairly distribute land ownership among the citizens of the Hawaiian islands.

The situation in Hawaii Housing Authority, is analogous to the situation in the present case. In order to rectify a perceived evil with regard to land ownership the legislatures in the respective states have enacted legislation designed to redistribute land ownership under their power of eminent domain. The specific problem that the Hawaii legislature faced was a concentration of land ownership dating back to the days when Hawaii land ownership was held by the Polynesian tribal chieftains. In order to more fairly give Hawaiian citizens the opportunity to own the land, a

procedure was set up for the taking of the land and reselling it or redistributing it to private Hawaiian citizens. The Supreme Court of the United States held the purpose of the statute passed constitutional muster, (both the 5th and 14th amendments), and held the Hawaii statute to be a valid exercise of the eminent domain power even thought the property would not be held for general public purposes.

Likewise, in the State of Florida, the legislature has for many years grappled with the social evils and unfairness of residential land and recreation leases that have a rent escalation clause tied to a cost of living index. Such leases today are illegal. When the Hawaii Housing decision became legal precedent, the Florida legislature had a guide path to follow which would permit the legal elimination of the social ill and provide a method of fair compensation to the leaseholder (see legislative intent, *supra*, pages 1270 - 1274), (A-3).

The Florida legislature clearly has met the standards set forth in Hawaii Housing, *supra*, to sustain the constitutionality of this statute. This statute is the result of a valid and rational exercise of the police powers of the State via a constitutional taking under the eminent domain powers of the sovereign. The constitutionality of this statute should be upheld.

IV. ALL PROCEDURAL AND SUBSTANTIVE CONSTITUTIONAL DUE PROCESS REQUIREMENTS OF LAW HAVE BEEN MET

The statute clearly provides for constitutionally sufficient notice and opportunity to be heard. The landowner is given an opportunity to present all relevant evidence as to the value of the property taken. In the present case, the defendant has complained that the taking of the lease might engender adverse tax consequences or inability to reinvest the sale proceeds at an equivalent interest rate. Assuming arguendo that the defendant was correct on these points, these economic issues would be addressed with the arbitrator in the form of appropriate expert testimony. In fact, these issues are illusory. The recipients of proceeds resulting from a forced sale due to eminent domain proceedings are given the opportunity to reinvest the funds without adverse tax consequences. (Internal Revenue Code §1033) The trial court in its order denying plaintiff's motion to appoint arbitrator stated that a sale under the terms of the statute would be a "forced sale." (R-33). The trial court and defendant argue that the statute somehow diminishes the value of the lease. (R-32). However, no legitimate or rational argument is made in support of this position. The statute provides for only full and fair compensation. There is no provision which per se diminishes value.

The trial court hypothesizes that the statute is unfair because "the lessor is not afforded an opportunity to retain his or

her property." (R-34). Again, there is no legal precedent for the inalienable right to retain property for sentimental or economic reasons in derogation of the sovereign's right to exercise its eminent domain powers. The premise of the trial court and the defendant is that such a right exists and that because of some reasons owing to the personal circumstances of this defendant their rights become superior to the of the sovereign under any circumstances. The trial court was fully aware that the arbitration process provided for full and fair compensation, but nonetheless incorrectly perceives that due process requires more.

> **Although arbitration provides the lessor with the opportunity to present evidence so that an arbitrator can make an informed decision regarding the appropriate compensation, the concept of due process demands more. (R-34).**

The position of the trial court and the defendant requiring more than monetary compensation for the taking of property via the exercise of the eminent domain authority of the State is incorrect. It is important to note that the trial court recognized that the statute provided for adequate notice and opportunity to be heard. The court then strays from accepted legal precedent when opining that the defendant is entitled to more than just compensation.

The statute meets all procedural and substantive and constitutional due process requirements of law and should be upheld.

V. JUDICIAL DEFERENCE TO THE LEGISLATIVE INTENT AND THE PRESUMPTION OF CONSTITUTIONALITY REQUIRES THAT THE CONSTITUTIONALITY OF THE STATUTE BE UPHELD.

The trial court failed to give the required judicial deference to the legislature when interpreting this statute. As stated above, the trial court states its displeasure with the statute because it fails to afford the lessor an opportunity to retain his or her property. (R-34-35). This observation on the part of the trial court may be correct, but does not constitute legal authority to override the expressed intent of the legislature in creating the statute. In reviewing the legislative intent which is the preamble to the statute, it is clear that the legislature acted to create a means to eliminate a long-standing social ill via a rational exercise of the State's eminent domain power and at the same time provide a means of a full and fair compensation for the property holders affected by the statute. By focusing on its own view of the result of the statute rather than the intended goals of the legislature, the trial court misperceived the entire judicial deference issue before it. As explained by the United States Supreme Court in the Hawaii Housing ruling, such musings on the part of the trial court did not constitute authority to encroach on the sphere of the legislature.

> **Of course, this Act, like any other, may not be successful in achieving its intended goals. But "whether *in fact* the provision will accomplish its objectives is not the question:**

> **the [constitutional requirement] is satisfied if ...the... [state] Legislature *rationally could have believed* that the [Act] would promote its objective."...**
>
> **"When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings - no less than debates over the wisdom of other kinds of socioeconomic legislation - are not to be carried out in the federal courts." (at page 2330).**

It is important to note that "Florida has long recognized that a statute found on the statute books must be presumed to be valid and given effect until judicially declared unconstitutional.'" Maison Grande Condominium Association, Inc. v. Dorten, Inc., *supra*. Florida Statute Section 719.401(1)(f)1 and its predecessor sections have been enacted since 1976. Great deference should be given to the legislature when determining this statute's validity.

It is submitted to this Court that if the intent of the Florida legislature is interpreted and applied in a reasonable manner, this statute clearly meets all State and Federal procedural and substantive due process requirements of law. The positions taken by the defendant in the lower court, and accepted by the trial court in its order denying plaintiff's motion to appoint arbitrator dated August 18, 1993, ask this Court to look at this statute in an unreasonable light and in a manner contrary to the intent of the legislature. In this regard, Moonlit Waters would

ask that the Court be guided by the case of State v. Miller, 468 So. 2d 1051 (Fla. 4th Dist. 1985), wherein it is stated that,

> **In statutory construction, the legislative intent is the polestar by which the courts must be guided, and no literal interpretation should be given that lends to an unreasonable or ridiculous conclusion or purposes not designated by the legislature. (At page 1053).**
>
> **Courts are to avoid such interpretation of statutes as would produce unreasonable consequences. (At page 1053).**

CONCLUSION

The legislature has fashioned a way to assist the multitude of Florida's cooperative dwellers still subject to the burdens of unreasonably inflated recreational and/or land lease payments to escape their unfair grasp and at the same time reasonably compensate the leaseholder. This statute clearly applies to the Moonlit Waters lease. The certified question should be answered in the affirmative. The legislature has not unconstitutionally impaired the contract rights of the lessor but has established, under its police power of eminent domain, a reasonable procedure under which a rationally perceived social and economic evil is avoided. As this statute is constitutionally sufficient, the opinion appealed from should be reversed and remanded with instructions for the trial court to reinstate these proceedings for the appointment of an arbitrator and final determination of the

issues set forth in the petitioner's petition to compel arbitration.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing initial brief of petitioner and the following attached appendix was mailed this 9th day of June, 1995, to Michael T. Burke, attorney for respondent, P.O. Box 02-0330, Fort Lauderdale, FL 33303-0220.

HARVEY K. MATTEL

SUPREME COURT OF FLORIDA

MOONLIT WATERS APARTMENTS, INC.

Petitioner,

vs.

JOSEPH J. CAULEY,

Respondent.

_____/

Case No. 85,489

District Court of Appeal
4th District - No. 93-3050

APPENDIX TO INITIAL BRIEF OF PETITIONER

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INDEX TO APPENDIX

Appendix Part 1

create a cooperative, in the manner provided in the document to amend the document, or, if none is provided, then by vote of a majority of the voting interests. The amendment is effective when passed and approved. This procedure for amendment cannot be used if such an amendment would materially or adversely affect property rights of unit owners, unless the affected owners consent in writing. This subsection does not restrict the powers of the association to otherwise amend the cooperative documents, or other documentation, but authorizes a simple process of amendment requiring a lesser vote for the purpose of curing defects, errors, or omissions when the property rights of unit owners are not materially or adversely affected.

(2) If there is an omission or error in a cooperative document, or other documents required to establish the cooperative, which would affect the valid existence of the cooperative and which may not be corrected by the amendment procedures in the cooperative documents or this chapter, then the circuit courts have jurisdiction to entertain petitions of one or more of the unit owners therein, or of the association, to correct the error or omission, and the action may be a class action. The court may require that one or more methods of correcting the error or omission be submitted to the unit owners to determine the most acceptable correction. All unit owners and the association and mortgagees of a first mortgage of record must be joined as parties to the action. Service of process on owners may be by publication, but the plaintiff shall furnish all unit owners not personally served with process with copies of the petition and final decree of the court by certified mail, return receipt requested, at their last known residence address. If an action to determine whether the cooperative documents or other documents comply with the mandatory requirements for the formation of a cooperative contained in this chapter is not brought within 3 years of the filing of the cooperative documents, the cooperative documents and other documents shall be effective under this chapter to create a cooperative, whether or not the documents substantially comply with the mandatory requirements of this chapter. However, both before and after the expiration of this 3-year period, circuit courts have jurisdiction to entertain petitions permitted under this subsection for the correction of the documentation, and other methods of amendment may be utilized to correct the errors or omissions at any time.

History.—s. 2, ch. 76-222, s. 224, ch. 77-104; s. 29, ch. 86-175.

PART IV

SPECIAL TYPES OF COOPERATIVES

719.401 Leaseholds.—

(1) A cooperative may be created on lands held under lease or may include recreational facilities or other common elements or commonly used facilities on a leasehold, if, on the date the first unit is conveyed by the developer to a bona fide purchaser, the lease has an unexpired term of at least 50 years. If rent under the lease is payable by the association or by the unit owners, the lease shall include the following requirements:

(a) The leased land must be identified by a description that is sufficient to pass title, and the leased personal property must be identified by a general description of the items of personal property and the approximate number of each item of personal property that the developer is committing to furnish for each room or other facility. In the alternative, the personal property may be identified by a representation as to the minimum amount of expenditure that will be made to purchase the personal property for the facility. Unless the lease is of a unit, the identification of the land shall be supplemented by a survey showing the relation of the leased land to the land included in the common areas. This provision shall not prohibit adding additional land or personal property in accordance with the terms of the lease, provided there is no increase in rent or material increase in maintenance costs to the individual unit owner.

(b) The lease shall not contain a reservation of the right of possession or control of the leased property by the lessor or any person other than unit owners or the association, and shall not create rights to possession or use of the leased property in any parties other than the association or unit owners of the cooperative to be served by the leased property, unless the reservations and rights created are conspicuously disclosed. Any provision for use of the leased property by anyone other than unit owners of the cooperatives to be served by the leased property shall require the other users to pay a fair and reasonable share of the maintenance and repair obligations and other exactions due from users of the leased property.

(c) The lease shall state the minimum number of unit owners that will be required, directly or indirectly, to pay the rent under the lease and the maximum number of units that will be served by the leased property. The limitation of the number of units to be served shall not preclude enlargement of the facilities leased and an increase in their capacity, if approved by the association operating the leased property after unit owners other than the developer have assumed control of the association. This paragraph does not apply if the lessor is the Government of the United States or the State of Florida or any political subdivision thereof or any agency or any political subdivision thereof.

(d)1. In any action by the lessor to enforce a lien for rent payable or in any action by the association or a unit owner with respect to the obligations of the lessee or the lessor under the lease, the unit owner or the association may raise any issue or interpose any defenses, legal or equitable, that he or it may have with respect to the lessor's obligations under the lease. If the unit owner or the association initiates any action or interposes any defense other than payment of rent under the lease, the unit owner or the association shall, upon service of process upon the lessor, pay into the registry of the court any allegedly accrued rent and the rent which accrues during the pendency of the proceeding, when due. If the unit owner or the association fails to pay the rent into the

registry of the court, it shall constitute an absolute waiver of the unit owner's or association's defenses other than payment, and the lessor shall be entitled to default. The unit owner or the association shall notify the lessor of any deposits. When the unit owner or the association has deposited the required funds into the registry of the court, the lessor may apply to the court for disbursement of all or part of the funds shown to be necessary for the payment of taxes, mortgage payments, maintenance and operating expenses, and other necessary expenses incident to maintaining and equipping the leased facilities or necessary for the payment of other expenses arising out of personal hardship resulting from the loss of rental income from the leased facilities. The court, after an evidentiary hearing, may award all or part of the funds on deposit to the lessor for such purpose. The court shall require the lessor to post bond or other security, as a condition to the release of funds from the registry, when the value of the leased land and improvements, apart from the lease itself, is inadequate to fully secure the sum of existing encumbrances on the leased property and the amounts released from the court registry.

2. When the association or unit owners have deposited funds into the registry of the court pursuant to this subsection, and the unit owners and association have otherwise complied with their obligations under the lease or agreement, other than paying rent into the registry of the court rather than to the lessor, the lessor cannot hold the association or unit owners in default on their rental payments nor may the lessor file liens or initiate foreclosure proceedings against unit owners. If the lessor, in violation of this subsection, attempts such liens or foreclosures, then the lessor may be liable for damages plus attorney's fees and costs which the association or unit owners incurred in satisfying those liens or foreclosures.

3. Nothing in this paragraph shall affect litigation commenced prior to October 1, 1979.

(e) If the lease is of recreational facilities or other commonly used facilities that are not completed, rent shall not commence until some of the facilities are completed. Until all of the facilities leased are completed, rent shall be prorated and paid only for the completed facilities in the proportion that the value of the completed facilities bears to the estimated value, when completed, of all of the facilities that are leased. The facilities shall be complete when they have been constructed, finished, and equipped and are available for use.

(f)1. A lease of recreational or other commonly used facilities entered into by the association or unit owners prior to the time the control of the association is turned over to unit owners other than the developer shall grant to the lessee an option to purchase the leased property, payable in cash on any anniversary date of the beginning of the lease term after the 10th anniversary, at a price then determined by agreement. If there is no agreement as to the price, then the price shall be determined by arbitration. This paragraph shall be applied to contracts entered into on, before, or after January 1, 1977, regardless of the duration of the lease.

2. If the lessor wishes to sell his interest and has received a bona fide offer to purchase it, the lessor shall send the association and each unit owner a copy of the executed offer. For 90 days following receipt of the offer by the association or unit owners, the association or unit owners have the option to purchase the interest on the terms and conditions in the offer. The option shall be exercised, if at all, by notice in writing given to the lessor within the 90-day period. If the association or unit owners do not exercise the option, the lessor shall have the right, for a period of 60 days after the 90-day period has expired, to complete the transaction described in the offer to purchase. If for any reason such transaction is not concluded within the 60 days, the offer shall have been abandoned, and the provisions of this subsection shall be reimposed.

3. The option shall be exercised upon approval by owners of two-thirds of the units served by the leased property.

4. The provisions of this paragraph shall not apply to a nonresidential cooperative and shall not apply if the lessor is the Government of the United States or the State of Florida or any political subdivision thereof or, in the case of an underlying land lease, a person or entity which is not the developer or directly or indirectly owned or controlled by the developer and did not obtain, directly or indirectly, ownership of the leased property from the developer.

(g) The lease or a subordination agreement executed by the lessor must provide either:

1. That any lien which encumbers a unit for rent or other moneys or exactions payable is subordinate to any mortgage held by an institutional lender, or

2. That, upon the foreclosure of any mortgage held by an institutional lender or upon delivery of a deed in lieu of foreclosure, the lien for the unit owner's share of the rent or other exactions shall not be extinguished but shall be foreclosed and unenforceable against the mortgagee with respect to that unit's share of the rent and other exactions which mature or become due and payable on or before the date of the final judgment of foreclosure, in the event of foreclosure, or on or before the date of delivery of the deed in lieu of foreclosure. The lien may, however, automatically and by operation of the lease or other instrument, reattach to the unit and secure the payment of the unit's proportionate share of the rent or other exactions coming due subsequent to the date of final decree of foreclosure or the date of delivery of the deed in lieu of foreclosure.

This paragraph does not apply if the lessor is the Government of the United States or the State of Florida or any political subdivision thereof or any agency or political subdivision thereof.

(2) If rent under the lease is a fixed amount for the full duration of the lease, and the rent thereunder is payable by the association or the unit owners, the division director shall have the discretion to accept alternative assurances sufficient to secure the payment of rent, including, but not limited to, annuities with an insurance company authorized to do business in this state, the beneficiary of which shall be the association, or, cash deposits in trust, the beneficiary of which shall be the association, which deposit shall be at an amount sufficient to generate interest sufficient to meet lease pay-

ments as they occur. If alternative assurances are accepted by the division director, the following apply:

(a) Disclosures contemplated by paragraph (1)(b), if not contained within the lease, may be made by the developer.

(b) Disclosures as to the minimum number of unit owners that will be required, directly or indirectly, to pay the rent under the lease and the maximum number of units that will be served by the leased property, if not contained in the lease, may be stated by the developer.

(c) The provisions of paragraphs (1)(d) and (e) apply, but need not be stated in the lease.

(d) The provisions of paragraph (1)(g) do not apply.

History.—s. 2, ch. 76-222; s. 1, ch. 77-174; s. 9, ch. 79-284; s. 5, ch. 80-323; s. 13, ch. 81-185; s. 30, ch. 86-175; s. 8, ch. 88-148; s. 3, ch. 88-225.

719.4015 Cooperative leases; escalation clauses.

(1) It is declared that the public policy of this state prohibits the inclusion or enforcement of escalation clauses in land leases or other leases or agreements for recreational facilities, land, or other commonly used facilities serving residential cooperatives, and such clauses are hereby declared void for public policy. For the purposes of this section, an escalation clause is any clause in a cooperative lease or agreement which provides that the rental under the lease or agreement shall increase at the same percentage rate as any nationally recognized and conveniently available commodity or consumer price index.

(2) This public policy prohibits the inclusion or enforcement of such escalation clauses in leases related to cooperatives for which the cooperative documents were recorded on or after June 4, 1975; it prohibits the enforcement of escalation clauses in leases related to cooperatives for which the cooperative documents were recorded prior to June 4, 1975, but which have been refused enforcement on the grounds that the parties agreed to be bound by subsequent amendments to the Florida Statutes or which have been found to be void because of a finding that such lease is unconscionable or which have been refused enforcement on the basis of the application of former s. 719.401(8); and it prohibits any further escalation of rental fees after October 1, 1988, pursuant to escalation clauses in leases related to cooperatives for which the cooperative documents were recorded prior to June 4, 1975.

(3) The provisions of this section do not apply if the lessor is the Government of the United States or the State of Florida or any political subdivision thereof or any agency of any political subdivision thereof.

History.—s. 9, ch. 88-148; s. 4, ch. 88-225; s. 2, ch. 89-164.

719.402 Conversion of existing improvements to cooperative.—A developer may create a cooperative by converting existing, previously occupied improvements to such ownership by complying with parts I and VI of this chapter.

History.—s. 2, ch. 76-222; s. 10, ch. 79-284; s. 9, ch. 80-3.

719.403 Phase cooperatives.—

(1) A developer may develop a cooperative in phases, if the original cooperative documents or an amendment to the cooperative documents approved by the unit owners and unit mortgagees provides for and describes in detail all anticipated phases, the impact, if any, which the completion of subsequent phases would have upon the initial phase, and the time period within which all phases must be added to the cooperative and must comply with the requirements of this section or the right to add additional phases shall expire.

(2) The original cooperative documents shall describe:

(a) The land which may become part of the cooperative and the land on which each phase is to be built. The descriptions shall include metes and bounds or other legal descriptions of the land for each phase, plot plans, and surveys. Plot plans, attached as an exhibit, must show the approximate location of all existing and proposed buildings and improvements that may ultimately be contained within the cooperative. The plot plan may be modified by the developer as to unit or building types to the extent that such changes are described in the cooperative documents. If provided in the cooperative documents, the developer may make nonmaterial changes in the legal description of a phase.

(b) The minimum and maximum number and general size of units to be included in each phase. The general size may be expressed in terms of minimum and maximum square feet. In stating the minimum and maximum number of units, the difference between the minimum and maximum numbers shall not be greater than 20 percent of the maximum.

(c) Each unit's percentage ownership in the common areas as each phase is added. In lieu of specific percentages, a formula for reallocating each unit's proportion or percentage of ownership in the common areas and manner of sharing common expenses and owning common surplus as additional units are added to the cooperative by the addition of any land may be described. The basis for allocating percentage ownership of units in phases added shall be consistent with the basis for allocation made among the units originally in the cooperative.

(d) The recreation areas and facilities to be owned as common areas by all unit owners and all personal property to be provided as each phase is added to the cooperative, and those facilities or areas which may not be built or provided if any phase or phases are not developed and added as a part of the cooperative. The developer may reserve the right to add additional common area recreational facilities if the original cooperative documents contain a description of each type of facility and its proposed location. The cooperative documents shall set forth the circumstances under which such facilities will be added.

(e) The membership vote and ownership in the association attributable to each unit in each phase and the results if any phase or phases are not developed and added as a part of the cooperative.

(f) Whether or not time-share estates will or may be created with respect to units in any phase and, if so, the degree, quantity, nature, and extent of such estates, specifying the minimum duration of the recurring periods of rights of use, possession, or occupancy that may be established with respect to any unit.

(3) The developer shall notify owners of existing units of the commencement of, or the decision not to

APPENDIX PART 2

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1995

MOONLIT WATERS APARTMENTS, INC., a Florida not for profit corporation,	)	
Appellant,	)	CASE NO. 93-3050
v.	)	L.T. CASE NO. 92-20586(11)
JOSEPH J. CAULEY, Trustee,	)	
Appellee.	)	

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Opinion filed March 15, 1995

Appeal from the Circuit Court for Broward County; Mel Grossman, Judge.

Harvey K. Mattel, Fort Lauderdale, for appellant.

Michael T. Burke of Johnson, Anselmo, Murdoch, Burke & George, Fort Lauderdale, for appellee.

STONE, J.

Appellant, the governing association of a cooperative apartment building, appeals a judgment in favor of the defendant-landowner. Appellant contends that section 719.401(1)(f)(1), Florida Statutes, providing for an option to purchase, applies to the underlying 99-year land lease upon which the subject cooperative was constructed. We find it does not and affirm.

The lease, executed in 1964, was between the landowner and the developer. There is no indication that the lease was anything other than an arm's length transaction between unrelated

parties. The lease does not include an option for the lessee to purchase the land.

In 1991, Moonlit Waters notified Cauley that it wished to purchase his interest in the lease, pursuant to a recent amendment to section 719.401, Florida Statutes. Section 719.401(6)(a), which has been redesignated as section 719.401(1)(f)1, required that "[a] lease of recreational or other commonly used facilities" entered into before the unit owners receive control of the association include an option to purchase. (Emphasis added) The statute was amended to add the sentence, "This paragraph applies to any contract entered into on, before, or after January 1, 1977, regardless of the duration of the lease." Ch. 88-225, § 3, at 1274, Laws of Fla. Parallel changes were made at the same time to the laws relating to condominiums in chapter 718.

The statute provides for sale at a price determined by agreement or, if there is no agreement, then by arbitration. Moonlit Waters instituted the instant action by petition to compel arbitration. Cauley answered with a two-pronged defense that the statute, as worded, was not applicable to a ground lease underlying the entire project, and that the statute as amended was unconstitutional as impairing the obligation of contracts. Although the trial court found that the statute violated the United States and Florida constitutions, we need not reach that constitutional issue here, as we conclude that the statute is not

applicable to an all encompassing underlying land lease, as such an extensive estate is not included within the very specific, and more limited, meaning of a "lease of recreational or other commonly used facilities."

On its face, the statute in question appears clear and unambiguous. In interpreting the statute, we must first look to the plain and ordinary meaning of the language used in the statute. Patently, a lease "of" recreational or other commonly used facilities is not any lease of land "including" such facilities. Cf. Lloyd Citrus Trucking, Inc. v. State Dep't of Agriculture and Consumer Servs., 572 So. 2d 977 (Fla. 4th DCA 1990); Hancock Advertising, Inc. v. Department of Transp., 549 So. 2d 1086 (Fla. 3d DCA 1989), rev. denied, 558 So. 2d 17 (Fla. 1990).

Chapter 88-225, Laws of Florida, not only added the above sentence to former § 719.401(6)(a), it also revised other portions of chapters 718 and 719, Florida Statutes. It created sections 718.4015 and 719.4015, which declare it to be the public policy of the state to prohibit "the inclusion or enforcement of escalation clauses in land leases or other leases or agreements for recreational facilities, land, or other commonly used facilities" serving residential condominiums and cooperatives, declaring such clauses void. §§ 718.4015(1), 719.4015(1), Fla. Stat. (1993) (emphasis added). It therefore appears clear that at the time the legislature amended chapter 719, it was cognizant of the

distinguishing term "land leases," and could have included that phrase relative to the option to purchase provisions had it chosen to do so. Omitting underlying ground leases from the specific provision in question, where recreational leases and leases of "other commonly used facilities" are enumerated, would seem to fall under the principle of statutory construction, expressio unius est exclusio alterius, the mention of one thing implies the exclusion of another. See Devin v. City of Hollywood, 351 So. 2d 1022, 1025 (Fla. 4th DCA 1976). It therefore appears that the failure to add the specific term "land leases" to the wording in section 719.401(6)(a), now section 719.401(1)(f)1, was intentional.[1]

Therefore, we affirm and certify the following question to the supreme court as one of great public importance:

> WHETHER SECTION 719.401(1)(f)1 APPLIES TO AN EXISTING LONG TERM GROUND LEASE ENTERED INTO AT ARM'S LENGTH UPON WHICH ALL IMPROVEMENTS OF A COOPERATIVE APARTMENT COMPLEX HAVE BEEN CONSTRUCTED.

POLEN and STEVENSON, JJ., concur.

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[1]We cannot help but note that it is common in south Florida, to find cooperative apartment complexes built upon land acquired by the developer on a long term ground lease. There is no reason to believe that the legislature is not cognizant of this fact.

Further, in our opinion, a lease to a condominium or cooperative association of land specifically set aside or designated for the construction of recreational or other commonly used facilities intended to serve the members of the association should fall within the ambit of the statute, irrespective of the stage of construction of such facilities.

Appendix Part 3

(d) A provision setting forth a procedure for relocating, altering, or closing of a connection when required by the department for good cause; and

(e) A provision that any changes to the local access regulations that result in standards which do not meet or exceed the standards of the department shall provide grounds for rescinding or terminating the agreement.

(f) A provision that any changes to the department's standards shall be included in the local access regulations.

(4) A local governmental entity may request that permitting authority be delegated by the department. Upon a determination by the department that the requirements of this section have been met, such delegation shall be effective as provided in an interlocal agreement.

(5) A delegation pursuant to this section may be rescinded if the secretary determines that such delegation is not being carried out in accordance with the interlocal agreement.

Section 13. This act shall take effect July 1, 1988, or upon becoming a law, whichever occurs later.

Approved by the Governor July 1, 1988.

Filed in Office Secretary of State July 1, 1988.

CHAPTER 88-225

Senate Bill No. 1422

An act relating to condominiums and cooperatives; amending ss. 718.401 and 719.401, F.S.; providing for the application of certain options available to condominium and cooperative leases governing recreational facilities or other common elements; creating ss. 718.4015 and 719.4015, F.S.; prohibiting the enforcement of escalation clauses in certain existing condominium and cooperative leases; providing an effective date.

WHEREAS, ss. 718.401(8) and 719.401(8), Florida Statutes, declare that the public policy of this state "prohibits the inclusion or enforcement of escalation clauses in land leases or other leases or agreements for recreational facilities, land, or other commonly used facilities serving condominiums and cooperatives, and such escalation clauses are declared void, and

WHEREAS, the Florida Supreme Court has held that s. 718.401(8), Florida Statutes, is not retroactive and may not apply to leases entered into prior to June 4 because such application would violate the contract clause of the Florida and Federal Constitutions, and

WHEREAS, the United States Supreme Court has since decided the case of Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 104 S.Ct. 2321 (1984), wherein it upheld a Hawaiian statutory scheme which authorizes the State of Hawaii to purchase land being used for residential rental housing pursuant to its powers of eminent domain,

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and in turn to sell the land to private citizens in order to attain the public good of land ownership being had by a broad spectrum of the citizenship. The court held that the public use requirement of an eminent domain taking is "coterminous with the scope of a sovereign's police power," and

WHEREAS, it is well recognized that the contract clauses of the Federal and State Constitutions are not absolute and may be required to yield to competing constitutional provisions, including the state's police power (see, e.g., Tampa Northern R., Co. v. City of Tampa, et al, 107 So. 364 (Fla. 1926), Pomponio v. Claridge of Pompano Condominium, Inc., 378 So.2d 774 (Fla. 1979), Yellow Cab Company of Dade County v. Dade County, 412 So.2d 395 (Fla. 3d DCA 1982), United States Fidelity and Guaranty Company v. Department of Insurance, 453 So.2d 1355 (Fla. 1984)), and

WHEREAS, there are an estimated 58,894 condominium units that are subject to escalation clauses in land or recreational leases. These leases are spread throughout 27 counties of this state, and

WHEREAS, the State of Florida has an exceptionally large population of elderly and retired citizens, a large number of whom reside in condominiums and cooperatives and an overwhelming number of whom are living on a fixed income, and

WHEREAS, in the early years of the development of the condominium and cooperative industry, the national inflation rate was less than 3 percent per year, but in the early seventies the inflation rate, and thus the consumer price indices, rose dramatically, providing windfall profits to owners of such condominium and cooperative leaseholds, and

WHEREAS, escalation clauses cause a rise in the cost of operations of recreational and common land and facilities which has no relation to the increase in costs of bringing those lands and facilities to the unit owners, and

WHEREAS, in recent years, inflation has drastically increased the cost of living in the state; the spiraling cost of living affects all people through erosion of the purchasing power of whatever monetary resources they command. For a growing proportion of Florida's population, quite possibly a majority, the high cost of living is denying them such basic necessities as sufficient nutritional intake, safe and healthy housing accommodations, clothing, and adequate preventive and curative health services. Stabilizing the artificial inflation of condominium and cooperative housing would help curb the rising cost of living in Florida and, ultimately, contribute to the welfare of all people of the state by improving their standard of living, and

WHEREAS, escalation clauses in leases for recreational facilities or other commonly used facilities or land serving condominiums are inflationary in nature, and

WHEREAS, inflation lessens the quality of life of all members of this state and is particularly invidious in its impact on the elderly and others on fixed incomes. The state has limited abilities to curb inflation and, perhaps, the only useful means available is the state's power to control housing costs. There is a pressing public necessity for the state to do whatever it can to curb inflation and to keep the cost of living at a level where it is possible and

manageable to provide citizens a decent and healthful standard of life. The public use and purpose of providing all citizens a decent and healthful standard of life will be directly and substantially furthered by the retroactive application of ss. 718.401(8) and 719.401(8), Florida Statutes, and

WHEREAS, leases involving the use of recreational or other common facilities or land by purchasers of condominiums and cooperatives and which contain escalation clauses tied to a nationally recognized consumer price index, entered into by parties wholly representative of the interests of a condominium or cooperative developer at a time when the condominium or cooperative unit owners not only did not control the administration of their condominium or cooperative, but also had little or no voice in such administration, have resulted in onerous obligations and circumstances, and

WHEREAS, the State of Florida has made substantial efforts to eliminate unscrupulous real estate and securities operations which, in the past, resulted in Florida's gaining a poor reputation for protecting consumers. Comprehensive laws have been adopted and scrupulously enforced in the areas of land sales, condominiums, cooperatives, time-share, and securities. It is in the public's interest and welfare that the state maintain its image of protecting Florida purchasers and dealing harshly with those who would take advantage of them, and

WHEREAS, the Legislature of the State of Florida finds that the legislation herein proposed is necessary to meet a broad and pressing social and economic need as described herein, NOW, THEREFORE,

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (a) of subsection (6) and subsections (8), (9), and (10) of section 718.401, Florida Statutes, are amended to read:

718.401 Leaseholds.--A condominium may be created on lands held under lease or may include recreational facilities or other common elements or commonly used facilities on a leasehold if, on the date the first unit is conveyed by the developer to a bona fide purchaser, the lease has an unexpired term of at least 50 years. If rent under the lease is payable by the association or by the unit owners, the lease shall include the following requirements:

(6)(a) A lease of recreational or other commonly used facilities entered into by the association or unit owners prior to the time when the control of the association is turned over to unit owners other than the developer shall grant to the lessee an option to purchase the leased property, payable in cash, on any anniversary date of the beginning of the lease term after the 10th anniversary, at a price then determined by agreement. If there is no agreement as to the price, then the price shall be determined by arbitration. <u>This paragraph applies to any contract entered into on, before, or after January 1, 1977, regardless of the duration of the lease.</u>

~~(8)(a) It is declared that the public policy of this state prohibits the inclusion or enforcement of escalation clauses in land leases or other leases or agreements for recreational facilities, land, or other commonly used facilities serving residential condominiums, and such clauses are hereby declared void for public policy. For the purposes of this section, an escalation clause is~~

~~any--clause--in--a-condominium-lease-or-agreement-which-provides-that the-rental-under-the-lease-or-agreement-shall-increase--at--the--same percentage---rate--as--any--nationally--recognized--and--conveniently available-commodity-or-consumer-price-index.--~~

~~(b)--The--provisions-of-this-subsection-do-not-apply-if-the-lessor is-the-Government-of-the-United-States-or-this-state-or-any-political subdivision--thereof--or--any--agency--of--any--political-subdivision thereof.~~

(8)~~(9)~~ Subsections (1) through (7) do not apply to residential cooperatives created prior to January 1, 1977, which are converted to condominium ownership by the cooperative unit owners or their association after control of the association has been transferred to the unit owners if, following the conversion, the unit owners will be the same persons who were unit owners of the cooperative and no units are offered for sale or lease to the public as part of the plan of conversion.

(9)~~(10)~~ If rent under the lease is a fixed amount for the full duration of the lease, and the rent thereunder is payable by a person or persons other than the association or the unit owners, the division director has the discretion to accept alternative assurances which are sufficient to secure the payment of rent, including, but not limited to, annuities with an insurance company authorized to do business in this state, the beneficiary of which shall be the association, or cash deposits in trust, the beneficiary of which shall be the association, which deposit shall be in an amount sufficient to generate interest sufficient to meet lease payments as they occur. If alternative assurances are accepted by the division director, the following provisions are applicable:

(a) Disclosures contemplated by subsection (2), if not contained within the lease, may be made by the developer.

(b) Disclosures as to the minimum number of unit owners that will be required, directly or indirectly, to pay the rent under the lease and the maximum number of units that will be served by the leased property, if not contained in the lease, may be stated by the developer.

(c) The provisions of subsections (4) and (5) apply but are not required to be stated in the lease.

(d) The provisions of subsection (7) do not apply.

Section 2. Section 718.4015, Florida Statutes, is created to read:

718.4015 Escalation clauses.--

(1) It is declared that the public policy of this state prohibits the inclusion or enforcement of escalation clauses in land leases or other leases or agreements for recreational facilities, land, or other commonly used facilities serving residential condominiums, and such clauses are hereby declared void for public policy. For the purposes of this section, an escalation clause is any clause in a condominium lease or agreement which provides that the rental under the lease or agreement shall increase at the same percentage rate as any nationally recognized and conveniently available commodity or consumer price index.

(2) The provisions of this section do not apply if the lessor is the Government of the United States or this state or any political subdivision thereof or any agency of any political subdivision thereof. However, the provisions of this section apply to contracts entered into prior to, on, and after June 4, 1975, if the lessor is not the Government of the United States or this state or any political subdivision thereof or any agency of any political subdivision thereof. The application of this section to contracts entered into prior to June 4, 1975, may not divest the parties of any benefits or obligations arising from the escalation of fees prior to October 1, 1988, but only prohibits further escalation of fees pursuant to the escalation clauses, on or after October 1, 1988.

Section 3. Paragraph (a) of subsection (6) and subsections (8) and (9) of section 719.401, Florida Statutes, are amended to read:

719.401 Leaseholds.--A cooperative may be created on lands held under lease or may include recreational facilities or other common elements or commonly used facilities on a leasehold, if, on the date the first unit is conveyed by the developer to a bona fide purchaser, the lease has an unexpired term of at least 50 years. If rent under the lease is payable by the association or by the unit owners, the lease shall include the following requirements:

(6)(a) A lease of recreational or other commonly used facilities entered into by the association or unit owners prior to the time the control of the association is turned over to unit owners other than the developer shall grant to the lessee an option to purchase the leased property, payable in cash on any anniversary date of the beginning of the lease term after the 10th anniversary, at a price then determined by agreement. If there is no agreement as to the price, then the price shall be determined by arbitration. This paragraph applies to any contract entered into on, before, or after January 1, 1977, regardless of the duration of the lease.

~~(8)(a) It is declared that the public policy of this state prohibits the inclusion or enforcement of escalation clauses in land leases or other leases or agreements for recreational facilities, land, or other commonly used facilities serving residential cooperatives, and such clauses are hereby declared void for public policy. For the purposes of this section, an escalation clause is any clause in a cooperative lease or agreement which provides that the rental under the lease or agreement shall increase at the same percentage rate as any nationally recognized and conventently available commodity or consumer price index.~~

~~(b) This subsection does not apply if the lessor is the Government of the United States or the State of Florida or any political subdivision thereof or any agency or political subdivision thereof.~~

(8)(9) If rent under the lease is a fixed amount for the full duration of the lease and the rent thereunder is payable by the association or the unit owners, the division director shall have the discretion to accept alternative assurances sufficient to secure the payment of rent, including, but not limited to, annuities with an insurance company authorized to do business in this state, the beneficiary of which shall be the association, or, cash deposits in trust, the beneficiary of which shall be the association, which deposit shall be at an amount sufficient to generate interest sufficient to meet lease payments as they occur. If alternative

assurances are accepted
apply:

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and the maximum number
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developer.

(c) The provisions of s
be stated in the lease.

(d) The provisions of s

Section 4. Section 719
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719.4015 Escalation cla

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assurances are accepted by the division director, the following apply:

(a) Disclosures contemplated by subsection (2), if not contained within the lease, may be made by the developer.

(b) Disclosures as to the minimum number of unit owners that will be required, directly or indirectly, to pay the rent under the lease, and the maximum number of units that will be served by the leased property, if not contained in the lease, may be stated by the developer.

(c) The provisions of subsections (4) and (5) apply, but need not be stated in the lease.

(d) The provisions of subsection (7) do not apply.

Section 4. Section 719.4015, Florida Statutes, is created to read:

719.4015 Escalation clauses.--

(1) It is declared that the public policy of this state prohibits the inclusion or enforcement of escalation clauses in land leases or other leases or agreements for recreational facilities, land, or other commonly used facilities serving residential cooperatives, and such clauses are hereby declared void for public policy. For the purposes of this section, an escalation clause is any clause in a cooperative lease or agreement which provides that the rental under the lease or agreement shall increase at the same percentage rate as any nationally recognized and conveniently available commodity or consumer price index.

(2) This section does not apply if the lessor is the Government of the United States or the State of Florida or any political subdivision thereof or any agency of any political subdivision thereof. However, the provisions of this section apply to contracts entered into prior to, on, and after June 4, 1975, if the lessor is not the Government of the United States or this state or any political subdivision thereof or any agency of any political subdivision thereof. The application of this section to contracts entered into prior to June 4, 1975, may not divest the parties of any benefits or obligations arising from the escalation of fees prior to October 1, 1988, but only prohibits further escalation of fees pursuant to the escalation clauses, on or after October 1, 1988.

Section 5. This act shall take effect october 1, 1988.

Approved by the Governor July 1, 1988.

Filed in Office Secretary of State July 1, 1988.

CHAPTER 88-226

House Bill No. 1717

An act relating to professional sports franchises; providing for the duties of the Sports Advisory Council; providing for the duties of the Department of Commerce in carrying