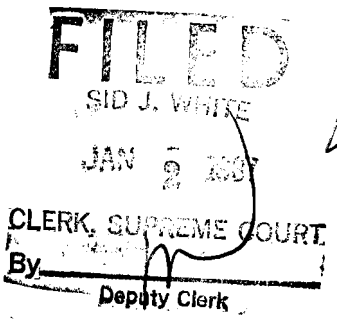
IN THE SUPREME COURT
OF THE STATE OF FLORIDA

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 THE CLASS ACTION REPRESENTATION OF THE CLASS OF PERSONS HEREIN DESCRIBED,

Appellees.

REPLY BRIEF OF APPELLANT ROBERT DAY, OSCEOLA COUNTY PROPERTY APPRAISER

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I.

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

Appellees assert that the fundamental presumption of constitutionality of statutes has somehow been reversed by virtue of the District Court decision in this case. To the contrary, Appellant assumes that a statute remains clothed with that presumption until such time as the highest court of this state has removed that presumption by declaring the statute unconstitutional. In any event, assuming that Appellees' position has any merit whatsoever, any erosion of the presumption of constitutionality of §192.037, Florida Statutes, resulting from the Fifth District decision herein must have been more than restored by the decisions of the Fourth District Court of Appeal in Spanish River Resort Corp. v. Walker, 11 FLW 2420 (4th DCA Fla. November 19, 1986); Oyster Pointe Resort Condominium Association Inc. v. Nolte, 11 FLW 2435 (4th DCA Fla. November 19, 1986); and Driftwood Management Company, Inc. v. Nolte, 11 FLW 2436 (4th DCA Fla. November 19, 1986), upholding the constitutionality of that statute.

Try as he might, Appellant Day is unable to locate the "self evident fallacy and inconsistency" of his argument that the striking down of §192.037, Florida Statutes, in its entirety, will result in assessment of fee time share estates at less than just value if Hausman v. VTSI, Inc., 42 So.2d 428 (5th DCA Fla. 1986) is good law. That argument has nothing to do with the consideration of fee time-shares as the common ownership of a whole estate as asserted by Appellees. It does have to do with the fact that Hausman, supra, holds that until the enactment of §192.037, Florida Statutes, there existed no basis for separately assessing each individual fee time-share estate. Appellant's point is that if the District Court decision in the instant case is correct, and Hausman, supra, is correct, then a situation will exist wherein the Property Appraisers must assess each time-share apartment as a whole unit condominium and then divide that value by the number of individual fee time-share estates existing in that particular unit. Such procedure must result in assessment of each individual fee time-share estate at far less than the just or fair market

value thereof as indicated by the purchase prices of the individual time-share weeks.

Appellees continue to clamor about the inability of individual fee time-share estate owners to ascertain the assessments and taxes on their properties. Appellant is unable to see the insurmountable difficulty in obtaining that information. §192.037, (3), Florida Statutes, expressly requires that the Property Appraiser annually notify the managing entity of each fee time-share development of the allocation of the assessed value of the time-share development among the individual fee time- share periods. Since such notification must be a public record under the applicable laws of the State of Florida, the individual fee time-share owner thus has two sources from which he may ascertain the assessment and taxation of his time-share estate: first, from the managing entity, and second, from the County Property Appraiser. While it is true that the statute in question prohibits partial payment of taxes on a time-share development, as has previously been pointed out by Appellants at great length, the individual fee-time share estate owners essentially own and control the managing entity, and through that entity have the ability to see to the payment of taxes on the development as a whole. In this regard it is important to remember that the purchaser of a fee time-share estate has been told in no uncertain terms prior to his purchase as required by §721.06 (1) (h), Florida Statutes, that the managing entity will be his agent for purposes of ad valorem assessment and taxation of the time-share unit. If he didn't like that deal, he shouldn't have bought a fee time-share estate - it's that simple.

Regardless of whether or not taxes on the time-share development are timely paid, the provision of §192.037 (9), Florida Statutes, that:

> If, however, an application is made pursuant to s.197.502, the time share period titleholder shall receive the protections afforded by Chapter 197.

affords very real protection to the owners of individual fee time-share estates, contrary to the assertions of Appellees. In the first place, §197.156, Florida Statutes, provides that each owner of "any part or parcel" or "any interest" in lands upon which a tax certificate is sold has the right to redeem that certificate on his portion of those lands. Thus,

assuming that the fee time-share estate owner complies with the duty imposed upon him by §197.0151 (1), Florida Statutes, to ascertain the ad valorem tax status of his property, he is given the right to redeem the tax certificate upon his time-share estate and forestall any application for a tax deed thereupon.

Further, even if an application for tax deed is made upon a fee time-share development, Chapter 197 again provides meaningful safeguards for the owners of the individual estates therein. Here it should be noted that Appellees have very carefully edited the quotation from §197.522, Florida Statutes, at page 11 of their brief. In fact, Subsection (1) (a) of §197.522, Florida Statutes, which was partially quoted by Appellees, reads as follows:

> The clerk of the circuit court shall notify, by certified mail with return receipt requested or by registered mail if the notice is to be sent outside the continental United States, the persons listed in the tax collectors statement pursuant to s.197.502 (4) that an application for a tax deed has been made. Such notice shall be mailed at least 20 days prior to the date of sale. If no address is listed in the tax collectors statement, then no notice shall be required.

It is clear, then, that §197.522, Florida Statutes, must be read in conjunction with §197.502 (4), Florida Statutes, in order to ascertain the extent of the protection afforded thereby. The pertinent portions of §197.502 (4), Florida Statutes, read as follows:

> (4) The tax collector shall deliver to the clerk of the circuit court a statement that payment has been made for all outstanding certificates or, if the certificate is held by the county, that all appropriate fees have been deposited, and stating that the following persons are to be notified prior to the sale of the property:
>
> (a) Any legal title holder of record if the address of the owner appears on the record of conveyance of the lands to the owner. However, if the legal title holder of record is the same as the person to whom the property was assessed on the tax roll for the year in which the property was last assessed, then the notice may only be mailed to the address of the legal title holder as it appears on the latest assessment roll. . . .

> (f) Any person to whom the property was assessed on the tax roll for the year in which the property was last assessed....

Therefore both the individual fee time-share estate owner, by virtue of his address appearing on his recorded deed, and the managing entity, by virtue of its listing on the assessment roll, will receive notice of any proposed tax sale of the fee time-share estate in question. There will be no deprivation of property without due process of law under §192.037, Florida Statutes.

The remainder of Appellees arguments under this point can be rebutted by pointing out that what we really have here is a time-share developer who wishes to "have his cake and eat it too". That is, he wants to own a time-share development consisting of apartments that (at, for example, $5000.00 Dollars per unit week average) have a just or fair market value of some $250,000.00 each, while having those apartments assessed and taxed essentially as whole unit condominiums having a value of perhaps $75,000.00 each. Not only that, but this developer apparently does not want to be bothered with establishing a viable managing entity to administer the collection of ad valorem taxes in accordance with the allocations and proportions provided by the Property Appraiser.

Since the developer is mandated by statute to establish the managing entity, and the managing entity is likewise mandated to maintain the common elements of the development and assess the individual owners therefore, it is difficult to perceive the enormity of the burden visited upon the developer and/or the managing entity by a requirement that ad valorem taxes be included in the assessments of the individual time-share estate owners. Rather than make this relatively minor addition to assessments which must be made in any case, this developer would visit upon the Property Appraisers and Tax Collectors of this state the severe administrative burden attendant upon the individual assessment and collection of each and every fee time-share estate. Appellants submit that such burden should not be imposed upon local government and that §192.037, Florida Statutes, merely establishes a reasonable and efficient method of administering the ad valorem taxation of fee time-share estates without adversely effecting any fundamental rights to own and protect real property.

II.

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

Appellant Day would adopt herein the argument set forth in the reply brief of Appellant Randy Miller, Executive Director of the Department of Revenue of the State of Florida.

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.

Counsel for amicus curiae, Florida Tax Collectors Association, in his reply brief on this point has put his finger squarely on the distinction between the instant case and Interlachen Lakes Estates, Inc. v. Synder, 340 So.2d 433 (Fla 1974), and Interlachen Lakes Estates, Inc. v. Brooks, 341 So.2d 993 (Fla 1977). That is, the statute here involved does not create a classification that results in the assessment of a particular class of real property at less than just value. Interlachen Lakes, supra, stands for the principle that because the Florida Constitution mandates that all property shall be assessed at just value unless specific constitutional authorization is given to the legislature to create a class of property to be assessed at less than just value, any statute which authorizes assessment at less than just or fair market value is unconstitutional unless adopted pursuant to such express constitutional authority. That is a simple, logical principle which is in no way applicable to the instant case. In fact, as pointed out in Point II of Appellant Day's initial brief herein, if the District Court holding in this case stands, the result could well be the assessment of individual fee time-share estates at far less than their just value.

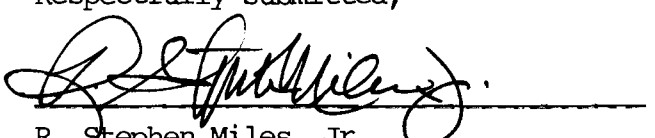
Appellant submits that §192.037, Florida Statutes, does not create an unconstitutional classification of property for ad valorem assessment purposes, rather its prescribes a method for the assessment of fee time-share estates to insure that they will be assessed at just or fair market value. The statute provides the Property Appraiser with a tool to be utilized in arriving at just value, and the use of that tool or method by the Property Appraiser is no more an unconstitutional exercise of authority than the use by the Property Appraiser, for example, of the income approach to arrive at the just value of a commercial property.

CONCLUSION

No one, and certainly not §192.037, Florida Statutes, makes anyone buy a fee time-share estate. The applicable statutes provide ample warning to prospective purchasers of such estates that they are unique and that in matters relating to ad valorem taxation, the fee time-share owner must rely on the managing entity of the time-share development. Through the managing entity and through the safeguards provided by Chapter 197, Florida Statutes, fee time-share owners are afforded equal protection of law and more than adequate protection against deprivation of their property without due process of law.

The provisions of §192.037, Florida Statutes, insure that fee time-share properties will be assessed at their just value as required by the Florida Constitution, and that county government will not bear the unreasonable administrative burden of separately assessing, billing and collecting ad valorem taxes on each individual fee time-share estate. This is a legitimate and compelling state interest and Appellants respectfully request that this court reverse the decision of the Fifth District Court of Appeal herein and declare that §192.037, Florida Statutes, is constitutional.

Respectfully submitted,



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