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.



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**APPELLEES' CONSOLIDATED REPLY BRIEF**

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**APPELLEES' CONSOLIDATED REPLY BRIEF**
**TO THE FOLLOWING, TO-WIT:**

(a) Brief of Appellant, Department of Revenue

(b) Brief of Appellant, Robert Day

(c) Brief of Amicus Curiae, Jimmy Alvarez

(d) Brief of Amicus Curiae, Florida Association Of Tax Collectors

## PREFACE

This brief consolidates the replies to each of the several briefs for the sake of brevity. It is respectfully suggested that within the 130 pages of briefing, the quantum of opinionated statements far outweighs the quantum of the discussions of controlling precedent. There will be no attempt in this brief to reply to each opinion. Only glaring error of fact will be noted, and only cited cases which may be controlling as directly on point, or persuasive by analogy will be discussed.

## STATEMENT OF THE CASE

Few exceptions are taken to the statements of the case by the several briefs.

However, no mention was made of the 328 class action Plaintiffs who were owners of fee time share periods on January 1, 1983, nor the Order of the Trial Court authorizing class action representation of such persons (R-31)(A-10).

For sake of clarification of identity of Appellees who were Plaintiffs in the Trial Court, they are:

High Point Condominium Resorts, Ltd., developer of the project, owner of all completed but unsold fee time share periods, and owner of all undeveloped land and uncompleted buildings.

High Point World Resort Condominium Association, Inc., the association of property owners.

Robert H. Harriss, Jr., individually, owner of Week 26, Unit 204, of Phase I, High Point World Resort Condominium, and as class action representative of owners, other than developer, of fee time share periods at the project as of January 1, 1983.

The Lower Court actions (1983 and 1984) were filed upon the basis of assessments and tax bills as actually rendered which for a variety of reasons were alleged to be illegal and void. Among other things, it was alleged that the Assessor had made no apportionment and the bills were not issued to the entity or

person responsible for payment of the taxes in any event (R-1)(A-8 and 9). By an agreed Partial Judgment the assessments and bills were declared void and unenforceable (R-135)(A-11). (Note - The Partial Judgment referred to is not the Summary Judgment appealed - it is included herein to refute certain misstatements of fact in the Department's brief.)

## SUMMARY OF ARGUMENT

A. The right to own and protect property is a fundamental right, protected by the Constitution of Florida.

The right to ascertain the valuation of ones own property and pay the taxes thereon, thereby discharging the lien for such taxes, is fundamental to the ownership and protection of property.

A law (in this case, Section 192.037, Fla.Stat.) which impairs (prohibits) such rights as to some property owners, but not others, is subject to a claim of denial of due process of law and equal protection of law.

Impairing as it does a fundamental right, the law is subject to the "strict scrutiny rule." When the strict scrutiny rule is applicable the impairment of a fundamental right for the sake of governmental administrative convenience is prohibited. A compelling state interest is required.

Section 192.037, Fla.Stat. was subjected to the strict scrutiny test in the District Court Of Appeal and was found (correctly) to contain invidious discriminations as against fee title owners of fee title periods solely for the sake of administrative convenience.

B. The subject of the validity of the enactment of the offending law is covered by the Appellees' brief on cross-appeal.

C. The unlawful classification question has been presented by Motion To Dismiss.

## POINTS INVOLVED

### Point I

THE DECISION OF THE DISTRICT COURT OF APPEAL DETERMINING SECTION 192.037, FLA.STAT. VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FLORIDA AND FEDERAL CONSTITUTIONS AND IS THEREFORE VOID IS A CORRECT RULING.

### Point II

CHAPTER 82-226, LAWS OF FLORIDA 1982 (SPECIAL SESSION D) WAS NEVER PASSED BY THE FLORIDA LEGISLATURE, ITS PROVISIONS CANNOT BE INCLUDED IN ENACTMENTS OF THE OFFICIAL STATUTES.

### Point III

CREATING A CLASSIFICATION OF REAL PROPERTY FOR PURPOSES OF AD VALOREM TAXATION OTHER THAN THOSE CLASSIFICATIONS EXPRESSLY PROVIDED IN SECTION 4, ARTICLE VII, FLORIDA CONSTITUTION CONFLICTS WITH THAT CONSTITUTIONAL PROVISION.

## ARGUMENT

### Point I

THE DECISION OF THE DISTRICT COURT OF APPEAL DETERMINING SECTION 192.037, FLA.STAT. VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FLORIDA AND FEDERAL CONSTITUTIONS AND IS THEREFORE VOID IS A CORRECT RULING.

First, the due process of law argument in this case is totally intertwined and inseparable from the equal protection aspect of the case. Secondly, the rights of the Plaintiffs asserted herein are claimed both under the State and Federal Constitutions, to-wit: Article I, Section 2, Florida Constitution, and the V and XIV Amendments to the U.S. Constitution.

The primary thrust of the equal protection argument in this case is that the offending Statute, Section 192.037, Fla.Stat. deprives the Plaintiff property owners of fundamental rights, to-wit: the right to own and protect property rights.

In this case, there is a distinct classification of property and property owners, to-wit: fee time share periods and the owners of fee time share periods. But it is not only the classification which is complained of. It is the discriminatory treatment of the class which effects a denial of fundamental rights otherwise protected by the Constitutions of Florida and the United States.

The Department attempts to raise at the Appellate level the

standing of the Plaintiffs to attack the illegal and void tax assessments. The Department ignores: (a) Chapter 86, Fla.Stat. (Declaratory Relief Statute) authorizing prospective determination of rights and joinder of parties who would be affected; (b) The tax bills which were attached to the Complaint and admitted; (c) The determinations by the class action order; (d) The Stipulations for, and the partial final judgment entered in the Lower Court; (e) The provisions of Section 194.181, Fla.Stat.; and finally Sub-section 192.Ø37(4) which the Department argues to be valid as granting to owners of fee time share periods all rights to contest illegal assessments pursuant to Chapter 194, Fla.Stat.

It is respectfully suggested that none of the Defendant Parties at the trial level questioned the standing of the Plaintiffs to maintain these actions and the Defendants entered into Stipulations intending that the Plaintiffs rely thereon in this litigation. The Trial Court entered a Partial Final Judgment upon said Stipulations, reserving nonetheless the jurisdiction to render judgment on the constitutional questions upon Motion of any of the parties, which Summary Final Judgment was appealed. It is respectflly suggested that the injury to these Plaintiffs occurred when the properties which they own were not placed on the tax rolls; when they failed to receive notice of proposed assessment; and when the alleged tax bills were rendered.

The Department's brief states: "The inherent weakness of the

taxpayer's due process argument is evidenced by their 'misplaced reliance on' the Mennonite Board of Missions case." No due process argument has been made by the Taxpayers in reliance upon the Mennonite case. None will be made. The Department knows that, but nonetheless continues to grasp at straws. The Mennonite case has only prognostic value: to fortell the plight of the Clerks of the Courts to be encountered if, and when, application for tax deed should be made. Then and only then would the Mennonite due process notice be required.

The Hue and cry of all the briefs is that the subject legislation ought to be "presumed valid." That was a fair argument. The problem now is that that presumption ought to now be supplanted with the presumption of the correctness of the decision of the District Court Of Appeal which the Appellants and the Amicus Curiae seek to over turn. It should be presumed that the District Court Of Appeal would not strike down a statute without careful and cautious judicial scrutiny. The thoroughness of their discussions, and the obvious comprehension of the problems exemplified by their decision bespeaks the concern of the judges for their duty and the law. And so this Counsel would respectfully suggest that the burden to over turn is now at the other table.

Appellant Day's brief suggests that fee time share ownership is simply a new form of joint ownership of real estate. If that were true, why would the legislature need to distinguish fee time shares from other time shares and classify fee time shares

specially for ad valorem taxation.

Appellant Day then argues that except for "the enactment of Section 192.Ø37(2) the property appraiser could not separately appraise the individual fee time share estates - - - ." While they (property appraisers) do not want to enter and extend the fee time share units on the tax rolls, they do want to evaluate them separately. The Appellant day cites Hausman v. VTSI, Inc., 482 So.2d 428 (Fla. 5th DCA 1986) to suggest that if Section 192.Ø37 is stricken, the property appraisers could not enter and extend each time share unit on the tax rolls and would be faced with the prospect of "assessing individual fee time share estates at less than their fair market value." The fallacy and inconsistency of Appellant Day's argument is considered to be self-evident. They want to consider fee time shares as the common ownership of a whole estate, on the one hand while, imposing tax values to each separate estate by some mathematical formula and by the amalgamation of those values arrive at a value for the whole many times its actual worth.

Both the Appellant Day and the Department suggest that there is no "God given right" to a tax bill. The Department even quotes Section 197.Ø151(1), Fla.Stat. 1983 expressing the duty of "owners of property" to ascertain and pay the amount of current and delinquent taxes. Appellees didn't attack 197.Ø151(1). However, they did complain and they do now complain that they cannot, as property owners, discharge their duty of law to ascertain and pay the taxes on their own property as charged

under 197.0151(1). Why Not? Because Section 192.037(2) prohibits the property appraiser from entering and extending the property owned by each of the Appellee Taxpayers on the tax rolls and Section 192.037(7) prohibits the tax collector from accepting payment of the taxes on a fee time share period (anything less than the entire project).

The failure to enter taxable property on the tax rolls in the name of the owner, and extending the same such that the amount of taxes on each owner's property can be ascertained and paid, is the point where the Section 192.037 invidious discriminations against fee time share property owners commence.

Historically and conventionally, the first step in the real property taxing process is the enrollment and extension on the tax rolls of the property of each owner. If fee time share estates are not real property entitled to enrollment on the real property tax rolls, then so be it. But then, they can't be taxed as real property either.

If the individual owners of fee time share estates can't ascertain and pay the tax on the estate which they own independent of the simultaneous payment of the total sum of the collective taxes of all owners of fee time share estates in the same development, what provision of law can one fee time share owner use to compel all of the other owners to make payment before delinquency occurs? Section 192.037 certainly contains no such provision.

The tax collectors urge no harm can occur to fee time share

owners because 192.Ø37(9) accords to such owners the protection of Chapter 197 when application for tax deed is made. This is an interesting bit of "buck passing". The language of Section 197.522 succinctly provides for notice, to-wit:

> "The Clerk of the Circuit Court shall notify by * * * * mail * * * * the persons listed in the Tax Collectors Statement * * * *. If no address is listed in the Tax Collectors Statement, then no notice shall be required." (Emphasis supplied)

Of course, if the tax collectors had billed each fee time share estate owner at the address shown on the recorded deed conveying the estate to the owner, that address will be on the Tax Collectors Statement.

It would be an equal choice to label the suggested Chapter 197 protections "non-existent" or a "farce."

The tax collectors also suggest a "better protection" to the individual owners by not sending the tax bill to each individual address. The doctrine of "equal choice of labels" is applicable to this argument also. If the last known address is used by the managing entity, would its ability to be responsible for owners who fail to apprise it of new addresses be any greater than the property appraiser or tax collector? Answer - No! But, if notice from the tax collector doesn't get to the owner, there is the period of two years after issuance of the tax sale certificate for it to catch up.

Under the 192.Ø37 concept - all of the other owners have to "chip in" to pay their own and the taxes of the delinquents, and

then rely upon a non-priority lien to try to recover their money. So much protection they can ill afford.

The tax collectors do ultimately concede (page 25 of their brief) that Section 192.Ø37 establishes a class of Taxpayers separate and apart from all other Taxpayers. (It should be noted that the tax collector who was a party to this cause in the Trial Court, did not file a brief or appear in the District Court Of Appeal and is not a party to this appeal.)

The tax collectors then get into a discussion of the area of law pertaining to the rules for determining unlawful discrimination.

With all due respect to the judiciary in these matters, it is sometimes difficult to determine which is the chicken and which is the egg. Does the decision follow the rule, or dictate it. And so it seems to be with the "rational basis", "reasonable relationship", "marginally more demanding scrutiny", and "strict scrutiny" rules for distinguishing, according to constitutional standards, whether discriminations (a) do not exist; (b) exist but are of little consequence: (c) are of greater consequence but not to a degree which is unreasonable in the light of some governmental need or purpose; or (d) of such consequence and nature that other constitutional rights are impaired whereupon a very compelling State interest must exist.

In this case, the offending statute impairs the basic rights of the owners of fee time share periods secured by Section 2, Article I of the Florida Constitution. The owners of fee time

share periods cannot go to the tax rolls and ascertain the tax on their unit, or walk up to the counter and pay their tax at the tax collector's office.

The duty to do so is prescribed by statute. Their right to do so is fundamental to the protection of their property.

The argument of Amicus Curiae Alvarez is inconsistent with the practices of the property appraisers. They do not want to enroll and extend each fee time share unit, or give notices and bill therefor. But they do want to, and are directed by 193.Ø37, to separately assess and amalgamate the "values" of the separate units. If their argument that the time share concept is simply a form of common ownership of a parcel, rather than a division to separate parcels is valid, then the definition of "fee time share real property" (Section 192.ØØ1(14)) and "time share period title holder" (Section 192.ØØ1(15)) are completely meaningless. The point of commencement of parcel recognition is unclear. Is the "parcel" which they say is owned by multi-owners the 1ØØ acre tract committed to time share development, or is it the condominium apartment owned by 5Ø owners. Apparently the property appraisers would say the 1ØØ acre tract is the parcel, at least under 192.Ø37, Fla.Stat. And if that's the case, what's the difference between a project where the right of use of a time share period is established by lease (leasehold) and one where the right of use (ownership) is established by deed (fee time share).

If there is no difference, as the property appraisers

contend, why did the legislature attempt to create a difference for tax treatment. If the time shares are leaseholds, the value of the whole is determined without regard to lease income, Section 193.023(4), Fla.Stat. If they are fee time shares, the "value" of each unit is determined and those separate values "combined" to determine the "value" of the whole.

What is the difference between "rent" for the time period and "purchase price" for the time period, so far as the real property value of the condo project is concerned. (In legal terms this counsel would have no answer. But in dollars of valuation according to the interpretation of the property appraiser on this now completed but unsold project the difference is $9,000,000.00 of combined values versus $1,000,000.00 of actual worth of the entire project.) So while the property appraisers argue that there is no distinction in this and other forms of multi-ownership properties, they come up with a "whopping dollar difference" in the tax structure.

The Department attempts to find consolation in the fact that the time share act contemplates Section 192.037, Fla.Stat. Such an argument is ridiculous. All provisions of the time share act recognizing Section 192.037 had their genesis in the Act creating Section 192.037, i.e. Chapter 82-226, Laws of Florida 1982.

Now, what is the point of all of these arguments. What is the purpose to be served. Neither of the Appellants, nor the Amicus Curiae have advanced any compelling state interest. All they say is that it would be burdensome and perhaps costly, to

put the properties on the tax rolls, give the trim notices, and send the tax statements. In short, the only state interest served is administrative convenience. And that is not a lawful purpose which justifies discriminations which impair fundamental rights.

To counter the argument of burden and costs by referring to the State of the Art computerized tax rolls, extensions, addressing, and mailing, available to the officials, however effective, is useless. They have a burden which is probably only slightly less burdensome than the burden placed on the managing entity - that non-consensual agent - the involuntary fiduciary with built in conflicting interests - and unlimited liabilites. As a fiduciary designated by the owners to manage, the entity is now a fiduciary of the County to bill and collect taxes.

If there was any legislative wisdom in this legislation, it was perhaps the deceptive grossness of its invidious provisions purposely designed to command the immediate attention of the Courts. The multitude of cases are exemplified by those referenced in the Department's brief. (And those are only those cases which, like this one, have been decided against the Taxpayers at the trial level.)

It is inconceivable that the members of the Florida Legislature knew of, or intended, these results. Such results are, as often as not, the product of hasty legislation powered through the halls at a time when the membership is more concerned with the hour of adjournment than the business at hand. The

uncontroverted facts of this case bespeak the suggestion just made.

When these things happen, it becomes necessary that such legislation be subjected to judicial scrutiny, and in this case strict judicial scrutiny.

It is suggested that in this case the members of the class have certain inalienable rights, explicity protected by the State and Federal Constitutions - Section 2, Article I of the State Constitution and the V and XIV Amendments of the U.S. Constitution, to-wit: the right to own and protect property. See 10 Fla.Jur2d 444, Constitutional Law, Section 263 and 264. See also Kass v. Lewin, 104 So.2d 572 (Fla. 1958).

As to this class of property owners, and only as to this class of property owners, those rights are jeopardized by the provisions of Section 192.037.

The only conceivable reason to provide for notices, billing, collection, and enforcement by a substitute agent, instead of by the duly elected property appraiser and tax collector (Constitutional officers) is to cast off the burden (and expense) to these property owners. And yet the single tax roll entry based upon the aggregate total of the values of all separate ownership (as applied by the property appraiser) results in taxes against these properties which are incomprehensible in terms of rational valuations.

In other words, the duty of billing and collecting has been cast on the owners themselves (they have to pay for all activity

by the association), and at the same time they are made fair game for a tax rip off. (See Partial Final Judgement (R-135 A-11), the 1983 settlement of $62,875.00 value per apartment and the 1984 settlement of $91,947.76 value per apartment). See also Supplemental Authority cite, to-wit: Spanish River Resort Corp. v. Walker, (4th DCA November 19, 1986, Case No. 85-1645). That case and the companion cases from that Court were valuation cases and as observed by Judge Letts, identical apartments were assessed at: (a) $25,000.00 for the ordinary condominium use, and (b) $236,634.00 for the fee time share use. That Court paid only lip service to such constitutional issues as were raised (not apparent from the decision). Perhaps Section 192.037 should have read enter time shares on the books and "whack em" 9.5 times regular condominium taxes. That may have been slightly less unlawful.

It is true they are a unique class - they don't elect property appraisers, they don't elect tax collectors, they don't elect governors, and they don't elect representatives. They have no political remedy. They have to seek their remedy in the courts. This is not to argue that they are in fact a "suspect class", although if factual evidence were adduced, it might be a close question as to the class action Plaintiffs.

The jeopardy to the fundamental rights of these Plaintiffs to own and protect their property is facially apparent in the provisions of the statute itself. That is the circumstance that requires the application of the strict judicial scrutiny test in

determining the equal protection question in this case.

The following language is quoted from 16B C.J.S. 521, Constitutional Law, Section 714:

> "To withstand the strict scruitiny test, the classification challenged must be necessary to promote a compelling state interest, important or legitimate governmental interests not being sufficient to justify the classification, and the means employed must be the least intrusive or restrictive available and must be necessary to achieve the desired end.
>
> "The burden, which is a heavy one, is upon the state to establish that it has a compelling interest which justified the law, and that the distinctions or classifications drawn by the law are necessary to further their purpose. Furthermore, the state must establish that there are no less restrictive or onerous alternatives available, and that the classification is precisely tailored or narrowly drawn to serve a compelling governmental interest."

It has been held that administrative convenience and efficiency are uniformly rejected when the strict scrutiny standard of equal protection applies. See Hassan v. Town of East Hampton, D.C.N.Y. 500 F.Supp 1034. See also Shapiro v. Townsend, 394 U.S. 618, 89 S.Ct. 1322.

No other legitimate reason for this classification, or these intrusions have been argued or suggested in this case. No others exist. There is no compelling State interest.

If it is urged that the opportunity for a tremendous increase in the property taxes on this class of properties is advanced as a compelling State interest, the State of Florida Department of Tourism should hang its head in shame and return its appropriation to the General Revenue Fund. Purchasers of fee time share units in Florida are offered safe haven protection

against unscrupulous developers and promoters, and then subjected to an unprecedented tax scheme by the State.

The Developer, High Point Condominium Resorts, Ltd. is an owner of not one, but all unsold fee time share periods in their project. It is caught in the web of the classification and the denials of this Statute. In the case before the Court, the Developer was billed as the taxable entity. The bills included its property, developed and undeveloped, fee time share units remaining unsold and all that had been sold. For 1983 and 1984, the Developer was literally forced to advance to the Association monies to pay all taxes (See Partial final Judgment A-11). Whether all of said monies can be recovered remains to be seen.

Recovery of monies for payment of taxes will be a problem for the Association as well. Theoretically, it is granted a lien for tax monies effective from time of recording. (See 721.16, Fla.Stat. and discussion of lien priorities in the Florida Bar Journal, Vol. LIX, No. 9, October 1985, page 92.) This lien right is substantially inferior to the County's lien for taxes on the entire project. There can be no enforcement against prior mortgages, judgment creditors, and others holding vested liens prior to the recordation of the lien for taxes.

This is a ludicrous situation. In the final analysis, to protect one fee time share period, the owner may be required to pay more than the lawfully assessed amount of taxes on his unit, not only to cover taxes on those other units lost to prior lien holders, but all costs and expenses of noticing (proposed

assessments), billing and maintaining the action to attempt recovery. Section 192.Ø37 does not take into account the logistics of recording liens and foreclosing them. Tax bills are rendered November 1 in each year and taxes become delinquent April 1 of the following year. Tax payers receive a discount of 4% if taxes are paid in November, 3% if paid in December, etc. There is an intervening time period of five months. When is it that the fee time share period owners are required to pay their taxes to avoid delinquency - November 1 when the bill is rendered to the Association, or by April 1 of the following year? When does the Assocation record its lien? When does it start foreclosure?

Are these questions to be answered arbitrarily by each Association? If so, is this either due process or equal protection of the law? Is this in fact a classification of the owners into a single class, or into many classes not founded upon State policy or law?

Do these problems outweigh the administrative inconvenience of the State and infringe upon the explicitly protected rights of these Plaintiffs?

The Appellants cite the case of Eastern Airlines, Inc. v. Dept. of Revenue, 455 So.2d 311 (Fla. 1984).

The language of that case clearly shows that it is not a strict judicial scrutiny case. The basis for classification differences in that case is fully explained by offsetting advantages and there is no suggestion of the infringement upon

fundamental rights of Eastern Airlines. In this case, there are no demonstrable offsetting advantages to this class and the flow of advantage is singularly to the State (County). The intrusion upon the fundamental rights of the persons of this class distinguishes the Eastern case from this case and the strict judicial scrutiny rule, once infringement is shown, shifts the burden to the State to show that it has a compelling interest which justifies the law. The burden is a heavy one and the State must show that there are no less onerous alternatives available. See 16B C.J.S. 522, Constitutional Law, Section 714.

It is respectfully suggested that the State cannot make such a showing because there are many less onerous, less intrusive, options available. To mention one - put these ownerships on the tax rolls like all other fee ownership. Ironically, they each pay a fee for this when their deeds are recorded. (See Section 28.24(15), Fla.Stat.) Other options are available. The legislative problem is that this Statute was railroaded through with no opportunity for careful consideration by the legislature or input from the industry.

This counsel has not as yet discovered a Florida case which discusses and applies the strict judicial scrutiny rule by name.

While not applying the strict scrutiny rule, the Florida Supreme Court in the State of Florida Dept. of Health and Rehabilitative Services v. West, 378 So.2d 1220 (Fla. 1979) recognized the "less than strict scrutiny test" and applied the rational basis rule in holding the paternity suit statute of

limitation unconstitutional as a denial of equal protection of the laws. The Court speaking through Justice Alderman stated:

> "The decisions of the Supreme Court, although applying seemingly variant tests, have culminated in a definitive test to apply in cases involving an equal protection challenge to an illegitimacy-based classification. This test, although it falls in the 'realm of less than strictest scrutiny,' requires more than a determination that there is a rational basis for the classification. The classification must also bear a substantial relationship to the state's interest asserted as the basis for the statute."

No less a test of this Statute in this case should be applied. Additionally, the State's interest must be compelling and the means adopted the least intrusive (on fundamental rights).

This counsel finds no problem with the "burden of proof" requirements stated in the Eastern case. It is just that once a showing of infringement on fundamental rights is made (initally the Plaintiffs' burden) the burden then shifts to the State to justify the infringements imposed upon the class by the Satute under review. And though it may be true, that no presumption of validity abides a Trial Court decision declaring a statute unconstitutional, such a presumption should abide an Appellate Court decision.

In Pinillos v. Cedars of Lebanon Hospital Corp., 403 So.2d 365 (Fla. 1981) the Court found the "rational basis rule" rather than the strict scrutiny rule to apply because there was no "implication" of fundamental rights. The Court upheld Section 768.48, Fla.Stat. (Collateral Source Rule in Medical Malpractice) as against the equal protection attack by Plaintiffs in a medical

malpractice suit.

In the case of Markham v. Fogg, 458 So.2d 1122 (Fla. 1984) the "rational basis" rule was defined and used to uphold Section 193.461(4)(a)(3), Fla.Stat. (dealing with land zoned agriculture).

In Department of Revenue v. Amren Corp., 358 So.2d 1343 (Fla. 1978) the Department of Revenue relied upon the broad suggestions referenced in the judgment of the lower court in this case, i.e. "that in matters of taxation the states are possessed of broad lattitude in creating classifications without offending the equal protection clause or privileges and immunities clause." Nonetheless the Court in that case upheld a Circuit Court decision holding a taxing statute unconstitutional because of a denial of equal protection of the laws.

In Sasso v. Ram Property Management, 431 So.2d 204 (Fla. 1st DCA 1983) Judge Ervin discusses the three generally recognized tests to determine statutory violations of the equal protection clause. His discussion of the strict scrutiny rule is limited. Discussion of the other rules are interesting. The Judge ruled immediately that restrictions on individual right on the basis of age need not pass the strict scrutiny test. Later in the opinon he seemingly started to recant on this position and then neatly passed the "buck" to the Federal Courts (See last sentence of opinion).

While no Florida case has used the strict scrutiny rule by name, this does not mean that the rule has not been applied. In

the case of Kass v. Lewin, supra, sections of a plat law were held unconstitutional under the equal protection clauses of both the State and Federal Constitutions because they infringed upon the inalienable right to own and protect real property.

This counsel was personally intrigued by the case of Louis K. Liggett Co. et al v. Lee, 288 U.S. 517, 53 S.Ct. 481, an appeal from a decision of the Supreme Court of Florida (141 So. 153). The U.S. Supreme Court reversed a decision of the Florida Supreme Court which had sustained a trial court dismissal of a Bill seeking relief against claimed due process and equal protection violations found in the "Florida Chain Store Act."

The reason for reversal by the High Court "was lack of a compelling state interest in whether a single store was on one, or the other, side of a County line. The opinion of the dissenters of both Courts provided not only provocative thought for the legal scholars of the day but as well an indication of a Court less toiled and tense than the modern day courts.

But that is not the reason for the personal interest of this Counsel in that case. It is that this counsel, then age 5 1/2, got his first look at the historical monument, the State Capitol of Florida, while accompanying my father, an independent grocer, to Tallahassee to lobby for the 1931 special session "Chain Store Bill." As I read the Liggett case, I could still see the trampled cigar butts and half filled spittoons and smell the heavy stench of stale smoke which was the clear indicator that the legislature was in session.

As far as the authority of that case is concerned, it equates to the case at bar only for the proposition that persuasions of special interests whether in the legislative halls, or in the Courts, lead to specious reasoning to sustain inequality.

In Schneider v. Rusk, 377 U.S. 163, 12L.Ed2d 218, 84 S.Ct. 1187 a point is stated which should be applied in this case:

> "While the V Amendment has no equal protection clauses, it does forbid discrimination that is so unjustifiable as to be violative of due process."

In Bolling v. Sharp, 347 U.S. 497, 98 L.Ed 884, 74 S.Ct. 693 similar language appears:

> "The concepts of equal protection of laws and due process of laws, though not always interchangeable, are not mutually exclusive. Discrimination may be so unjustifiable as to be violative of due process."

And thus this argument is concluded on its opening comment. In this case the due process and equal protection of laws concepts are totally intertwined and inseparable.

The discriminations which are facially apparent in the provisons of Section 192.Ø37, Fla.Stat. violate both the V and XIV Amendments of the U.S. Constitution and Article I, Section 2 of the Florida Constitution.

## Point II

CHAPTER 82-226, LAWS OF FLORIDA 1982 (SPECIAL SESSION D) WAS NEVER PASSED BY THE FLORIDA LEGISLATURE, ITS PROVISIONS CANNOT BE INCLUDED IN ENACTMENTS OF THE OFFICIAL STATUTES.

This Point is presented by Cross-Appeal. Separate brief was filed by Appellees as Cross-Appellants.

For this Point, reliance is placed upon the requirements of Article III, Section 3(c)(1), Florida Constitution.

## Point III

CREATING A CLASSIFICATION OF REAL PROPERTY FOR PURPOSES OF AD VALOREM TAXATION OTHER THAN THOSE CLASSIFICATIONS EXPRESSLY PROVIDED IN SECTION 4, ARTICLE VII, FLORIDA CONSTITUTION CONFLICTS WITH THAT CONSTITUTIONAL PROVISION.

This point is presented by motion to dismiss or affirm with cases cited therein.

For this Point, reliance is placed upon the decision in the case Interlachen Estates, Inc. v. Synder, 304 So.2d 433 (Fla. 1974).

## CONCLUSION

The decision of the District Court of Appeal striking down Section 192.037, Fla.Const. is a correct decision and should be affirmed in that particular.

It is correct because Section 192.037, Fla.Stat. effects discriminations which impair fundamental rights with no compelling state interest.

It is correct because Section 192.037, Fla.Stat. purports to classify fee time share properties for special assessment procedures inconsistent with the provisions for classification of properties set forth in Section 4, Article VII, of the Florida Constitution.

It is correct because Chapter 82-226, Laws of Florida which attempted to create 192.037, Fla.Stat. was never introduced in either house of the legislature.

The decision while correct on each of the points aforesaid, does err in its holding that the unpassed law can be passed by adoption of the Official Statutes.

Therefore, this Honorable Court should affirm the District Court Of Appeal, while clarifying and correcting the errant principle of law pertaining to passage of legislation which is beyond the power of the legislature to consider.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been served by mail this 9th day of December, 1986, on:

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