SUPREME COURT
STATE OF FLORIDA

ROBERT DAY, Osceola County Tax Appraiser; and RANDY MILLER, Executive Director of the Department of Revenue of the State of Florida,

Appellants,

vs. CASE NO. 69-519

HIGH POINT CONDOMINIUM RESORTS, LTD,; HIGH POINT WORLD RESORT CONDOMINIUM ASSOCIATION, INC.; and ROBERT H. HARRISS, JR., individually and ROBERT H. HARRISS, JR., for Class Action Representation of the Class of Persons Herein Described,

Appellees.

INITIAL BRIEF OF AMICUS CURIAE, FLORIDA TAX COLLECTORS ASSOCIATION

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

The Florida Tax Collectors, Inc., adopt the statement of the case and facts submitted by Appellant, Randy Miller, Executive Director of the State of Florida, Department of Revenue.

SUMMARY OF ARGUMENT

By the clear, broad, and unambiguous language of the governor's proclamation for a special legislative session in March and April of 1982, all persons were given notice that the legislature would be considering any and all legislation necesasry for appropriations or legislation implementing the appropriations bill. Chapter 82-226 has a rational nexus or connection to both the appropriations bill and its implementing legislation. Moreover, the legislators themselves considered Chapter 82-226 to be within the purview of the governor's call and great deference should be given to the legislature's decision on this issue absent an abuse of discretion.

The reenactment of Chapter 82-226, and particularly section 192.037, Fla. Stat. (1982 Supp.), by the legislature on at least five different occasions cured any potential defect in enactment of the bill. The defect, if any, was procedural in nature and did not go to substance or content. A policy favoring cure gives effect to the legislative intent.

The proper test to use in analyzing the constitutionality of section 192.037 is whether there is a rational basis for the legislation. No suspect classification or fundamental rights are involved. The legislative goals and objectives in enacting section 192.037 are served by the operation of the statute and neither equal protection nor due process guarantees are violated.

The district court's decision finding that reenactment cured any procedural defect in Chapter 82-226 should be affirmed. The district court's decision determining that section 192.037 is unconstitutional should be reversed.

I. CHAPTER 82-226 WAS CONSTITUTIONALLY ENACTED AS IT WAS WITHIN THE SCOPE OF THE GOVERNOR'S PROCLAMATION AND WAS INTRODUCED WITH THE CONSENT OF TWO THIRDS OF THE MEMBERS OF EACH HOUSE.

Chapter 82-226 was adopted during a special legislative session held in March and April of 1982. Pursuant to Article III, Section 3(c), Florida Constitution (1968), during a special legislative session lawmakers may consider any legislative business within the purview of the governor's proclamation or within a communication from the governor. Other business may also be considered if two-thirds of the members of each house consent. Art. III, §3(c)(1).

The governor's amended proclamation convening the 1982 special session included as one of the purposes for the session the consideration of a general appropriations act and "necessary implementing legislation." (A. at p.1).[1]

Representative Steve Pajcic introduced three bills (HB 2-D, HB 21-D, and HB 28-D) concerning taxation during this special session. A transcript of the tape recorded proceedings during which Representative Pajcic introduced this legislation indicates that all three bills were considered by the House to be within the purview of the governor's proclamation for the proceeding. (FTCA App. at pp. 1-7)[2] Representative Pajcic stated, as he

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[1]A. shall refer to the Appendix to Cross-Appellant's Brief filed with this Court November 11, 1986. The Florida Tax Collectors do not wish to clutter this Court's files by including the same materials in an appendix to this brief.

[2]FTCA App. shall refer to the appendix to this brief.

prepared to introduce the third of these bills, that the bill was the last of the three "implementing" the appropriations act. (FTCA App. at p. 7). Notably, when the House considered a bill to be outside the scope of the Governor's call, a constitutional two-thirds voice vote was taken. (FTCA App. at p. 6).

The fact that the legislature itself considered the statute to be within the scope of the Governor's call is extremely pursuasive. 1949 Op. Att'y Gen. Fla. 049-415 (September 1, 1949). The legislature's discretion on this issue should not be questioned unless there was a clear abuse of discretion. Id.

Even a cursory review of Chapter 82-226 reveals that all of the provisions of the act are related directly to local government finance and taxation. The extent to which local government is required by the appropriations act to contribute certain funds to such interests as schools is directly related to the extent to which the local government can raise revenues through ad valorem taxation. See, e.g. Article VII, §8, Fla. Const. (1968). State appropriations and local government's revenues are intertwined in the form of state aid to counties and local requirements for school districts established at the state level. To suggest that Chapter 82-226 has no relationship to implementing legislation for the 1982 appropriations act is to ignore the clear and unambigious language of the omnibus local finance and taxation act, Chapter 82-226 and the provisions of Article VII of the Florida Constitution.

Further, this argument ignores Article III, Section 12, Florida Constitution (1968), which prohibits the inclusion in

state appropriations bills of any provisions on any other subjects. Thus, legislation necessary to the implementation of the 1982 appropriations bill was required to be separate from the funding legislation.

More importantly, the trial court specifically found that Chapter 82-226 was within the proclamation of the governor for the special session. (A. at p. 11). However, without any discussion of either the law or the facts, the District Court of Appeal, Fifth District, concluded that Chapter 82-226 was not within the purview of the call of the governor. (A. at p. 25). The appellate court did not explain why an act related solely to local government finance and taxation was not necessary to the implemenation of the appropriations bill.

In addition, the Appellees/Cross-Appellants failed to introduce even one scintilla of evidence to support their contention that Chapter 82-226 was not legislation necessary to the implementation of the 1983 appropriations act. As the challengers of the constitutionality of the enactment, Appellees bore the burden of proof on this issue. To be successful, they were required to prove the unconstitutionality of the enacting procedures beyond all reasonable doubt. Mayo v. Texas Company, 137 Fla. 218, 188 So. 206 (1939); State ex rel. Florida Portland Cement Company v. Hale, 129 Fla. 588, 176 So. 577 (1937).

No Florida case has involved the specific question of the proper test to use to determine whether a statute enacted during a special session was within the scope of a governor's proclamation. However, in Louis K. Liggett Company v. Amos, 104 Fla. 609, 141

So. 153 (1932), rev'd on other grounds sub nom., Louis K. Liggett Company v. Lee, 288 U.S. 517, 53 S. Ct. 481 (1933), appeal after remand, 149 So. 8 (Fla. 1933), the constitutionality of a statute imposing licenses and fees for opening and running stores was challenged. The statute also defined the duties of the comptroller and tax collectors with regard to the licenses fees. The statute was enacted during an extraordinary legislative session. This Court, without establishing an appropriate test for resolving this issue and without any real substantive discussion, found the act to be within the purview of the second subject listed in the governor's call, which included the words "To provide new sources of revenue. . . ." 141 So. at 154 162, 171.

If, as in Liggett, a statute defining duties of the Comptroller and tax collectors is related to raising new sources of revenue, then a statute such as 82-226 is clearly related to general state appropriations and the necessary implementing legislation.

The general rule for determining if legislation falls within the scope of the governor's call for a special session is whether the public was adequately notified by the proclamation that legislation of the sort enacted would be considered. Sutherland, Statutory Construction §5.08. Unless the enactment "is entirely foreign to the purpose of the call it will be sustained." Id.

Other states have considered this issue. In Wieder v. People, 722 P. 2d 396 (Colo. 1986), the court was faced with a challenge to the validity of a statute governing criminal actions

for conduct arising in a detention context. The defendant contended that the statute was limited to detention situations and could not be extended to situations involving field arrests. The statute had been passed by the Colorado legislature during an extraordinary session, the governor's call for which sought legislation relating to assault on employees of or persons under contract with a detention facility. Id. at 397. In determining that the statute could be applied to the defendant's situation in which he had assaulted police officers who were attempting to place him in a patrol car, the Colorado Supreme Court applied a rational nexus test. Id. at 398. The court found that there was a rational connection between protecting police officers and firefighters from assault while on duty and the governor's proclamation for the extraordinary session. Id. Accord, Empire Savings Building and Loan Association v. Otero Savings and Loan Association, 640 P. 2d 1151 (Colo. 1982).

In Gilbert Central Corporation v. State, 716 P. 2d 654 (Okla. 1986), the court considered the constitutionality of an act which, in response to the governor's call seeking legislation barring sales of personal property by certain convicted felons to the state or its subdivisions, barred sales of real and personal property. The state constitution prohibited the legislature from considering any subjects during an extraordinary session except those recommended by the governor in his proclamation. The court compared this constitutional provision to the single subject requirement of the state's constitution and determined that the test for deciding whether the act exceeded the scope of the governor's

call should be the same as the test for the single subject requirement. Id. at 665-666. Matters which are "germaine, relative, and cognate" to the subjects of the governor's call are permissably acted on by the legislature during an extraordinary session. Id. at 666. The court upheld the constitutionality of the act in question. Id.

In the instant case, under the rational nexus test there can be no question that Chapter 82-226, an omnibus bill relating to local government finance and taxation, is rationally connected with the state appropriations bill and the implementing legislation thereto. Similarly, under a test similar to the one used to determine whether an act meets the single subject rule, as the Oklahoma court has adopted, it is clear that Chapter 82-226 would pass constitutional muster. See State v. Lee, 356 So. 2d 276 (Fla. 1978) (natural and logical connection test); see also, Chenoweth v. Kemp, 396 So. 2d 1122 (Fla. 1981); and United States Fidelity and Guaranty Company v. Department of Insurance, 453 So. 2d 1355 (Fla. 1984). There is a natural and logical connection between the state appropriations act, its implementing legislation, and legislation relating to local finance and taxation. See also, Branton v. Parker, 233 So. 2d 278 (La. Ct. of App. 1970).

The language of the governor's proclamation in the instant case was extremely broad. Further, a review of the provisions of Article VII, Florida Constitution (1968), clearly demonstrates that matters related to ad valorem taxation and local government finance are intertwined and directly related to state appropriations. Finally, the transcript of proceedings in the House on the

date Chapter 82-226 was introduced clearly demonstrates that the House members themselves considered the legislation to be within the scope of the Governor's proclamation. (FTCA App. at p. 7).

Even assuming, however, that the enactment of Chapter 82-226 exceeded the scope of the governor's proclamation, the enactment is still constitutional unless Appellees proved beyond a reasonable doubt that the bills were not introduced with the consent of two-thirds of the membership of each house. The Appellees have completely failed to sustain this burden of proof.

The fact that the Senate bill was introduced with the consent of two-thirds of the Senate membership is not challenged by Appellee. (FTCA App. at pp. 8,9). The House Journal is simply silent on this point. Appellees would have this Court assume that because the House Journal is silent on the specific vote taken to introduce the bill, the vote was insufficient to meet the two-thirds requirement. This argument is erroneous for two reasons.

First, in the House Journal, the absence of the specific vote taken on the introduction of the bill is not proof of anything. It is just as reasonable to assume that the absence of the specific vote is an indication that there was no objection to the introduction of the legislation. In fact, the transcript of the House proceedings on this bill supports this assumption. No negative votes were voiced when the bill was read the first, second and third times. (FTCA App. at p. 5).

Second, the House Journal does reflect the actual final vote taken on the passage of the bill. Ninety-eight members of the House voted in favor of the bill and there are one hundred

twenty members in the House of Representatives. Thus, the enactment passed by well more than the two-thirds vote required for introduction of the legislation. Two presumptions or inferences (unrebutted by Appellees) can be reasonably drawn from this vote.

First, it is highly unlikely that House members would have voted in favor of a bill if they did not even want the bill to be introduced. The overwhelmingly favorable vote for the legislation on final passage is indicative of overwhelming support for the introduction of the bill. By voting in favor of Chapter 82-226, far more than two-thirds of the house members impliedly consented to the introduction of the legislation.

Second, the vote on final passage of Chapter 82-226 supports the inference that there was simply no sufficient opposition to the introduction of the legislation to require a machine vote upon its introduction. This inference disposes of Appellees' assumption that simply because the vote on introduction is not recorded in the House Journal, the vote did not reach the two-thirds level required.

In summary, the governor's proclamation for the 1982 special session clearly placed the general public on notice that all legislation necessary to implement the 1982 appropriations act would be considered. Local revenue raising methods are rationally and logically related to state appropriations and the implementing legislation for appropriations. Thus, Chapter 82-226 was within the purview of the governor's call.

Moreover, Appellees failed to prove beyond a reasonable doubt that even if the legislation was not within the scope of the

proclamation, the legislation failed to be introduced by the consent of two-thirds of the House members. In fact, the available evidence indicates that the bill was introduced without objection by any House members and thus, was consented to by the requisite number of representatives.

II. ANY PROCEDURAL DEFECTS IN THE ENACTMENT OF CHAPTER 82-226 HAVE BEEN CURED BY SUBSEQUENT AMENDMENTS TO AND REENACTMENTS OF THE LEGISLATION.

One of the leading cases dealing with procedural infirmities in legislative acts is State ex rel. Badgett v. Lee, 22 So. 2d 804 (1945). In Badgett, this Court held that an act which had previously been declared unconstitutional due to a title defect was cured of the defect by the inclusion of the legislation in a subsequently adopted compilation and revision of all Florida laws. Id. at 806. This Court specifically stated that incorporation of the defective act into the general revision statutes was a ratification of the legislation. Id. However, this Court properly pointed out that incorporation in such a general revision statute could not cure legislation which was unconstitutional due to content. Id. at 807.

Numerous cases have followed Badgett and have found title defects to have been cured by subsequent reenactment. See e.g. Honchell v. State, 257 So. 2d 889 (Fla. 1972); Alterman Transport Lines, Inc. v. State, 405 So. 2d 456 (Fla. 1st DCA 1981); Owen v. Cheney, 238 So. 2d 650 (Fla. 2d DCA 1970). In McKee v. State, 203 So. 2d 321, 322 to 323 (Fla. 1967), this Court again noted that where the constitutionality of a statute is challenged because it is deficient in form or title as opposed to substance or content, the deficiency is cured by later reenactment. (Emphasis supplied).

In the instant case, assuming there was some deficiency in the enactment of Chapter 82-226, the deficiency is procedural in nature and not substantive. The procedural deficiency has been

subsequently cured. Specifically, in 1983, subsection 6 of section 192.037 was amended by the legislature and the remainder of the act was unchanged. Further, the entire codification of Florida Statutes was enacted and adopted, including all changes made in 1982 and 1983. Ch. 83-264, §28; Ch. 83-61, Laws of Florida (1983).

The 1983 legislature, by adopting the revised and compiled Florida Statutes, expressly ratified the enactment of all laws contained therein. Even assuming the original Chapter 82-226 was defective and void, once it became part of the statutory compilation expressly approved by the legislature, the original procedural problems were cured.

In addition, in 1985, a reviser's bill amended a portion of section 192.037. Chapter 85-342, §204, Laws of Florida (1985). Further, all Florida statutes as compiled and revised were again approved and ratified by the legislature. Ch. 85-59, Laws of Florida (1985). Finally, in 1986, the Legislature again amended a portion of section 192.037, Chapter 86-300, §1. Thus, since the initial passage of Chapter 82-226 and more specifically section 192.037, Florida Statutes (1982 Supp.), the legislature has five times reenacted the legislation originally proposed in the 1982 special session. Clearly, even if defective in its original enactment the subsequent legislative actions cured the defect. If the defect cannot be said to have been cured, then at the very least the legislation was properly enacted, for the first time in 1983 by virtue of both the amendment to section 192.037 and the codification of the laws.

Appellees rely on several cases to argue that the cure theory is limited to title defects and has no application to procedural defects occurring during enactment. Horton v. Kyle, 81 Fla. 274, 88 So. 757 (1921); Hillsborough County v. Temple Terrace Assets Company, Inc., 111 Fla. 368, 149 So. 473 (1933). This argument is without merit for several reasons.

First, in Hillsborough County, the court was not faced with a situation involving an enactment that allegedly exceeded the scope of a call for a special session. This case involved the enactment by the House of one bill and the enactment by the Senate, through error, of a similar but not identical bill. Because the same bill was not enacted by both houses, the bill was never actually passed by the legislature. Later legislative attempts to ratify and confirm the adoption of the initial legislation were deemed ineffective because there was no initial legislation to confirm or ratify. This case clearly presents a substantive problem with the content of the legislation, not its form, procedure for enactment, or title. Thus, Hillsborough County is inapplicable to the instant case.

Second, both Hillsborough County and Horton, were decided long before the Badgett and McKee courts reaffirmed the holding that non-substantive defects could be cured by subsequent statutory enactments.

Third, these cases are not in keeping with more recent case law stressing the intent of the legislature over form or

technicalities. See e.g. State v. Miller, 468 So. 2d 1051 (Fla. 4th DCA 1985).

Fourth, these and other cases relied upon by Appellees are dependent in large part upon the specific language of the enact ments by which the defects were allegedly cured. For example, in Horton, the Court held that an act which attempted to validate prior "acts, proceedings, contracts, and records," could not validate something that was not a prior act of the legislature due to its failure to pass. 88 So. at 759.

In the instant case, Chapter 83-61, section 1 states in pertinent part:

> The accompanying revision, consolidation, and compilation of the public statutes of 1981 of a general and permanent nature . . . prepared by the joint committee under the provisions of sec. 11.242 together with corrections, changes, and amendments to and repeals of provisions of Florida Statutes 1981 enacted in additional reviser's bill or bills by the 1983 Legislature, is adopted and enacted as the official statute law of the state under the title of "Florida Statutes 1983" and shall take effect immediately upon publication.

There is no question and it is undisputed that the portion of Chapter 82-226 at issue in this case, as amended by Chapter 83-264 was contained within the compilation that came to be known as Florida Statutes 1983. See, §192.037, Fla. Stat. (1983). This language did not attempt to reenact a previous, but "non existent" act of the legislature. It adopted and enacted the recognized compilation, including bills such as Chapter 83-264 passed by the Florida legislature. Section 2 of Chapter 83-61 likewise reenacted Chapter 82-226 as amended by Chapter 83-264. Thus, cases such as

Horton are inapplicable due to the specific language used in Chapter 83-61. Even assuming Chapter 83-61 was ineffective for some reason, Chapter 85-59, containing language almost identical to that quoted above, clearly cured any procedural defect.

Fifth, none of the cases cited by Appellees have discussed the policy reasons for allowing defects to be cured by subsequent reenactments. The repeated reenactment by the legislature of a particular statute which may have been initially passed with procedural defects is a clear and unambiguous expression by the Legislature of its satisfaction with and ratification of the particular statute at issue. A holding that subsequent reenactments do not cure procedural defects flies in the face of this clear legislative intent.

Finally and most importantly, there is no legitimate reason to distinguish between defects as to title and other procedural defects in determining what types of defects are cured by reenactment. This is particularly true with regard to an alleged defect in the passage of a bill that purportedly exceeded the scope of the governor's call for a special session. The purpose of the constitutional provision in Article III, section 6 relating to bill titles and the single subject requirement is to place all persons on notice as to the content and subject matter of the law and to prevent the surprise or fraud that would arise from hidden provisions. North Ridge General Hospital, Inc. v. City of Oakland Park, 374 So. 2d 461 (Fla. 1979), app'l dism'd, 100 S. Ct. 1001 (1980). The same rational lies behind the constitutional provision requiring the legislature to consider only those matters

within the proclamation of the governor. See Sutherland at §5.08. If the defect in title can be cured by a later ratification or reenactment of the legislation, then a defect as to legislation exceeding the call of the governor should likewise be curable.

Appellees attempt to distinguish defects due to title by arguing that though defective, bills with title problems were still enacted. Appellees argue that bills exceeding the scope of a call of the governor are never enacted. Appellees are incorrectly reading into the constitution a provision that is not present. An unconstitutional enactment is no less a problem simply because the defect is in the title rather than the manner in which the bill was introduced.

When a title defect is cured by reenactment of the bill it is cured because the defect is absent from the title of the reenacting legislation. Likewise, a procedural defect arising out of legislation passed during a special session is cured by the reenactment because the defect does not exist in the reenactment. This is the precise reason for distinguishing between substantive or content defects and form, procedural, or title defects. The substantive defects continue to exist within the language of reenacting legislation, but the procedural defects do not.

Appellees' reliance on Wood v. State, 98 Fla. 703, 124 So. 44 (1929), is likewise misplaced. This case involved the inclusion in a statutory compilation of a bill that never actually was passed by the Senate. This Court held that the inclusion of the act in the compilation did not cure the failure of the Senate to enact the bill. Notably this Court pointed out that the

statutory compilation at issue was never enacted as the general statutory law of the state, but by legislative enactment it was merely deemed to be prima facie evidence of the statutes. 124 So. at 45. The reenactment statutes at issue in the present case are not so limited. Moreover, the instant case does not involve a statute that was never passed out of the House or the Senate.

In conclusion, the alleged procedural defects in the enactment of Chapter 82-226 have been cured by the acts of the legislature over the last four years. The alleged defects clearly were not substantive in nature and are subject to cure by reenactment. No public policy would be served by limiting the cure theory to title defects. In fact, the public policy of giving effect to the clear intent of the legislature would be frustrated by such a limitation. The district court's holding on this point should be affirmed.

III. THE TIME-SHARE TAXATION AND ASSESSMENT LEGISLATION DOES NOT VIOLATE THE EQUAL PROTECTION OR DUE PROCESS CLAUSES OF THE FEDERAL OR FLORIDA CONSTITUTIONS.

An analysis of the constitutionality of section 192.037 first requires a complete understanding of the statute itself. Section 192.037 is designed to provide a reasonable method for assessing and collecting taxes on fee time-share real property interests. Fee time-share property poses an administrative nightmare for both the property appraiser and the tax collector. A single condominium unit can be owned by as many as 52 different persons or entities. Thus, a condominium complex with 100 units could be owned by 5,200 different persons, who could realistically reside throughout the United States and beyond.

The property appraiser is required to include on the assessment roll the address of the person or fiduciary responsible for payment of taxes. §193.114(2)(e). This address is taken from the deed or other document conveying the property to the grantee, unless a different address is provided to the property appraiser by the grantee or fiduciary. Unless the property owner continually provides the property appraiser with a current and correct address, all notices regarding the payment of property taxes would be sent to the address on the assessment roll, and if it were incorrect or outdated, the person responsible for payment of taxes would receive no notice.

It is within this context that section 192.037 was enacted. The statute appoints the managing entity of the fee time-share

property as the taxpaying agent for the titleholders. The managing entity, as taxpayer, has several responsibilities:

1. To allocate ad valorem taxes and special assessments to the various time-share period owners according to the proportions established by the property appraiser; §192.037(3);

2. To collect from the time-share period owners and remit to the tax collector all taxes and special assessments; §192.037(5);

3. To place all funds collected for ad valorem taxes and special assessments in a special escrow account; §192.037(6);

4. To file a lien against the time-share periods for any unpaid taxes and special assesments; §192.037(8).

Notably, subsection (4) of section 192.037, states:

> All rights and privileges afforded property owners by chapter 194 with respect to contesting or appealing assessments shall apply both to the managing entity responsible for operating and maintaining the time-sharing plan and to each person having a fee interest in a time-share unit or time-share period.

(emphasis supplied).

Chapter 194, Florida Statutes affords taxpayers numerous protections for contesting and appealing assessments. An opportunity for an informal meeting with the property appraiser to resolve disputes as to the appraisal is provided. §194.011(2). A taxpayer may object to an assessment by filing a petition before the property appraisal adjustment board. §194.011(3). A taxpayer may participate in a hearing before the Board after due notice.

§194.032. The taxpayer may appeal an adverse decision to the circuit court for a trial de novo. §194.036.

Appellees will argue that these protections are meaningless in light of the time constraints for filing the petition and the requirement of section 192.037(3) that the proposed appraised value notice required by section 194.011(1) must be sent to the managing entity. This argument misses its mark. If the managing entity fails to promptly notify the time-share period owners of their proposed assessments, the problem is the failure of the managing entity to comply with this statutorily imposed fiduciary duty. The problem is not the statute.

Time-share period owners are afforded the notice, hearing, and appeal opportunities of chapter 194 by virtue of the provisions in section 192.037(4). Moreover, the time-share period owner is given more than the ordinary taxpayer because both he and the managing entity have the right to challenge an assessment.

Section 192.037(9) provides that the enforcement and collection of delinquent taxes must proceed against the entire "development" as a whole and the managing agent. The Department of Revenue's rules have defined a time share "development" synonymous with time share unit, as "an accommodation of a time share plan which is divided into time-share periods." Rule 12D-6.06 (2)(d) Fla. Admin. Code. However, section 192.037(9) goes on to provide that a time-share period owner is individually entitled to the protections of Chapter 197 if and when an application for a tax deed is filed by a tax certificate holder. These protections include notice by certified mail, publication, and personal

service of process, if the owner resides in Florida. Such notices must occur prior to the sale of the property. §197.512 and §197.522.

The statutes governing the managing entity of a time-share development are also critical to an analysis of the constitutionality of section 192.037. Before the first sale of a time-share period, the managing entity must be retained. §721.13(1). The managing entity is statutorily placed in a fiduciary relationship with all time-share period owners, §721.13(2), and thus, in addition to statutorily listed duties, §721.13(3), the managing entity has a fiduciary responsibility to the time-share period owners. The owners have the statutory right to discharge the managing entity, §721.14, and the managing entity can be held criminally responsible for misappropriations. §721.13(5).

A brief understanding of the nature of time-share ownership and of time-share property is also critical to an analysis of the constitutionality of section 192.037. The legislature statutorily recognized that time share is a real property interest. §721.02(1). Yet, rather than owning a parcel of property that is physically divisible from other parcels, such as acreage or a condominium unit, a time-share owner's interest is divided along a time continuum, usually weeks. Consequently, numerous owners of time share weeks own an interest in the same parcel of property. As a result, it is common for the time-share interest to be conveyed as an undivided interest in a time-share unit with a specific limitation on the occupancy of the unit during a certain period of time each year, continuing usually for a certain number of years, coupled with a

remainder interest in the unit or project, depending upon how the interest was originally conveyed. Further, time share property necessarily has common elements and common expenses and the managing entity is statutorily obligated to levy and collect assessments for such expenses from each time-share owner. §721.15(2). There is nothing to prohibit the managing entity from collecting a time share owner's taxes when other assessments are collected.

To summarize, unlike other property owners, time-share unit owners do not receive individualized tax bills or notices of proposed assessments.[3] Their managing entity receives these notices. Unlike other property owners, the time share unit owners do not pay their taxes directly to the tax collector. They pay their taxes to their managing agent just as they pay other assessments to the managing agent. However, like all other taxpayers the unit owners are given opportunities for administrative and judicial challenges to the assessments and mail, published, and, for Florida residents, personal notification of any tax deed sale.

Thus, the provisions of section 192.037 when read in para materia with Chapters 194, 197 and 721 provide an arsenal of protections and remedies for time-share period owners. This arsenal,

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[3]If the tax collector and property appraiser were required to send the tax bills and property assessments to each individual share owner, it is very likely they would be sent to the address on the owners' deeds. This address could be the actual time-share unit or the owner's address at the time he purchased the time-share period. Unless the time share owner notified the property appraiser of address changes, the likelihood that the appraiser would have the correct address and the owner would receive the tax notices is much less than when the managing entity receives and forwards the notices. For this reason, the use of the managing entity actually affords the owners more protection than they might otherwise receive.

in its entirety, must be measured against the due process and equal protection clauses of the Florida and federal constitutions.

The due process and equal protection clauses of the Florida constitution have been interpreted consistently with the federal courts' interpretations of the federal constitutional provisions. See e.g., Sasso v. Ram Property Management, 431 So. 2d 204 (Fla. 1st DCA 1983), aff'd, 452 So. 2d 932 (Fla. 1984). The analysis for alleged violations of both the equal protection and due process clauses is the same where no fundamental rights or suspect classifications are involved. United Yacht Brokers, Inc. v. Gillespie, 377 So. 2d 668 (Fla. 1979). In such a situation, the constitutionality of the challenged governmental act or legislation will be sustained if it bears a reasonable or rational relationship to a permissable legislative objective and is not discriminatory, arbitrary, or oppressive. Id. at 671. This test is frequently called the rational basis test.

Appellees cannot reasonably suggest that time-share period owners fall within any recognized suspect class. However, Appellees will argue and suggest that the legislation at issue impacts their fundamental right to own property thereby requiring analysis of the legislation under a strict scrutiny test. This argument is without merit for two reasons.

First, Appellees rely on Kass v. Lewis, 104 So. 2d 572 (Fla. 1958), to support their argument that the right to property ownership has been recognized as fundamental for purposes of strict scrutiny analysis. This case does not stand for this pro-

position, and in fact, in striking the statute at issue in Kass, this Court utilized a rational basis analysis. Id. at 577 to 578.

Second and more importantly, Appellees have not suffered any deprivation of property by virtue of the operation of section 192.037. The statute deals solely with the method for assessing and collecting taxes. The statute does not affect a right to own or alienate property. To find a fundamental right affected, this Court would have to hold that the right to an individualized (by time-share unit) property assessment and collection procedure is fundamental. Clearly, it is not. The statutes go so far as to place the duty of ascertaining the amount of taxes due on the property owner, to create a presumption that taxpayers know when their taxes are due, and to provide that no error made by the property appraiser or tax collector shall operate to defeat the payment of taxes. §197.332 and §197.142.

Great deference is afforded to legislative judgments and enactments in the areas of taxation, assessment, and collection. Eastern Air Lines, Inc. v. Department of Revenue, 455 So. 2d 311 (Fla. 1984), cert. dism'd, 106 S. Ct. 213 (1985). Every presumption in favor of the validity of the statute must be indulged and Appellees bear the burden of showing there is no rational connection between section 192.037 and the objectives it was intended to achieve. Id. at 314.

There is no question that section 192.037 establishes a class of taxpayers separate and apart from all other taxpayers. The class is composed of owners of fee time-share periods. However, the classification is only unconstitutional if it is not

reasonably related to the legitimate state purpose to be achieved by the statute. Markham v. Fogg, 458 So. 2d 1122 (Fla. 1984).

Section 192.037 was enacted to provide local property appraisers and tax collectors with a reasonable means of dealing with the unique and cumbersome problems presented by time-share development in this state. Further, the statute was designed to afford time-share unit owners the protections required by the due process clause considering the unique nature of time-share period ownership wherein a parcel of property is divided in time rather than physically and the ownership resembles an undivided interest in such parcel. Time-share period owners elect freely and voluntarily to purchase their interests in the development in this manner and receive advance notice that the managing entity will be their agent for purposes of collecting and paying taxes. §721.06(1)(h). In electing to utilize the benefits of this type of property ownership, they also elect to share all other incidents of ownership.

With time-share ownership, since each owner's interest cannot be physically separated, each owner must bear a proportionate share of the responsibilities incident to ownership to protect all owners' interests in the unit. For example, the managing entity is required to assess for common expenses necessary to maintain the property. §721.15(2). If the time share project has recreational facilities that can be utilized by all owners, the seller of the time-share project can require all owners to pay a separate fee for such facilities as an incident to ownership. §721.07(5)(i)(2). Similarly, it is important with this form of

ownership that a responsible entity be designated to ensure the proper collection of taxes from each owner so that the other owners' interests are not undermined or jeopardized. Admittedly, the Legislature could have designated the tax collector as that entity, but it is not unconstitutional to have designated the managing entity as the initial collector of taxes from each owner. Moreover, it is logical and further protects all owners for the managing entity, who is already responsible for the maintenance of the time share project and collection of common expenses, to collect the taxes imposed by local government to fund governmental services. The classification at issue achieves all of these legislative purposes without any undue hardship on the part of the property owners.

This system of collection bears a strong resemblance to the sales tax collection system in Florida. The owner of a hotel or motel who rents rooms, the lessor of real property, the theater owner, and the seller of tangible property at retail, are all required to collect and remit taxes to the state to avoid the administrative nightmare and the unbelievably cumbersome process that would be associated with a system that required each person subject to the tax to pay it to the state on all taxable transactions. Instead, the state still requires the tax to be paid, but the taxes are collected by "dealers" on a transactional basis and remitted periodically to the state. §212.03; §212.031; §212.04; 212.05, Fla. Stat. (1985).

The protections afforded by the due process and equal protection clauses are not infringed upon by this statutory

scheme. The district court's findings are erroneous for several reasons.

First, time share period owners are not the only taxpayers who are subject to some of the provisions discussed. For example, the district court argues that time-share period owners are not entitled to be listed individually on the tax assessment rolls. Notably, all taxpayers represented by fiduciaries are listed on the tax rolls under either the owner's name or the fiduciary's name. Thus, it is not unusual for a mortgagee-fiduciary to be listed in lieu of the property owner where the mortgagor includes tax payments for an escrow account in his monthly mortgage payment. The statute does not single out time share owners. It applies to all taxpayers represented by fiduciaries.

Second, the fact that the tax bill for a time-share development, which, under 12D-6.06(2)(d), Fla. Admin. Code, is a bill for a particular unit, may not be partially paid, is the same limitation imposed on other owners of an undivided interest in real property. Section 197.373 allows for partial payment when a portion of real property has been sold or is under a contract for sale and can be ascertained by legal description. Although no cases have been found on point, this statute does not allow an owner or purchaser of an undivided interest in real property to pay a portion of the taxes due on the property absent a partition of the property into two or more physical parcels. As stated previously, a time-share period owner's interest closely resembles or is in fact an undivided interest in the unit. Moreover, section 721.22 does not allow for partition of a time-share unit

unless provided for in the contract between the seller and purchaser. Appellees do not allege that their contracts allowed for partition.

Third, the district court was incorrect in the factual and legal analysis of the operation of section 192.037. An individual time-share period owner is entitled to be individually heard on any objections to a proposed assessment. §192.037(4) and Chapter 194. Likewise all of the protections of Chapter 194 as to the challenge of an assessment are available to the individual owners. §192.037(4). The district court glossed over this requirement by finding that since time-share owners are not listed on the assessment rolls individually they cannot receive individual notices as required by Chapter 194. This is false.

The original notice as to the proposed assessment is sent to the managing entity. §192.037(3). However, the managing entity then, in compliance with his fiduciary responsibilities, must timely notify the individual owners of the proposed assessment and their rights to challenge it. The statute specifically provides for individual owner participation in the assessment appeal process and this obviously includes the notifications required under Chapter 194 once the individual owner files an appeal.

Likewise, the district court's statement that time-share property owners are not individually notified of the filing of an application for a tax deed is incorrect. Section 192.037(9) expressly requires individual owner notification if a tax deed application is filed pursuant to section 197.502. The court also

glossed over this requirement by commenting that unless the time share onwer was listed on the previous year's tax roll this requirement was meaningless. This is incorrect. Section 197.502(4)(a) requires the tax collector to list on the statement provided to the circuit court "any legal titleholder of record," unless the legal titleholder and the name on the assessment rolls are the same. When a tax deed application is made pursuant to section 197.502, the tax collector is obligated to obtain an abstract or title search covering a period of time of at least twenty years prior to the date of the tax deed application. 12D-13.60-.61, Fla. Admin. Code. Any owner or lienholder of record receives notice of the tax deed application, regardless of the type of real property involved. Therefore, time-share owners receive at least the same protections afforded by section 197.502(4) to all property owners, and even more protection. Under sections 197.502(4)(a) and (f) the notice of tax deed application must be sent to both the owner of record (as the address appears on the deed) and the person in whose name the property is assessed (the managing entity). Since these will be different with time share property, two notices will always be sent whereas with other forms of real property, only one notice is required to be sent if the record owner is the same as the person on the assessment roll. However, the district court ignored the rest of the statute and improperly looked solely at the provision in section 197.502(4)(f).

The due process clauses of the Florida and U. S. Constitutions require only that persons be given notice and an opportunity

to be heard. Quay Development, Inc. v. Elegante Building Corporation, 392 So. 2d 901 (Fla. 1981); Hadley v. Department of Administration, 411 So. 2d 184 (Fla. 1982). The statute in question affords notice to the managing entity, or the individual unit owner or both in all situations in which other taxpayers receive notice. Likewise, the individual unit owner and the managing entity are provided an opportunity to be heard administratively and judicially to contest an assessment. Finally, the individual unit owner and the managing entity are entitled to sufficient notice to be heard at a tax deed sale. This is more than due process requires. Bath Club, Inc. v. Dade County, 394 So. 2d 110, 113-114 (Fla. 1981); see also, Johns v. May, 402 So. 2d 1166 (Fla. 1981).

What Appellees apparently really object to is the concept of the managing agent. However, the state, in at least one other context, utilizes the agency concept constitutionally. Specifically, the state has an interest in making sure that various businesses in this state have an agent available to receive service of process. Under section 48.151 numerous state officials are required to serve in this capacity. Thus, the agency concept is neither radical nor unique and is used to ensure an available entity for various purposes deemed necessary by the legislature.

The protections afforded by section 192.037 read in para materia with Chapters 194, 197, and 721 clearly satisfy and exceed the minimum requirements of the due process clause. They are not arbitrary or oppressive and in fact in numerous instances provide

dual protections by providing both the managing entity and the individual owner with remedies.

Moreover, the provisions of section 192.037 are rationally related to the state's interests in protecting the fiscal integrity of the tax collection and assessment process. By assigning the notice of assessment and the collection and remittance duties to the managing entity and opening up all other statutory remedies to both the time-share unit owner and the managing entity, the legislature has eliminated the bureaucratic nightmare and administrative quagmire involved in taxing time-share unit developments. The system also protects time-share owners from the default of their co-owners, a protection not available to other more traditional owners of undivided interests in property.

In summary, the district court's erroneous analysis of the statute led the court to an erroneous conclusion. Neither the due process nor the equal protection clauses of the Florida or U.S. Constitutions are violated by section 192.037, Florida Statutes.

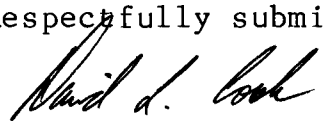
CONCLUSION

The district court's determination that Chapter 82-226 was constitutionally enacted or reenacted should be affirmed. Chapter 82-226 was within the purview of the call of the governor, but even if outside the scope of the call was properly introduced by the House and Senate, or any defect has been cured by subsequent legislative amendments and reenactments of the compilations of statutes as the official statutes of Florida.

The district court's holding that section 192.037 violates the state and federal due process and equal protection clauses is based upon an erroneous analysis of section 192.037 and should be reversed.

The summary final judgment entered by the trial court which sustained the constitutionality of Chapter 82-226 and specifically section 192.037 should be reinstated.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished by U. S. Mail this 21st day of November, 1986, to: BENJAMIN T. SHUMAN, ESQ., 611 North Pine Hills Road, Orlando, FL 32808; J. TERRELL WILLIAMS, ESQ., Assistant Attorney General, Tax Section, The Capitol, Tallahassee, FL 32399-1050; STEPHEN MILES, ESQ., 2727 13th Street, St. Cloud, FL 32769; and LARRY E. LEVY, ESQ., Post Office Box 82, Tallahassee, FL 32301.

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