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IN THE SUPREME COURT OF THE STATE OF FLORIDA

ROBERT DAY & DEPARTMENT
OF REVENUE,

Appellants,

vs. CASE NO. 69,519

HIGH POINT CONDOMINIUM
RESORTS, LTD.,

Appellees.

CLERK
By

On Appeal from the District Court of Appeal, Fifth District,
State of Florida, Case No. 85-1403

INITIAL BRIEF OF APPELLANT,
DEPARTMENT OF REVENUE, STATE OF FLORIDA

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PRELIMINARY STATEMENT

In this Inital Brief, Appellant, Randy Miller, as Executive Director of the Department of Revenue, State of Florida, will be referred to as the "Department." The Co-Appellant, Robert Day, as Property Appraiser of Osceola County, Florida, will be referred to as the "Property Appraiser." The Appellees, High Point Condominium Resorts, Ltd., High Point World Resort Condominium Association, Inc., and Robert H. Harriss, Jr., will be generally referred to herein as the "Taxpayers." The trial court in this case was the Honorable Rom Powell of the Ninth Judicial Circuit Court, in and for Osceola County, Florida, which court will be referred to as the "trial court." The Fifth District Court of Appeal of Florida will be referred to as the "District Court." The symbol (A.) followed by a page number will refer to the separate Appendix of the Department's Initial Brief. The symbol (R.) followed by a page number will refer to the Record on Appeal.

STATEMENT OF THE CASE & FACTS

In the 1982 special session, the Legislature enacted the subject provisions of s. 192.037, Fla. Stat. Pursuant to these newly created statutory provisions, the Property Appraiser assessed the subject fee time-share estates, combined them into single listings on the tax rolls for the years 1983 and 1984 and sent the tax bills to the "managing entity" of High Point World Condominium Resorts, Inc. (R. 1-19, 232-249).

The managing entity and other Plaintiffs then filed timely actions challenging both the constitutionality of s. 192.037 and, in the alternative, the propriety of the valuations placed on the subject property by the Property Appraiser. (R. 1-19, 232-249). A Stipulation of Compromise and Settlement was subsequently executed by all parties to the suit wherein the valuation issues were settled (R. 129-134). This Stipulation of Compromise and Settlement was subsequently approved by the trial court by the entry of a partial final summary judgment. (R. 135-195).

The suit filed in the trial court by the "managing entity" placed into issue the legality of the assessment of each and every fee time-share estate owned by the respective individual owners of fee time-share estates at High Point Condominium Resorts. (R. 1-19, 232-249). There was absolutely no contention presented by the Taxpayers in the trial court that the actions of

the Property Appraiser and or Tax Collector pursuant to s. 192.037 resulted in any notices of delinquent taxes being issued, tax certificates being sold, application for tax deeds made or the issuance of any tax deeds affecting any fee time-share estate at High Point Condominium Resorts. (R. 1-19, 232-249).

Motions for summary judgment were then filed on behalf of the plaintiffs and defendants dealing with the constitutional issues raised by the plaintiffs in the trial court. A summary final judgment was subsequently entered by the trial court on August 15, 1985, wherein the trial court upheld the constitutionality of s. 192.037, Fla. Stat., in all respects. (A. 6-9).

The summary final judgment of the trial court was timely appealed by the Taxpayers to the district court. On August 14, 1986, the district court filed its opinion reversing the summary final judgment of the trial court and holding facially unconstitutional the provisions of s. 192.037 on due process and equal protection grounds. (A. 1-5).

Motions for Rehearing were filed on behalf of the Appellants and Appellees. Both Motions for Rehearing were subsequently denied by the district court on September 23, 1986. The Department and the Property Appraiser then filed a timely appeal of the District Court decision pursuant to the provisions of Fla. Rule of App. P. 9.030(a)(1)(A)(ii).

SUMMARY OF ARGUMENT

In the last 10 years, a new concept of marketing real property in Florida has emerged by the creation of "fee time-share estates" in real property. This novel concept of subdividing a single condominium unit into as many as 50 separate fee time-share estates has greatly enhanced the aggregate market value of the condominium units, to the delight of the real estate developers.

However, this new concept of a temporal subdivision of condominium units into many individual fee time-share estates posed unique problems with respect to the existing statutory scheme in Florida for assessment and collection of ad valorem taxes on parcels of real property. The potential geometrical increase from approximately 200 to up to 10,000 individual taxpayers in a 200 unit condominium project committed to fee time-share estates presented a potential administrative and financial crisis on the part of the assessment and collection officials in the State of Florida.

In response to this potential crisis in the ad valorem assessment and collection process, the Florida Legislature enacted in a 1982 special session ss. 53-61 of Ch. 82-226, Laws of Fla. (hereafter referred to as the "Act"). Sections 53-61 of the Act instituted comprehensive changes in the statutory provisions relating to the ad valorem taxation of fee time-share real property, including the creation of the subject provisions of s. 192.037, Fla. Stat.

The decision of the district court holding the provisions of s. 192.037 unconstitutional erroneously assumes that each owner of a fee interest in real property must be identified on the tax roll and must be separately billed in order for the tax assessment to be constitutionally valid. However, this assumption by the district court has no precedent in the established tax law of this state. Furthermore, the record on appeal is totally void of any evidence from which this Court could find that the individual fee time-share estate owners at High Point Condominium Resorts have suffered, or assuredly will suffer, any injury as the result of the challenged statutory scheme.

In view of the potential devastating administrative and financial burdens imposed on local governments inherent in sending tax notices and bills to numerous fee time-share estate owners residing in other states and countries, there was a rational basis to support the challenged tax scheme set forth in s. 192.037, Fla. Stat., utilizing a local "managing entity" statutorily responsible for payment of ad valorem taxes as agent for the of the respective nonresident fee time-share estate owners. This "managing entity" statutory agent concept is a recognized approach also utilized by the States of Hawaii, Colorado and Vermont.

Finally, the district court's concern over the necessity of a "consensual agreement" to support the creation of an agency relationship appears to be clearly obviated by the express provisions of s. 721.06(h), Fla. Stat. Section 721.06(h)

requires each prospective owner of a fee time-share estate to agree in writing in the contract for sale that the "managing entity" will be the agent for ad valorem tax purposes. These critical provisions of <u>s. 721.06(h) have not been challenged by the Taxpayers and are not at issue in this proceeding.</u>

ARGUMENT

THE DECISION OF THE DISTRICT COURT HOLDING FACIALLY UNCONSTITUTIONAL THE PROVISIONS OF SECTION 192.037, FLA. STAT., PERTAINING TO AD VALOREM TAXATION OF FEE TIME-SHARE REAL PROPERTY ON DUE PROCESS AND EQUAL PROTECTION GROUNDS CONSTITUTES REVERSIBLE ERROR.

In commencing its argument, the Department suggests that a proper analysis of the constitutional issues raised in this proceeding should be structured within the framework of the following basic guidelines applicable to judicial review of actions challenging the constitutionality of tax statutes:

1. The person making the constitutional attack must plead and prove that he has suffered actual damage or injury due to the challenged statutory scheme. Henderson v. Antonacci, 62 So.2d 5, 8 (Fla. 1952); and Gaulden v. Kirk, 47 So.2d 567, 572 (Fla. 1950).

2. It is a fundamental rule of constitutional law frequently cited by this Court that acts of the Legislature are presumed to be valid, and that the courts should indulge every presumption in favor of the constitutional validity of a challenged statute. Eastern Airlines, Inc. v. Dept. of Revenue, 455 So.2d 311 (Fla. 1984); Just Valuation & Taxation League, Inc. v. Simpson, 209 So.2d 229 (Fla. 1968); and Gaulden v. Kirk, supra.

3. The burden on a person attacking a statute is an unusually heavy one in that this Court has held that the challenging party has the burden of proving its constitutional validity ". . . beyond a reasonable doubt." (e.s.). Knight & Wall Co. v. Bryant, 178 So.2d 5, 8 (Fla. 1965); cert. den. 383 U.S. 958 (1966).

4. In taxation, even more than other fields, the Legislature possesses the greatest freedom in classification; and the burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it. Eastern Air Lines v. Dept. of Revenue, supra, at page 314; Just Valuation & Taxation League, Inc. v. Simpson, supra, at page 323; and Madden v. Kentucky, 309 U.S. 83, 60 S.Ct. 406, 84. L.Ed. 590 (1940).

5. If any state of facts can be conceived of which would sustain the reasonableness of an act of the Legislature, then the courts should indulge the presumption that such state of facts exists and justifies the enactment. State v. Bales, 232 So.2d 9, 11 (Fla. 1977).

A. THE RECORD ON APPEAL IS UTTERLY VOID OF ANY SHOWING THAT THE INDIVIDUAL OWNERS OF THE FEE TIME-SHARE ESTATES HAVE SUFFERED ANY ACTUAL INJURY DUE TO THE CHALLENGED STATUTORY SCHEME SET FORTH IN SECTION 192.037, FLA. STAT.

The Department respectfully submits that it is not necessary for this Court to expend any substantial judicial time and effort in attempting to do a detailed analysis of the constitutional claims raised on behalf of the individual owners of fee time-share estates by the Taxpayers as set forth in the decision of the district court. This conclusion is warranted due to the total failure of the Taxpayers to comply with guideline number 1 above of proving that the individual owners of fee time-share estates at High Point Condominium Resorts have suffered, or assuredly will suffer, actual damage or injury due to the challenged statutory scheme.

Under Point II of their initial brief filed with the District Court, the Taxpayers' counsel posed a number of hypothetical adversities that might face an individual owner of a fee time-share estate as a result of the implementation of the provisions of s. 192.037, Fla. Stat. However, the Taxpayers' hypotheticals [and the district court's opinion] overlook the critical fact that the record on appeal is totally devoid of any evidence from which the trial court or the appellate courts could reasonably conclude that any individual owner of a fee time-share estate at High Point Condominium Resorts has suffered, or surely will suffer, injury due to implementation of the statutory provisions of s. 192.037.

One of the leading Florida cases discussing the issue of a requisite showing of some present (or imminently probable) injury on the part of a plaintiff attacking the constitutionality of a statute is Henderson v. Antonacci, supra. On page 8 of the Henderson opinion, this Court observed as follows:

> It is a well established principle that the courts will not declare an act of the legislature unconstitutional unless its constitutionality is challenged directly by one who demonstrates that he is, or assuredly will be, adversely affected by it. . . . (e.s.).

Furthermore, in the landmark case of Gaulden v. Kirk, supra, this Court upheld the constitutionality of the Florida Revenue Act of 1949 by ruling in its opinion that:

> . . . [O]ne will not be heard to question the constitutionality of a legislative enactment except insofar as he may be able to show that it adversely affects him. (citations omitted). Id., at page 572.

The possibility of injury to the Taxpayers at sometime in the future is insufficient as a matter of law to constitute the necessary present, adverse interest that must be demonstrated in order for a complaining party to be entitled to a declaratory decree passing on the validity of the action of any state, county or municipal agency or public official. See, City of Pensacola v. Johnson, 28 So.2d 905 (Fla. 1947); and Okaloosa Island L. Association, Inc. v. Okaloosa Island Authority, 308 So.2d 120 (Fla. 1st DCA 1975).

For instance, the Taxpayers suggested in Point II of their initial brief below the following possibilities:

(1) That a negligent "managing entity" might fail to

collect the taxes from some of the owners of time-share estates and that some of the other time-share owners might be required to pay the expenses of the foreclosure of lien by the association. This might result in the loss of lien rights against the defaulting owners because of prior liens say the Taxpayers. However, there was absolutely no evidence before the trial court of any such failure on the part of the "managing entity" in this case. It is undisputed here that the "managing entity" made a timely good faith payment of the taxes admitted to be due and owing as required by s. 194.171(3),. Fla. Stat.

(2) That, as the individual owner of a time-share estate, you ". . . may thereby be denied your right to timely attack the valuations [of your property] even though Section 192.037(4) pays lip service to such a right. Id., at 16." However, once again, there was absolutely no evidence or even any contention presented by the Taxpayers before the trial court that any individual owner of a fee time-share, at High Point Resorts was denied his right to timely attack the valuations in the instant case! To the contrary, as admitted by the Taxpayers' in their Statement of Facts in their initial brief in the district court, a timely judicial challenge to the valuations of all the subject fee time-share estates at High Point Condominium Resorts was made below on behalf of all the owners of fee time-share estates. This timely challenge resulted in a Stipulation of Compromise and Settlement of the valuation issues and a subsequent Final Judgment entered by the trial court based upon this Stipulation of Compromise and Settlement.

(3) That the challenged statutory provisions are defective because they do not afford the individual owner of a fee time-share estate the right to contest the assessment of his particular fee time-share estate. This speculative scenario obviously assumes that the managing entity has not taken the initiative to challenge the assessments at a time-share resort in behalf of all of the fee time-share owners as expressly authorized by the provision of s. 192.037. Once again, the Taxpayers posed a hypothetical situation having no basis in fact in the evidence of record. As stated above, it is undisputed in this proceeding that the suit filed in the trial court by the "managing entity" and other plaintiffs below did place into issue the validity of the assessment of each and every fee time-share estate on behalf of each and every fee time estate titleholder.

It can be seen from above that the list of "potential horribles" raised by the Taxpayers in the trial court and the district court are merely speculative possibilities having absolutely no basis in the facts of record. Hypothetical "horribles" posed solely in argument of counsel and totally unsupported by the record obviously do not constitute a basis for the courts to declare a statute facially unconstitutional! Consequently, the constitutional Due Process and Equal. Protections claims relating to the individual owners of fee time-shares at High Point Condominium Resorts should be summarily denied.

B. SEVERAL OF THE BASIC CONCLUSIONS OF THE DISTRICT COURT IN ITS OPINION ARE DIRECTLY REPUGNANT TO THE EXPRESS PROVISIONS OF SECTION 192.037, FLA. STAT.

The decision of the District Court is reported as High Point Condominium Resorts v. Day, 494 So.2d 508 (Fla. 5th DCA 1986). On page 510 of its opinion, the district court concluded as follows:

> . . . Other real property owners, as taxpayers on the assessment roll, are entitled to informally confer with the property appraiser regarding the correctness of the assessment (§194.011(2), Fla. Stat.) - time-share owners are not. Other real property owners, as taxpayers on the assessment roll, are entitled to petition the property appraisal adjustment board (§§194.011(3), 194.013, 194.032, Fla. Stat.) - time-share owners are not. Other real property owners as taxpayers on the assessment roll are entitled to petition the property appraisal adjustment board, are also entitled to be notified by first-class mail of the board decision (§194.034(2), Fla. Stat.) - time-share owners are not. Other real property owners, as taxpayers on the assessment roll, are entitled to bring an action to contest the tax assessment (§§194.036(2), 194.171, 194.181(1)(a), Fla. Stat.) - time-share owners are not. . . . (A. 3).

The Department submits that the above conclusions of the district court obviously misapprehend or overlook the express provisions of subsection 192.037(4), Fla. Stat., which read as follows:

> 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-shareing plan and to each person having a fee interest in a time-share unit or time-share period. (e.s.).

The above cited provisions of s. 192.037(4) express the clear legislative intent that each individual owner of a fee time-share unit or time-share period shall have all of the legal rights to contest his or her proportionate share of the combined time-share assessment as is provided to all other property owners by Ch. 194 of the Florida Statutes. The provisions of Ch. 194 provide in Part I for administrative review of tax assessments by the property owner filing a petition with the property appraisal adjustment board (ss. 194.011 - 194.037). In addition, Part II of Ch. 194 provides for the right of judicial review by a property owner filing a de novo action in the circuit court challenging a tax assessment. See, ss. 194.171, Fla. Stat., et al.

The district court's conclusion that the provisions of s. 192.037 do not entitle the individual owners of fee time-share estates the legal right to seek administrative review from the property appraisal adjustment board or the right to file a de novo action in the circuit court challenging the valuation placed by the property appraiser on the proportionate share of the combined assessment, in essence, renders the provisions of s. 192.037(4) meaningless and of no force and effect. This ruling apparently overlooking the express provisions of s. 192.037(4) violates a basic rule of statutory construction that <u>it should never be presumed that the Legislature intended to enact meaningless and useless legislation, and it must be assumed that provisions enacted by the Legislature are intended to have some useful purpose</u>. See, <u>Smith v. Piezo Technology & Professional</u>

Administrators, 427 So.2d 182 (Fla. 1983); Dickinson v. Davis, 224 So.2d 262 (Fla. 1969); and City of Indian Harbour Beach v. City of Melbourne, 265 So.2d 422 (Fla. 4th DCA 1972).

On page 510 of its opinion, the district court also concluded that ". . . Other real property owners are entitled to be notified of the application for a tax deed (§§197.522(1)(a), (b), 197.522(2), Fla. Stat.) - time-share owners are not" (A. 3). However, this conclusion of the district court overlooks the plain provisions of subsection 192.037(9), Fla. Stat., which read as follows:

> (9) All provisions of law relating to enforcement and collection of delinquent taxes shall be administered with respect to the time-share development as a whole and the managing entity as an agent of the time-share period titleholders; <u>if, however, an application is made pursuant to s. 197.502, the time-share period titleholders shall receive the protections afforded by ch. 197</u>. (e.s.).

The above cited provisions of s. 192.037(9) express the clear intent of the Legislature that individual owners of fee time-share periods or estates would be entitled to all of the due process and notice requirements afforded by Ch. 197 in the event that an application for tax deed were to be made pursuant to the provisions of s. 197.502, Fla. Stat. (1985), formerly s. 197.241, Fla. Stat. (1983). These statutory provisions appear to place an affirmative duty on the Tax Collectors to obtain from the managing entity the name and addresses of the individual fee time-share estate owners and to provide each of them with the

statutory notice in the event that an application for tax deed is filed by a holder of a tax certificate.

The Department submits that this conclusion of the district court that the provisions of s. 197.037 [and particularly s. 197.037(9)] do not provide the individual owners of fee time-share periods or estates the legal right to be notified in the event that an application for a tax deed is filed would also render the cited provisions of s. 192.037(9) meaningless and no force and effect. Such a judicial ruling likewise violates the above discussed rule of statutory construction "that it should never be presumed that the Legislature intended to enact meaningless and useless legislation, and it must be assumed that the provisions enacted by the Legislature are intended to have some useful purpose."

On page 511 of its opinion, the district court further concluded that:

> . . . The property appraiser is also required to annually notify the managing entity of the 'proportions' to be used in allocating the valuation, taxes, and assessments on the time-share property among the time-share estate onwers (§192.037(3)). Query: Does 'proportions' relate to the physical units and common property or does it also include value considerations as to the time element? Obviously all weeks are not equal because in every location the use of the property at some seasons of time is far more valuable than its use at other seasons. As to time-share owners this very important value factor is apparently left to the discreton of the managing entity which may own some some time-share periods, and, therefore, have conflicts of interest with individual time-share owners as to taxes and the relative value of time periods as to the same unit. . . . (A. 4).

The Department would first note that the Taxpayers never raised this "proportions" issue in either the trial court or in their initial or reply briefs filed in the district court. The Department also respectfully submits that this cited conclusion of the district court on page 511 of its opinion overlooks or misapprehends the express provisions of subsection 192.037(2) and (3), which read as follows:

> (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.
>
> (3) The property appraiser shall annually notify the managing entity of the proportions to be used in allocating the valuation, taxes, and special assessments on time-share property among the various time-share periods. Such notice shall be provided on or before the mailing of notices pursuant to s. 194.011. Ad valorem taxes and special assessments shall be allocated by the managing entity based upon the proportions provided by the property appraiser pursuant to this subsection. (e.s.).

The Department contends that the above cited provisions of s. 192.037(2) and (3) evidence the clear intent of the Legislature that the "proportions" to be supplied by the property appraiser to the managing entity constitute merely ministerial allocations by the managing entity of the actual valuations previously determined by the property appraiser of the respective individual time-share unit periods or weeks, which are then combined into one listing of the entire time-share development as one parcel for the purpose of recording on the assessment roll.

Thus, the allocation duties of the managing entity are purely ministrial in nature, i.e., determining the names and addresses of the respective owners of the individual fee time-share estates and allocating to them their respective mathematical "proportions." There is no language in s. 192.037 that purports to delegate to the "managing entity" any discretionary authority to determine the actual "just value" of the various time-share unit weeks based upon the time of year to which the respective unit week applies or based on any other factor bearing on the "just value" determination.

The apparent Legislative intent expressed in s. 192.037 that any judgment determinations concerning the actual valuation of the respective time-share periods or estates contained in a time-share development is within the sole province of the property appraiser is evidenced by the fact that the cited provisions of subsection 192.037(2) require the property appraiser to combine the individual time-share periods or individual time-share estates in order to arrive at the aggregate assessed value of the total time-share development. If the provisions of s. 192.037(2) and (3) did not contemplate the property appraiser actually valuing each of the individual time-share estates, then why would these provisions require the time-share estates to be "combined" into one total value for each time-share development?

This Court has stated its approval of the rule of statutory construction that the law favors a rational and sensible construction of statutes. See, City of Boca Raton v. Gidman, 440 So.2d 1277 (Fla. 1983). A rational and sensible construction of

the provisions of s. 192.037(2) and (3) would require the property appraiser to determine the actual values of the respective fee time-share periods or estates and to then combine these individual fee time-share estate values into one aggregate value for the clerical purpose of listing on the assessment rolls. Thus, there would be no actual judgment decisions remaining to be made by the managing entity once the property appraiser has completed his duties under s. 192.037(2) and (3). The managing entity would only be required to carry out its ministerial duties of ascertaining and notifying the various fee time-share estate owners of their respective "proportions" of the taxes as previously determined by the Property Appraiser.

C. THE FACT THAT THE PROVISIONS OF SECTION 192.037 DO NOT REQUIRE THE TAX COLLECTOR TO SEND A TAX BILL TO EACH INDIVIDUAL OWNER OF A FEE TIME-SHARE ESTATE DOES NOT RENDER SAID PROVISIONS CONSTITUTIONALLY DEFECTIVE ON DUE PROCESS GROUNDS.

The inherent weakness of the Taxpayers' Due Process argument is evidenced by their misplaced reliance in the district court on the case of Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983). In the Mennonite Board of Missions case, the purchaser of property at a tax sale later brought a suit to quite title. The trial court ruled in favor of the purchaser and the mortgagee of the property appealed the ruling.

Indiana law required notice by certified mail on the

property owner, but at that time there were no provisions for notice by mail on mortgagees of the property. The subject mortgagee did not learn of the tax sale until more than two years later. The U.S. Supreme Court held in the Mennonite Board of Missions case that notice on the mortgagee by publication only was not sufficient to meet requirements of the Due Process Clause of the Fourteenth amendment; and that notice by mail was constitutionally required where the names and addresses of adversely affected parties are known.

The obvious conclusion that the Mennonite Board of Missions case is materially distinguishable from the instant case is evidenced by the fact that the due process claims here are purportedly made on behalf of the individual owners of fee time-share estates. However, unlike the Indiana statute, the challenged provisions of s. 192.037(9), do expressly mandate that each individual time-share period title holder shall receive the protection afforded by Ch. 197, which includes the right to be notified by certified mail, return receipt requested of an application for a tax deed as set forth in ss. 197.502 and 197.522, Fla. Stat.

The compelling conclusion that the Mennonite Board of Missions holding is not applicable here is further illustrated by the undisputed facts of record establishing that this is not a case where ownership rights of property have been lost (or even imminently threatened) by virtue of a tax deed having been issued or an application for a tax deed having been made. In fact, as discussed above, there is not even any contention in this case

that a tax certificate has been issued for failure to pay the delinquent taxes or even that a notice of delinquent taxes had been issued by the Tax Collector.

The rationale inherent in the district's court's decision erroneouly assumes that if an owner of a fee interest in real property in this state is not separately identified on the tax roll and does not receive from the Tax Collector an annual tax bill, then the assessment is constitutionally defective on due process grounds. Such an assumption, however, is directly contrary to the long standing ad valorem tax law of Florida concerning the rule that all persons are presumed to have knowledge of the annual taxes due and owing on property in this state.

The provisions of s. 197.0151(1), Fla. Stat. (1983), expressly relied upon by the trial court (A.8), read in pertinent part as follows:

> . . . All owners of property shall be held to know that taxes are due and payable annually and are charged with the duty of ascertaining the amount of current and delinquent taxes and paying them before April 1 of the year following the year in which taxes are assessed. No sale or conveyance of real or personal property for nonpayment of taxes shall be held invalid except upon proff that:
>
> (a) The property was not subject to taxation;
>
> (b) The taxes had been paid before the sale of personal property; or
>
> (c) The real property had been redeemed before the execution and delivery of a deed based upon a certificate issued for non-payment of taxes. (e.s.).

The above cited provisions of s. 197.0151(1) place all

owners of property on statutory notice that ad valorem taxes are annually due and payable, and they are charged by statute with the duty of ascertaining the amount of such taxes. There is absolutely no suggestion or implication in the language of s. 197.0151(1) that the failure of an owner of property to be named on the tax roll or the failure to receive an annual tax bill would invalidate the tax assessment or any subsequent sale of the property.

In fact, the provisions of s. 197.0151(1) provides only two instances where a sale of real property for nonpayment of the taxes may be held invalid. These two instances are where the property is not subject to taxation or where the real property has been redeemed before the issuance of a tax deed. The failure to receive an annual tax bill is conspicuously omitted as a basis for invalidating a sale of property for nonpayment of taxes.

In the case of Thompson v. City of Key West, 82 So.2d 749 (Fla. 1955), this Court relied upon a statutory predecessor of current s. 197.0151(1) to uphold the validity of a tax assessment of the City of Key West, even though the description of the property on the tax rolls was so defective that the land could not be located by reference to the defective description. On page 754 of the opinion on rehearing in the City of Key West case, the learned Justice Terrell observed in his "homespun" manner that:

> . . . Since 1925 or earlier the legislature has more and more indulged the presumption that every property owner is on notice that his taxes are due annually. This is not an unreasonable presumption. It is a common cliche that 'death and taxes are certain.' To

> indulge otherwise would be as ridiculous as it would be to assume that one who lives in the country and owns a milk cow was not on notice that she has to be fed and milked twice a day. (e.s.).

There are various legal capacities of ownership of real property in this state whereby several parties may have multiple ownership interests in a single parcel of real property. Property ownership as tenants by the entirety, joint tenants with the right of survivorship and tenants in common is recognized in Florida. However, the Department is not aware of any Florida case law, statutory law or any other legal authorities holding [or even suggesting] that a tax assessment would be constitutionally invalid solely because one [or more] of a number of tenants in common or joint tenants with right of survivorship were not named on the tax roll or did not receive an annual tax bill from the Tax Collector!

The ad valorem tax law of Florida has, for many years, been based on the logical and sensible assumption that the various parties who have an ownership interest in a particular parcel of land will protect their respective property interests, even though they may not receive a separate tax bill or even may not be identified as taxpayers on the assessment rolls. Just as lessors and lessees have the prudence and common sense to negotiate their respective rights and obligations concerning payment of ad valorem taxes when they negotiate their lease agreement, so should the prospective owner of a fee time-share estate make provision for the payment of ad valorem taxes at the time of the purchase.

Such an agreement between the time-share developer-seller and the prospective purchaser of a fee time-share estate concerning the payment of ad valorem taxes is not only desirable, but <u>such agreement is actually mandated by the statutory provisions of s. 721.06(h), Fla. Stat.</u> The provisions of s. 721.06(h) expressly provide that every contract for sale of fee time-share estates shall contain the statement in bold type:

> (h) If a time-share estate is being conveyed, the following statement in conspicuous type:
>
> FOR THE PURPOSE OF AD VALOREM ASSESSMENT, TAXATION AND SPECIAL ASSESSMENTS, THE MANAGING ENTITY WILL BE CONSIDERED THE TAXPAYER AS YOUR AGENT PURSUANT TO SECTION 192.037, FLORIDA STATUTES.

Thus, every executed copy of a contract for sale of a fee time-share estate in compliance with the provisions of s. 721.06(h) results in each fee time-share estate owner agreeing in writing that the managing entity will be considered his or her agent for the purpose of ad valorem taxation. Consequently, the <u>consensual agreement deemed necessary by the district court decision to create an agency relationship is satisfied by the statutory mandate of s. 721.06(h).</u>

The Department would direct the Court's attention to the critical fact that the validity of these provisions of s. 721.06(h) imposing a statutory requirement that the prospective owner of a fee time-share estate agree in writing in the contract for sale that the managing entity will be considered the taxpayer as his agent were not attacked on any grounds by the Taxpayers in

either the trial court or the district court. Thus, these provisions of s. 721.06(h) stand before this Court fully intact and unchallenged and should be accorded full force and effect.

In reviewing the Taxpayers' constitutional attack on the statutory concept embodied in s. 192.037, it is also important to recognize that the "managing entity" concept was not originated by the 1982 Act dealing with ad valorem taxation of fee time-share property. The "managing entity" concept was created pursuant to the enactment in 1981 of Ch. 721, Fla. Stat., known as the "Florida Real Estate Timesharing Act," administered by the Division of Florida Lands Sales & Condominiums of the Department of Business Regulation.

Under s. 721.13, a time-share developer is required to set up a "managing entity" prior to the first sale of a time-share period. Among other duties of the managing entity set forth in s. 721.13 are the management and maintenance of all accommodations and facilities constituting the time-share plan, collection of all assessments for common expenses and an annual mailing to all purchasers of an itemized budget.

Under s. 721.13, the managing entity was therefore required prior to 1983 to send annual information to each time-share purchaser and the managing entity was already required prior to the enactment of s. 192.037 to collect from each owner of a time-share estate all assessments for common expenses. It is evident that the Legislature's use of the "managing entity" concept as a designated agent to remit and collect ad valorem taxes on fee time-share estates under s. 192.037 was integrally connected with

the existing "managing entity" statutory scheme embodied in s. 721. Consequently, the enactment of the challenged provisions of s. 192.037 in 1982 by the Legislature did not introduce a radically new concept, but merely imposed additional statutory responsibilities on the part of the "managing entity" similar to those already existing under Ch. 721.

The Department would also advise the Court that the use of a agent designated to be statutorily responsible for remitting ad valorem taxes on fee time-share estates to taxing authorities is not a radical concept that is completely unique to the State of Florida. The State of Hawaii utilizes a similar managing entity concept in the statutory chapter on Timesharing Plans by providing that "The plan manager,if any, shall be primarily liable for the payment of real property taxes due on the time-share units under his authority." Ch. 514 E-3(a), Hawaii Revised Statutes (1984 Supp.), (e.s.).

A similar provision is also found in the statutes of the State of Vermont dealing with Timeshare Projects, wherein it is provided that:

> With respect to property taxes, both real and personal, on time-share projects, each property owner of a time-share estate shall be liable for the payment thereof to the town. However, the owners' association, corporation or what ever entity is authorized by the project instruments to manage the common property, shall be the agent of the time-share estate owners for the payment of property taxes from the individual owners to the town. . . . (e.s.).

Title 32, s. 3619(b), Timeshare Projects, Vt. Stats. Anno. (1982 Supp.).

The use of a statutory agent is also employed by the State of Colorado in their Condominium Ownership Act wherein it is provided in s. 38-33.111(3), as follows:

> With respect to each time share unit, each owner of a time share estate therein shall be individually liable to the unit owners' association or corporation for all assessments, property taxes both real and personal, and charges levied pursuant to the project instruments against or with respect to that unit, and such association or corporation shall be liable for the payment thereof, except to the extent that such instruments provide to the contrary. (e.s.).

Title 38, Ch. 33, s. 111(3), Colorado Rest. Stats. (1982 Supp).

The conclusion that the "managing entity" as agent of the taxpayer statutory scheme employed by the State of Florida [and the States of Hawaii, Vermont and Colorado] does provide adequate constitutional due process to the individual owners of fee time-share estates is actually demonstrated in this case. The managing entity, acting in behalf of all the fee time-share estate owners at High Point Condominium Resorts, timely challenged the valuation of all the time-share unit weeks resulting in a court approved settlement of the valuation issue. Thus, the alleged deprivation of due process exists solely in the minds of the disgruntled time-share developers.

D. THE PROCESS SET FORTH IN SECTION 192.037, FLA. STAT., UTILIZING THE MANAGING ENTITY AS A STATUTORY AGENT AND PROVIDING FOR THE LISTING OF THE TIME-SHARE DEVELOPMENT AS ONE PARCEL ON THE ASSESSMENT ROLL DOES HAVE A CONCEIVABLE RATIONAL BASIS AND DOES NOT INVIDIOUSLY DISCRIMINATE AGAINST THE TAXPAYERS.

The apparent disdain of time-share developers to being required to carry out the statutory duties of the "managing entity" under s. 192.037 in collecting and remitting taxes on fee time share real property as the agent of the fee time-share period titleholders is understandable. However, mere disagreement on the part of a taxpayer with statutory language and duties, no matter how sincere, does not render such statutory duties and language unconstitutional!

The Department suggests that the Taxpayers' attack on s. 192.037 merely evidences an understandable longing of time-share developers to revert to pre-1983 law, when the developers had no express statutory responsibility in assisting in the process of the collection of ad valorem taxes on time-share property.[1]

[1] The current provisions of s. 192.037(5) require the "managing entity" to collect and remit the ad valorem txes due on fee time-share real property, as the statutorily designed agent of the individual fee time-share period titleholders. The Taxpayers and other time-share developers disapprove of these statutorily duties and have attacked their validity on constitutional grounds in this case and the two other cited circuit court decisions challenging 1983 tax assessments on fee time-share real property.

Chapter 82-226, Laws of Fla., (hereafter referred to as the "Act"), not only created a new statutory section (s. 192.037, Fla. Stat., titled "Fee Time-Share Real Property"), but also amended ss. 192.011, 194.011, 195.073, 197.0167, 718.120, 718.503, 721.03 and 721.06, Fla. Stats. Section 81 of Ch. 82-226 expressly provided that the portions of the Act dealing with the ad valorem taxation of time-share periods sold as fee time-share real property would take effect on January 1, 1983. Notwithstanding these substantial statutory amendments resulting from the 1982 Act, time-share developers subsequently filed several suits in various counties challenging the assessments of fee time-share estates for the tax year 1983, including the instant case.

However, in every case where a constitutional challenge to a 1983 tax assessment of fee time-share estates under the 1982 Act has proceeded to final judgment, the trial courts of Florida unanimously rejected the claims of the time-share developers. High Point Condominium Resorts, Ltd. v. Day, et al., [Case Nos. 83-1793 & 84-2025 (Fla. 9th Jud. Cir. Ct. 1985)] (A. 6-9); Oyster Pointe Resort Condominium Assoc., Inc., et al. v. Nolte, et al. & Driftwood Management Co., Inc. v. Nolte, et al., [consolidated Case Nos. 85-569, 83-570, 83-517 & 83-572 (Fla. 19th Jud. Cir. Ct. 1985)] (A. 10-15), and Spanish River Resort Corp., et al. v. Walker, et al., [Case No. 84-788 (Fla. 15th Jud. Cir. Ct. 1985)] (A. 16-29). The Oyster Pointe Resort Condominium, Driftwood Management Co. and Spanish River Resort cases are also on appeal and are now awaiting decisions from the

Fourth District Court of Appeal, with oral arguments having been presented.

The conclusion that a state tax scheme which arguably discriminates against a particular class of taxpayers is not necessarily proscribed by the Equal Protection Clause of the United States Constitution is illustrated by the case of Allied Stores of Ohio v. Bowers, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959). In the Allied Stores case, the U.S. Supreme Court upheld an Ohio tax scheme which assessed taxes for ad valorem purposes on merchandise held in warehouses for storage only by residents, while exempting the same merchandise of non-residents. Upholding this tax scheme, the Supreme Court concluded in the opinion that:

> The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guarantees of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule on equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. (e.s.). Id., at 358 U.S. 526.

Another example of the U.S. Supreme Court's tendency to uphold state tax schemes attacked on federal Equal Protection grounds is found in Lehnhausen v. Lakeshore Auto Parts Co., 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973). In Lehnhausen, the Supreme Court upheld an Illinois tax scheme which had the

effect of authorizing the ad valorem taxation of tangible personal property of corporations, while exempting tangible personal property of individuals from taxation. In upholding this act, the Supreme Court ruled in pertinent part in the Lehnhausen opinion that:

> The Equal Protection Clause does not mean that a State may not draw lines to treat one class of individual or entities differently from others. The test is whether the difference in treatment is an invidious discrimination. . . . (e.s.). Id., at 410 U.S. 359, 93 S.Ct. 1003.

Furthermore, both this Court and the U.S. Supreme Court have held that in taxation, even more than other fields, the Legislature possesses the greatest freedom in classification; and the burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it. Eastern Air Lines, Inc. v. Dept. of Revenue, supra, at page 314; Just Valuation & Taxation League, Inc. v. Simpson, supra, at page 232; and Madden v. Kentucky, supra.

There is a conceivable basis, not invidiously discriminatory in nature, for the Legislature designating a statutory agent responsible for remitting ad valorem taxes on fee time-share estates to the Tax Collector and for combining the numerous fee time-share estates into one listing on the tax roll. Time-share real property is a creation of very recent origin having first appeared in its current recognized form in Florida in the 1970's. The sheer ingenuity of the persons responsible for conceiving the idea of subdividing a single condominium unit into

as many as 50 separate marketable fee time-share estates is admirable!

The temporal subdivision of a condominium unit into many fee time-share estates has dramatically increased the number of potential purchasers of fee interests in a single condominium unit committed to the fee time-share use. This subdivision of a condominium unit into many fee time-share estates obviously has also resulted in a dramatic increase in the total aggregate purchase price received by time-share developers for a single condominium unit divided into fee time-share estates. However, this ingenuous and creative concept of real estate marketing has also created some dramatic challenges on the part of local government officials responsible for the assessment and collection of ad valorem taxes on condomidnium units subdivided into fee time-share estates.

The magnitude of the potential problems inherent in the Florida statutory process for assessment and collection of ad valorem taxes on fee time-share estates, assuming no statutory designated agent such as a "managing entity", is illustrated by consideration of the notice requirements of the "Trim Bill" as codified in Ch. 200, Fla. Stat. Section 200.069, Fla. Stat., requires the Property Appraiser to annually mail to each taxpayer a Notice of Proposed Property Taxes containing, among other information, the proposed millage rate of each taxing authority and the date, time, and place of a public hearing to be held to consider the proposed millage rate and the tenative budget.

If the Property Appraiser was dealing with a standard 200 whole-unit condominim project, then he would only have to send approximately 200 Trim Notices under s. 200.069. However, if the provisions of s. 192.037 are stricken, the Property Appraiser could be required to mail up to 10,000 Trim Notices with respect to a comparable condominium development committed to a fee time-share plan and having sold substantially all the available fee time-share estates. The same potential geometrical increase from approximately 200 to up to 10,000 would also be applicable to the annual notice of taxes that is required to be mailed by the Tax Collector to each taxpayer under the provisions of s. 197.072, Fla. Stat.

These ad valorem tax notices and collection problems dealing with fee time-share estates have been recognized and discussed by experts in the time-share development field. In the treatise on the 1984 "Law and Business of Timeshare Resorts," Tax Aspects, s. 7.03(5), the following comments are made at pages 7-14 and 7-15:

> Due to the number of interest owners associated with a time-share resort, there is some dispute as to the method for administering property taxes. Should the tax assessor send one lump-sum bill to the owner's association reflecting all of the interests, a partial bill addressed to each condominium unit on behalf of all 52 interest owners in that unit, or an individual bill to each interest owner? Needless to say, the assessor's office will not cherish the idea of sending out 52 bills where they previously sent out one. Nor will they cherish administering 52 separate assessments for each condominium unit and attempting to collect on delinquent taxes from 52 interest holders with

out-of-state addresses. A sold-out time-share development with 200 units which previously required 200 separate tax bills will now require over ten thousand bills. It just may not be worth the assessor's time to collect ten thousand bills of $50 to $75 when each convential residential bill hovers around $1,000. (e.s.)

As indicated in the above-cited portion of the treatise on the 1984 "Law and Business of Timeshare Property," the notice and collection of problems related to ad valorem taxation of fee time-share estates are magnified by the fact that time-share promotions are directed, in large part, to out-of-state residents. Some of these fee time-share estate owners are even residents of other countries, and a statutory requirement that separate tax bills must be sent to numerous persons residing in various parts of the world as a condition precedent to collecting ad valorem taxes on fee time-share estates poses an obvious serious threat to the efficacy of the ad valorem tax collection process in Florida.

Furthermore, as noted in the above-cited treatise, the dubious cost effectiveness of trying to collect small tax bills in the range of $50 to $75 from numerous nonresident fee time-share estate owners is apparent. These potential substantial assessment problems were obviously considered by the Legislature during the course of its deliberations on the passage of s. 192.037, Fla. Stat.

The relevance of tax collection costs in comparsion with the amount of potential revenue to be generated in classifying property for ad valorem taxation was noted by this Court in its decision in Colding v. Herzog, 467 So.2d 980 (Fla. 1985). On page 983 of the Herzog opinion, this Court stated in pertinent part as follows:

> . . . This principle does not, however, prohibit the legislature from classifying property or from excluding certain property from taxation when the expense of an assessment and collection would exceed the revenue generated from the tax. Were the legislature not permitted such authority, Florida taxpayers would be forced to subsidize tax collection costs. Such a result would be illogical and was never intended by the authors of the constitution. . . . (e.s.)

In closing, the Department would note that this Court has consistently indicated its approval of the rule of statutory construction that, if any state of facts can be conceived of which would substain the reasonableness and validity of an act of the Legislature, the courts should indulge the presumption that such state of facts exists and justifies the enactment. State v. Bales, 343 So.2d 9, 11 (Fla. 1977); and Ex parte Lewis, 101 Fla. 624, 135 So. 147, 150 (Fla. 1931).

Consequently, the presumed existence of the facts supporting the apparent futility of requiring the Property Appraisers and Tax Collectors in the 67 counties in Florida to send trim notices and tax bills in relatively small amounts to numerous owners of fee time-share estates residing out-of-state clearly supplies a conceivable basis for the statutory scheme set forth in s. 192.037. In addition, the potential threat to the

financial viability of the process for assessment and collection of ad valorem taxes in Florida if each fee time-share estate has to be separately listed and billed constitutes a compelling state interest in the enactment of this necessary statutory scheme embodied in s. 192.037, Fla. Stat.

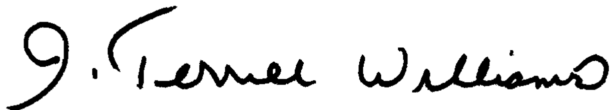
CONCLUSION

There is clearly a conceivable, rational basis to support the statutory scheme set forth in s. 192.037 for separately assessing individual fee time-share estates and combining them into a single entry for listing purposes on the tax roll, and for designating an "on site" statutory agent responsible for remitting to the Tax Collector the aggregate ad valorem taxes due from numerous time-share estate owners, many of which reside in other states and countries.

The decision of the district court should be quashed, with directions that the summary final judgment of the trial court upholding the constitutionality of the provisions of s. 192.037 be affirmed.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant has been furnished by mail to David L.Cook, Esq., P.O. Box 1833, Tallahassee, FL 32302; Stephen Miles, Esq., 2727 13th St., St. Cloud, FL 32769; Benjamin T. Shuman, Esq., 611 North Pine Hills Rd., Orlando, FL 32808; and Larry E. Levy, Esq., P.O. Box 82, Tallahassee, FL 32302, this 21st day of November, 1986.

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