11-88

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO. 69,519

ROBERT DAY, Osceola County Tax Appraiser; MURRAY A. BRONSON, Osceola County Tax Collector; and RANDY MILLER, Executive Director of the Department of Revenue of the State of Florida;

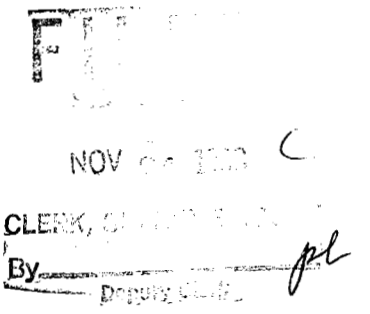
Appellants,

vs.

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.



APPELLANTS' BRIEF

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STATEMENT OF THE CASE

This case arises out of an action by Appellees in the Circuit Court in and for the Ninth Judical Circuit, Osceola County, Florida, contesting the ad valorem assessment of Appellees' time-share development, High Point Condominium, by Appellant, Robert Day, Osceola County Property Appraiser, pursuant to §192.037, Florida Statutes. It should be noted that the "managing entity" of the development was one of the parties initiating this case. Appellees contended, among other things, that that statute unconstitutionally denies due process and equal protection of the law to the owners of fee time-share estates. On motions by both parties the trial court entered a Summary Final Judgment on August 15, 1985 (A-1) upholding both the assessment and §192.037, and Appellees appealed that decision to the Fifth District Court of Appeal.

The District Court, in an opinion filed August 14, 1986 (A-5), ruled that §192.037 does deny time-share owners due process and equal protection because it precludes them from being listed on the tax rolls, from paying their own taxes, from receiving notice of and opportunity to contest assessments, and places them at a substantial disadvantage relative to other property owners in avoiding penalties for nonpayment of taxes. The District Court therefore held the statute unconstitutional, denied motions for rehearing on September 23, 1986, and this appeal was filed on October 21, 1986 by the Property Appraiser and State Department of Revenue.

POINTS INVOLVED

I.

DID THE FIFTH DISTRICT COURT OF APPEAL ERR IN HOLDING THAT §192.037, FLORIDA STATUTES, UNCONSTITUTIONALLY DENIES THE OWNERS OF FEE TIME-SHARE ESTATES IN REAL PROPERTY DUE PROCESS AND EQUAL PROTECTION OF THE LAW?

II.

DID THE FIFTH DISTRICT COURT OF APPEAL ERR IN HOLDING §192.037, FLORIDA STATUTES, UNCONSTITUTIONAL IN ITS ENTIRETY?

SUMMARY OF ARGUMENT

I.

DID THE FIFTH DISTRICT COURT OF APPEAL ERR IN HOLDING THAT §192.037, FLORIDA STATUTES, UNCONSTITUTIONALLY DENIES THE OWNERS OF FEE TIME-SHARE ESTATES IN REAL PROPERTY DUE PROCESS AND EQUAL PROTECTION OF THE LAW?

The District Court erred in finding that §192.037, Florida Statutes, denies the owners of fee time-shares estates in real property due process and equal protection of the law.

A fee time-share estate is a unique interest in real property which the owner thereof voluntarily acquires subject to reasonable governmental regulations thereupon; which imposes a disproportionate burden on government; and, which the legislature has both a rational basis and a compelling state interest in treating differently than more conventional forms of ownership. Such treatment is not arbitrary or discriminatory and does not deny equal protection.

The statute in question, when considered in light of the other statutes applicable to time-share developments, does not deny fee time-share owners due process of law because those owners may exercise through the managing entity of their development all rights and privleges afforded other property owners. Nor does the statute violate due process in an agency context by "appointing" the managing entity as agent for the fee time-share owners. The applicable laws compel no one to purchase a time-share estate, they merely impose rational and practical conditions upon those who choose that form of ownership in the same manner, for example, as do the statutes requiring creation of and membership in whole-unit condominium owner's associations.

II.

DID THE FIFTH DISTRICT COURT OF APPEAL ERR IN HOLDING §192.037, FLORIDA STATUTES, UNCONSTITUTIONAL IN ITS ENTIRETY?

The District Court needlessly struck down the entirety of §192.037, Florida Statutues, thus removing the authority of the

Property Appraisers of this state to appraise individual fee time-share estates at their fair market values due to the earlier ruling of the same Court in Hausman v. VTSI, Inc. 42 So.2d 428 (5 DCA Fla. 1985) to the effect that in the absence of Subsection (2) of §192.037, Property Appraisers were without authority to individually appraise fee time-share estates. If this Court upholds the District Court herein, then each fee time-share estate or unit week in an apartment will essentially have to be valued at 1/52 of the value of the apartment as a whole-unit condominium and not at what a willing buyer would pay a willing seller for that unit week.

This result could and should have been avoided by upholding the constitutionality of those portions of §192.037 which authorize the Property Appraiser to appraise each individual fee time-share estate or unit week, rather than deriving those values from the overall value of the apartment as a whole-unit condominium.

I.

DID THE FIFTH DISTRICT COURT OF APPEAL ERR IN HOLDING THAT §192.037, FLORIDA STATUTES, UNCONSTITUTIONALLY DENIES THE OWNERS OF FEE TIME-SHARE ESTATES IN REAL PROPERTY DUE PROCESS AND EQUAL PROTECTION OF THE LAW?

The Fifth District Court has held that § 192.037, Florida Statutes, is unconstitutional because it does not afford the owners of fee time-share estates the same rights with regard to assessment, billing and collection of ad valorem taxes as are afforded other real property owners by the laws of State of Florida. Essential to this holding is the finding by the District Court that the statute improperly appoints the "managing entity" of the time-share property as the agent of the individual owners of fee time-share estates. The District Court ruling ignores the unique nature of fee time-share estate ownership, the essence of the managing entity, and the statutory safeguards imposed upon the managing entity.

In a sense fee time share estate ownership is simply a new form of joint ownership of real property, and it is a given that when one elects to own property jointly with others, regardless of the particular form of that joint ownership, one sacrifices total control over the destiny of that property. A fee time-share estate owner chooses that unique form of ownership freely and voluntarily, subject to the laws and regulations applicable thereto, and must be presumed to know that his rights in that property are necessarily limited by the very nature of the fee time-share estate. The time-share owner is surely more in control of his property rights and less affected by operation of law, so to speak, than one who falls heir to joint ownership through intestacy laws or dissolution of marriage, for example.

A fee time-share estate is most definitely a unique form of ownership, as evidenced by the many pages of the Florida Statutes devoted to the creation, organization, marketing and operation of time-share developments. The most common form of fee time-share estate essentially consists of the ownership of an apartment for one week during each year. Is it not reasonable that the owner of an apartment for one week each year be treated somewhat differently for ad valorem taxation purposes than one who

owns an apartment or other parcel of real property three hundred sixty-five days of every year? The case of Eastern Air Lines v. Department of Revenue, 455 So.2d 311 (Fla. 1984) directly addresses the principle involved.

In Eastern Air Lines, supra, this Court was dealing with an airline's contention that it was denied equal protection by a fuel tax statute that treated airlines differently from other common carriers. The Court pointed out that in the area of taxation the legislature possesses great freedom in classification and that the burden is on the those attacking the statute in question to "negate every conceivable basis which might support it". The Court summarized its holding on the equal protection issue in language which can be directly applied to the instant case: (P.34)

> We agree with the circuit court's conclusion that Eastern has not met its burden in attacking the classification made here. They have failed to demonstrate that a hostile and oppressive discrimination has been made. There are many obvious distinctions between public road and highway transportation of persons and property and air transportation upon which the classification at issue could rationally be based. The modes of transportation are inherently and essentially different. The classification drawn does not violate concepts of equal protection.

It is submitted that fee time-share ownership affords advantages unavailable in other forms of real property ownership, imposes disproportionate burdens upon government,[1] and is inherently and essentially different from other forms of ownership. There therefore exists both a rational basis and a compelling state interest to support the different treatment accorded fee time-share estates by §192.037. That treatment does not deny the owners of those estates equal protection because it is not arbitrary and thus does not wrongfully discriminate against them.

1. a fifty unit time-share development, for example, will generate in excess of 2500 separate tax parcels under the District Court ruling herein, as opposed to one parcel under §192.037 or fifty parcels for a comparable whole-unit condominium development.

Appellant likewise does not believe that §192.037 denies due process to fee time-share owners. In this regard, it should be kept in mind that the managing entity of a time-share development is controlled by the owners of the individual fee time-share estates. §721.13 (1), Florida Statutes, provides as follows:

> Before the first sale of a time-share period, the developer shall create or provide for a managing entity, which may be the developer, a separate managing firm, or owner's association, or some combination thereof...

The immediately succeeding statute, §721.14, Florida Statutes, clearly states that the owners of fee time-share estates, through the owner's association, have the right to discharge the managing entity and obtain another managing entity if they so desire. Further, if the owner's association fails to obtain another managing entity, any individual time-share estate owner has the right to the appointment of a receiver to perform the duties of the managing entity upon application to the Circuit Court therefor. Thus, the fee time-share estate owner through the managing entity can exercise all of the rights and privileges of any individual owner of real property and the litany of "time-share owners are not" recited by the District Court herein is not entirely accurate.

Surely the legislature was not without rational basis in presuming that the owners of fee time-share estates will be desirous of preserving and protecting their estates from loss through non payment of taxes, and that these owners, being in control of the managing entity, will see to it that satisfactory arrangements are made for the collection and timely payment of ad valorem taxes, doubtless through the simple expedient of increasing their regular periodic assessments to generate a sufficient escrow fund to pay the taxes as well as other common expenses. Likewise, it can reasonably be presumed that the individual time-share estate owners will be concerned with minimizing their tax assessments and tax liability, and will therefore see to it that the managing entity protests any excessive assessment.

Finally, the question of the "agency" of the managing entity appears a less than sufficient basis for striking down §192.037. Appellant is not

aware of any constitutional right to acquire a time-share estate free of reasonable governmentally imposed regulations and restrictions applicable to all such estates.

From the outset of his relationship with a prospective owner, the time-share developer is required to disclose that the managing entity will be the agent of the owner for ad valorem tax purposes. §721.06 (1)(h), Florida Statutes, requires that every contract for purchase of a time-share estate contain the following language in "conspicuous type":

> FOR THE PURPOSE OF AD VALOREM ASSESSMENT, TAXATION AND SPECIAL ASSESSMENTS, THE MANAGING ENTITY WILL BE CONSIDERED THE TAX-PAYER AS YOUR AGENT PURSUANT TO §192.037, FLORIDA STATUTES.

The agency relationship between owner and managing entity is thus created by the contract for purchase of the fee time-share estate, and even though the contract provision is required by law, it cannot be argued that the owner did not freely and voluntarily agree to the creation of the agency relationship when he signed the contract to purchase his time-share estate.

The legislature neither coerces nor commands anyone to purchase a time-share estate, it simply imposes a logical and practical condition upon those who choose to purchase such estates. In fact, the legislature has gone so far as to afford the purchaser of a fee time-share estate the right to cancel his contract of purchase at any time within ten days after execution, §721.06 (1) (i), Florida Statutes. To further safeguard the rights of the fee time-share owner the legislature has specifically provided in §721.13 (2), Florida Statutes, that the managing entity of the time-share development shall be a fiduciary to the owners, thus imposing upon the managing entity the highest standard of care in dealing with the owners' funds and property rights.

Appellant is unable to perceive a fundamental distinction between the statutory "appointment" of the managing entity as agent for the fee time-share estate owner in connection with tax assessment and collection and the basically identical principal embodied in §§721.13 and 721.15, Florida Statutes, which require that the managing entity maintain and pay all expenses of the time share development, assessing the individual owners therefore, or the requirements of §§718.111 and 718.113, Florida Statutes,

which mandate that a whole-unit or non-time-share condominium have an association which must be the agent of all owners therein for the maintenance of common elements. These are simply reasonable, common sense provisions necessitated by unique forms of property ownership. None of these provisions denies anyone due process of law, and neither does §192.037.

II.

DID THE FIFTH DISTRICT COURT OF APPEAL ERR IN HOLDING §192.037, FLORIDA STATUTES, UNCONSTITUTIONAL IN ITS ENTIRETY?

The District Court decision in this case simply strikes down §192.037, Florida Statutes, in its entirety, without regard for the fact that a very material portion of that statute is not only constitutional but essential to lawful assessment of fee time-share estates.

A fee time-share estate is either merely another fractional interest in real property not subject to separate assessment and collection for ad valorem tax purposes, or it is a separate, individually assessed and collected parcel of real property. If it is only a fractional interest in real property then each owner thereof is no more entitled to separate assessment, billing and collection than any other joint owner of real property and the constitutional questions raised by the District Court in the instant case are inapposite. If, however, a fee time-share estate is a separate parcel of real property, as the language of the District Court opinion would indicate, then the Court has gone too far in striking down the valid statutory authority to assess it as such along with those provisions which the Court found constitutionally objectionable.

The holding of the District Court herein appears to be based upon the premise that each individual fee time-share estate is a separate parcel of real property for ad valorem tax purposes, and statutory authority for that position can be derived from §§721.03 (5) and 721.05 (24), Florida Statutes.[1] Having so recognized the independent status of individual fee time-share estates, the District Court nevertheless proceeded to hold all of §192.037 unconstitutional, including the very portion which logically provides that the valuation of a time-share development is the combined value of the individual fee time-share estates comprising that development.

1. §721.03 (5) The treatment of time-share estates for ad valorem tax purposes and special assessments shall be as prescribed in chapters 192 through 200.

§721.05 (24) "Time-share estate" means a right to occupy a time-share unit, coupled with a freehold estate or an estate for years with a future interest in a time-share property or a specified portion thereof.

The Court clearly states that each fee time-share estate owner should be separately assessed, noticed and billed for ad valorem taxes, then, in light of the previous holding of the same District Court in Hausman v. VTSI, Inc. 42 So.2d 428 (5th DCA Fla. 1985), removes the Property Appraisers' authority for making such individual assessments by declaring §192.037 (2) invalid along with the remainder of the statute.

Subsection (2) of §192.037 provides:

> (2) Fee time-share real property shall be listed on the assessment rolls as a single entry for each time-share development. The assessed value of each time-share development shall be the value of the combined individual time-share periods or time-share estates contained therein.

In Hausman, supra, the Fifth District Court held that prior to the enactment of §192.037 (2), the Property Appraiser could not separately appraise the individual fee time-share estates and derive the value of the development therefrom, stating at page 430 of that opinion:

> "The existing statutes did not authorize Hausman to appraise the partial time-share interests created in VTSI's condominium units. Due to this lack of authority, the trial court correctly concluded that Hausman's appraisal based on the value of the unit weeks was unlawful."

The Court went on to state that its holding would be of "limited precedential value" since §192.037 (2) had been enacted by the legislature at the time the Hausman opinion was rendered. In view of the District Court ruling herein invalidating subsection (2) along with the remainder of §192.037, the precedential value of Hausman, supra, no longer seems so limited, and by virtue thereof the Property Appraisers are faced with the prospect of assessing individual fee time-share estates at less than their fair market value.

Appellant must assume that if the District Court decision herein stands, Property Appraisers will be operating under the mandate of Hausman, supra, which effectively requires that they appraise time-share developments as whole-unit condominiums, as well as under the instant case and §721.03 (5), Florida Statutes, which clearly require that each fee time-share estate be treated as an individual parcel of real property. Thus, the Property Appraisers must appraise each time-share apartment as a

whole-unit condominium, doubtless resulting in a value significantly less than the sum of the values of the fee time-share estates in that apartment, then divide that appraised value by the number of individual unit weeks (fee time-share estates) comprising that apartment to arrive at the taxable value of each unit week - a value which cannot help but be far lower than the fair market value as indicated by what willing buyers are paying willing sellers for such unit weeks.

The District Court could and should have avoided this situation by upholding the constitutionality of those portions of §192.037 having to do with valuation method as opposed to procedures for notice, billing and collection of ad valorem taxes. Specifically, the second sentence of Subsection (2), all of Subsection (4), and the last clause of Subsection (9) could have been excluded from the holding of unconstitutionality. §192.037 would then read as follows:

> The assessed value of each time-share development shall be the value of the combined individual time-share periods or time-share estates contained therein... all rights and privileges afforded property owners by Chapter 194 with respect to contesting or appealing assessments shall apply 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... if, however, an application is made pursuant to s.197.502, the time-share period titleholders shall receive the protections afforded by Chapter 197.

The quoted provisions are not so inseparably connected with the remainder of §192.037 as to be dependent thereon and they are certainly capable of being executed in accordance with the apparent legislative intent, which was to provide for the appraisal of individual fee time-share estates at their fair market values and not at the unrealistically low values generated by appraising them as whole-unit condominiums. In Kass v. Lewin, 104 So.2d 572 (Fla. 1958), this court pointed out that staututes come before the court with a presumption of constitutionality, and stated at page 577:

> Further, although a portion of the act be found to be unconstitutional, we must uphold the remainder if that which is left is complete in itself, sensible, capable of being executed and wholly independent of that which is rejected.

Appellant submits that the principle set forth in Kass, supra, should have been applied by the District Court herein.

The Fifth District Court does not appear to find fault with the valuation method prescribed by §192.037 (2). By more carefully delineating what it found to be the constitutionally invalid provisions of the statute, the Court could have left intact the statuory basis for individual assessment of fee time-share estates and thereby avoided creating a situation wherein such estates must be assessed at less than their fair market value.

CONCLUSION

Appellant requests that this Court declare that §192.037, Florida Statutes, does not deprive fee time-share estate owners of either due process or equal protection of the law, reverse the ruling of the Fifth District Court of Appeal herein, and reinstate the Summary Final Judgment entered by the trial court.

In the alternative, should this Court agree that the assessment and collection procedures mandated by §192.037 are unconstitutional, Appellant urges the Court to find that those portions of the statute dealing with the method of appraisal of time-share estates are valid, not dependent upon the remainder of the statute, and should be excluded from the holding of unconstitutionality.

Respectfully submitted,

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