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OIA 9-1-87

IN THE SUPREME COURT OF THE STATE OF FLORIDA

OYSTER POINTE RESORTE CONDOMINIUM ASSOCIATION, INC., Etc., et al.,

Petitioners,

vs.

DAVID C. NOLTE, Etc., et al.,

Respondents. /

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CASE NO. 69,794

OYSTER BAY II OWNERS' ASSOCIATION, INC., Etc., et al.,

Petitioners,

vs.

DAVID C. NOLTE, Etc., et al.,

Respondents. /

CASE NO. 69,795

On Review from the Fourth District Court of Appeal, State of Florida, Case Nos. 85-1290 and 85-1291

ANSWER BRIEF ON THE MERITS OF THE RESPONDENT, DEPARTMENT OF REVENUE, STATE OF FLORIDA

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PRELIMINARY STATEMENT

In this Answer Brief on the Merits, the Respondent, Randy Miller, Executive Director of the Department of Revenue, State of Florida, will be referred to as the "Department." The Co-Respondent, David C. Nolte, as Property Appraiser of Indian River County, Florida, will be referred to as the "Property Appraiser." The Petitioners, Oyster Pointe Resort Condominium Association, Inc., et al., and Oyster Bay II Owners' Association, Inc., et al., will be generally referred to as the "Taxpayers." The trial court in this case was the Honorable L. B. Vocelle of the Nineteenth Judicial Circuit, in and for Indian River County, Florida, which court will be referred to as the "trial court." The symbol (A.) followed by a page number will refer to the separate Appendix to the Department's Answer Brief.

STATEMENT OF THE CASE AND FACTS

The Department will rely primarily on the Statement of the Case and Facts as set forth in the Answer Brief of the Co-Respondent, Property Appraiser. However, the Department would note that the unchallenged findings of fact of the trial court included:

1. The Property Appraiser, for the tax year 1983, appraised each of the individual time-share estates at Oyster Pointe and Oyster Bay resorts based on comparable sales of other individual fee time-share estates. The Property Appraiser therefore valued each fee time-share estate based on the "market approach" to value (A. 3).

2. The evidence showed that the conveyances of the fee time-share periods were accomplished by warranty deeds recorded in the real property records of Indian River County. These warranty deeds were also accompanied by title insurance issued for the full purchase price of each fee time-share estate. (A. 4).

The trial court also upheld the constitutional validity of the Property Appraiser's reliance on s. 192.037(2), Fla. Stat., whereby he appraised each of the individual fee time-share estates and then combined them into one single listing on the tax roll. (A. 3-5).

The Fourth District Court of Appeal affirmed the amended final judgment of the trial court based on the authority of Spanish River Resort Corporation v. Walker, 497 So.2d 1299 (Fla. 4th DCA 1986), which opinion was issued simultaneous with the opinion in Oyster Pointe Resort Condominium Assoc., Inc. v. Nolte, 497 So.2d 1306 (Fla. 4th DCA 1986) The District Court also acknowledged in the opinion below that they were expressly approving the constitutional validity of s. 192.037(2), Fla. Stat. (1985). (A. 8)

SUMMARY OF ARGUMENT

In the 1970's, a new concept of subdividing and marketing real property was introduced in Florida and other vacation states by the creation of "fee time-share estates" in real property. This novel concept of subdividing a condominium unit into as many as 50 separate "fee time-share estates" 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 a single condominium unit into many individual "fee time-share estates" created unique problems with respect to state regulation over this newly created industry. In the year 1981, the Florida Legislature created Ch. 721, Fla. Stat. ("Real Estate Time-Share Plans"), in an attempt to provide needed consumer protection with respect to this unique and recent development in real estate sales. One of the basic concepts embodied in Ch. 721 featured the creation of a "managing entity" responsible for managing the time-share project, including the duty of collecting annual assessments for common expenses from the owners of time-share periods.

The potential geometrical increase from approximately 200 up to 10,000 individual taxpayers in a standard 200 unit condominium project committed to fee time-share real property also produced a potential administrative and fiscal crisis on the part of the

officials responsible for the assessment and collection of ad valorem taxes in Florida and other affected states. In response to the potential crisis in the ad valorem assessment and collection process, the Florida Legislature subsequently enacted 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 ad valorem taxation of time-share real property.

The Act, among other changes, created s. 192.037, Fla. Stat., utilizing the "managing entity" concept already in existence in Chapter 721. The use of a "managing entity" (or other similar entity) designated by statute to be responsible for collection and payment of ad valorem taxes on fee time-share estates was also adopted by the States of Hawaii, Colorado and Vermont. In addition, the Act introduced "first-time" statutory references in the ad valorem tax provisions of Ch. 192 to "fee interest in a time-share unit or time-share period," and new references in Chapters 718 and 721, Fla. Stat., to "ad valorem taxation of time-share estates." (e.s.).

Notwithstanding the plain language of these terms utilized by the Legislature in the 1982 Act, the Taxpayers and other time-share developers filed suits in various counties in 1983. These suits challenged the legality of the actions of the respective property appraisers whereby each of the fee time-share estates were separately appraised and then combined into one listing on

the tax rolls in the name of the managing entity, as seemingly required by the Act.

Based on the provisions of the 1982 Act, the Property Appraiser here subsequently appraised each of the individual fee time-share estates at the Oyster Pointe and Oyster Bay resorts for the tax year 1983. The Property Appraiser also combined the appraisals into one listing on the tax rolls, relying on the Act.

The undisputed testimony at trial established that the valuations placed on the individual fee time-share estates by the Property Appraiser were based on the "market" or "comparable sales approach," utilizing adjusted sales data from list or actual sales prices of comparable fee time-share estates. The adjustments made by the Property Appraiser were always less than list or actual sales prices and represented the Property Appraiser's determination of the weight to be given to the criteria set forth in subsection 193.011(8), Fla. Stat.

Mere disagreement by a taxpayer with the Property Appraiser's methodology or disagreement with the weight given by the Property Appraiser to a particular criteria set forth in s. 193.011 is not legally sufficient to overturn a tax assessment. The Taxpayers have failed to carry their heavy burden of proving that the Property Appraiser's ultimate valuations of the fee time-share estates based on the "market approach" are totally arbitrary, and not supported by any reasonable hypothesis of a legal assessment.

The Taxpayers also claim that s. 192.037 (as implemented by the Property Appraiser) violates the Due Process and Equal Protection Clauses of the Federal and State Constitutions. The Taxpayers also suggest that the "managing entity" concept embodied in s. 192.037 violates the limitations on "delegation of authority" under the Florida Constitution.

However, it is a basic rule of constitutional law that actions of the Legislature carry a strong presumption of correctness, and the courts are required to indulge every presumption in favor of the constitutional validity of challenged enactments. The Taxpayers have failed to demonstrate that the challenged statutory scheme providing for separate appraisals of individual fee time-share estates and combining them into one entry for listing on the tax roll in the name of the "managing entity" is so invidiously discriminatory or so broad with respect to the duties assigned to the "managing entity" as to render the statute constitutionally defective.

ARGUMENT

POINT I

SECTION 192.037, FLA. STAT., AND THE RELATED STATUTORY PROVISIONS ENACTED IN 1982 EVIDENCE THE CLEAR INTENT OF THE LEGISLATURE TO TREAT FEE TIME-SHARE ESTATES AS SEPARATE PARCELS OF PROPERTY FOR AD VALOREM APPRAISAL PURPOSES BEGINNING WITH THE YEAR 1983.

Stated in the Inital Brief of the Taxpayers as:

> **POINT I - UNDER THE FACTS OF THIS CASE, WAS THE PROPERTY APPRAISER CORRECT IN ASSESSING EACH INDIVIDUAL TIME-SHARE "WEEK" OR SHOULD THAT ASSESSMENT HAVE BEEN RESTRICTED TO THE FAIR MARKET VALUE OF THE ENTIRE TIME-SHARE DEVELOPMENT OR OF THE ENTIRE CONDOMINIUM APARTMENT UNIT WITHOUT REFERENCE TO ITS SUBDIVISION INTO TIME-SHARE INTERESTS?**

Chapter 82-226, Laws of Fla., not only created s. 192.037, but also amended ss. 192.001, 194.011, 195.073, 197.0167, 718.120, 718.503, 721.03 and 721.06, Fla. Stats. (1983). 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.

Despite these above-referenced numerous statutory changes made by the Legislature in 1982 with respect to the ad valorem taxation of time-share periods sold as fee time-share estates, the Taxpayers and other time-share developers have attempted to persuade the courts of Florida to rule that there is still no statutory basis after 1982 for the separate appraisal of fee

time-share estates for ad valorem tax purposes.[1] The Department suggests that such an argument on the part of the Taxpayers merely evidences an understandable longing on their part to revert back to the pre-1983 statutory law of Florida, when time-share developers had no express statutory responsibility in assisting in the process of collection of ad valorem taxes on fee time-share real property.

The apparent conclusion that the various statutory changes made by the Act evidence the Legislature's intent to statutorily recognize fee time-share estates as separate parcels of property for ad valorem appraisal beginning in 1983 is evidenced by the fact that there are at least thirteen (13) separate references to the terms "fee" time-share estates, "fee" time-share periods, "fee" interests in real property , "fee" interest in time-share units or "fee" time-share real property in ss. 53 through 61 of the Act. This repeated reference to the terms "fee" and "estates" in connection with ad valorem taxation of time-share periods sold as fee interests in real property would seemingly

[1] However, in every case where a challenge to a 1983 tax appraisal of fee-time estates under the 1982 Act has been asserted, not one single trial or appellate court of Florida has agreed with the contention of the time-share developers that s. 192.037 and related statutory provisions do not purport to require the property appraisers to separately appraise fee time-share estates for ad valorem tax purposes, and then combine the fee time-share estates into a single listing on the tax roll. See, Oyster Pointe Resort Condominium Assoc., Inc. v. Nolte, 497 So.2d 1306 (Fla. 4th DCA 1986); pet. for review filed, Nos. 69,794 and 69,795 (Fla.); Driftwood Management Co., Inc. v. Nolte, 497 So.2d 740 (Fla. 4th DCA 1986), pet. for review filed, No. 69,796 (Fla.); Spanish River Resort Corp. v. Walker, 497 So.2d 1299 (Fla. 4th DCA 1986); app. filed, No. 69,797; and High Point Condominium Resorts, Ltd. v. Day, 494 So.2d 508 (Fla. 5th DCA 1986), appeal filed, No. 69,519 (Fla.).

compel a reasonable conclusion that it was the intent of the Legislature to classify fee time-share estates as separate parcels of property for ad valorem appraisal purposes.

It is an elementary tenet of real property law that the term "fee" or "fee simple" represent the highest and most complete estate in the land known to law. See, State ex rel. Ervin v. Jacksonville Expressway Authority, 139 So.2d 135 (Fla. 1962); and 22 Fla. Jur.2d, Estates, Powers & Restraints, s. 8. In 22 Fla. Jur.2d, Estates, Powers & Restraints, supra, the treatise sets forth the following discussion of the term "fee" simple at pages 256-257:

> "Fee simple" defines the largest estate in the land known to the law and necessarily implies that absolute dominion over the land. Only one estate in fee simple can exist in a particular tract of land; it is an estate of inheritance unlimited in duration, descendible to all the heirs of the owner, and except for the fact that it may be created so as to be defeasible and subject to executory limitations or granted or devised subject to a condition subsequent, it is clear of any qualification or condition with respect to its duration and enjoyment. It is also defined as an estate of perpetuity, conferring an unlimited power of alienation. . . .
>
> * * * * *
>
> Inasmuch as an estate in fee simple implies absolute sovereignty over the land, the power of alienation is necessarily incidental thereto, and an unlimited condition in restraint of alienation attached to such an estate is void. . . . (e.s.)

Thus, the Taxpayers' attempt to continue to portray fee time-share estates in real property as "partial interests" in real estate for ad valorem taxation under the Florida statutory law in effect since January 1, 1983, is totally repugnant to the

critical statutory terminology as historically utilized in real property law.

This identical argument was expressly rejected by the Fourth District Court of Appeal of Florida in its opinion in the Spanish River Resort case, as follows:

> . . . In view of the statute quoted above [192.037], it would appear that an ad valorem tax may be assessed against time-share estates. However, the time-share unit owners disagree and point to the second sentence of the particular section, quoted above, which for emphasis we again repeat:
>
> **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.**
>
> As the time-share unit owners see it, this language calls for the assessed value of the **development, i.e.,** land and buildings (in other words, the entire units unaffected by subdivision into time-share weeks). . . .
>
> Nonetheless, we do not agree with the time-share unit owners' contention. Section 192.037(2) must be read in pari materia with all of the other subsections in section 192.037, particularly the preceding subsection (1). Subsection (1) provides that the managing entity shall be considered the agent for **all** the time-share unit holders, so that, as subsection (2) contemplates, only a single entry for each development need appear on the assessment rolls. However, Subsection (2) quite clearly goes on to provide that that single assessment entry shall be the value of the combined **individual** time-share periods. While we are not very impressed with this statutory choice of words, we are confident that the language employed contemplates that the single assessment entry is to reflect the sum of the individual assessments of each time-share unit. Our conclusion is bolstered by all the other statutory enactments or amendments which took place during this same period. For example, there are now at least thirteen separate occasions on which the term "fee" has been engrafted into the applicable

> statutes. In addition, section 721.03(5), Florida Statutes (1983), now clearly specifies that "the treatment of time-share estates for ad valorem purposes and special assessments shall be as prescribed in Chapters 192 through 200." This quoted language, appearing contemporaneously with the enactment of section 192.037, is an unmistakable expression of the legislature's intent to bring individual time-share units or "weeks" within the ambit of ad valorem taxation. The Legislature is presumed to know the meaning of words which have accepted meaning and usage which it adopts for statutory use. See Thayer v. State, 335 So.2d 815 (Fla. 1976). In this context, the use of the word "fee" on so many occasions cannot be ignored. . . . (e.s.).

Id., at pages 1301-1302.

As in the Spanish River Resort case, the undisputed testimony and documentary evidence introduced at the trial below established that the time-share units or periods at the Oyster Pointe and Oyster Bay resorts were sold by warranty deed conveying fee title to the individual time-share estates. These warranty deeds were also accompanied by title insurance policies insuring title of the grantees to the individual fee time-share periods in the full amount of the purchase price. In addition, the Taxpayers' testimony revealed that purchase money mortgage financing on sale of the individual fee time-share estates at the Oyster Pointe and Oyster Bay resorts was also provided comparable to purchase money mortgage financing of any other parcel of property.

The Department respectfully suggests the Taxpayers' attempt to persuade this Court that the individual fee time-share estates conveyed to the public by warranty deed with accompanying title insurance are not separate parcels of real property for ad

valorem appraisal purposes constitutes blatant incongruity. This claim is in direct contrast to the Taxpayer's representations in their warranty deeds, title insurance policies and purchase money mortgages that the grantees are receiving separate fee estates in real property. Such inconsistent posturing should not be condoned by the appellate courts of this state!

The Taxpayers' argument under Point I contains citations to various ad valorem tax cases purporting to support their position. However, the Taxpayers' reliance on the cited cases are misplaced, since none of the cases hold (or even suggest) that the use to which a parcel of real property is committed is not a major criteria in determining the value of the property for ad valorem taxation.

The Taxpayers argue that the property appraisers should focus solely on the physical attributes of improved real property in determining the appraised value of the property for tax purposes. However, this conclusion is clearly erroneous. Three identical-appearing structures, located side-by-side, could actually be (1) a rental apartment building, (2) a number of whole-unit condominium parcels, and (3) condominium parcels divided into fee time-share estates. The "physically defined realty" in each of these three situations would look the same.

The Taxpayers contend that the ad valorem tax value of these similar appearing real property improvements should be the same, notwithstanding the different uses to which the various structures have been committed by the owner. However, in the landmark tax case of Park-N-Shop, Inc. v. Sparkman, 99 So.2d 571,

573 (Fla. 1957), this Court ruled that ". . . the criterion in determining the taxable character of property is the nature of the use to which it is put. . . ." (e.s.).

This cardinal rule of ad valorem tax law enunciated in Park-N-Shop, Inc., was followed by the Fourth District Court of Appeal in the subsequent case of Orlando Utilities Commission v. Milligan, 229 So.2d 262 (Fla. 4th DCA 1969), cert. den., 237 So.2d 539 (Fla. 1970). The court observed on page 264 of the Milligan opinion that the ". . . utilization of the property, not the character or nature of its owner, is the major criterion to be used in determining an owner's liability or non-liability for taxes." (e.s.).

It is undisputed in this case that substantially all of the subject condominium parcels at the Oyster Pointe and Oyster Bay resorts had been committed to time share-property under Ch. 721, Fla. Stat., on the assessment date. Even time-share developers have not suggested that the aggregate value of hundreds of condominium units would have the same fair market value for tax purposes as a similar number of apartment units in a physically identical apartment building! How then can the Taxpayers and other time-share developers seriously urge the courts of this state to rule that a building committed to use as time share real property and divided into thousands of separately saleable fee time-share estates should be treated the same for tax purposes as a physically identical structure used as an apartment or condominium facility?

The Taxpayers close Point I of their initial brief by suggesting that their argument is supported by the language in s. 192.037(3) requiring the Property Appraiser to ". . . anually notify the managing entity of the proportions to be used in allocating the valuation . . . among the various time-share periods." However, this conclusion is clearly unwarranted when this language is viewed in para materia with the preceding provisions of s. 192.037(2). Subsection 192.037(2) requires the Property Appraiser to combine the values of the individual fee time-share estates into one aggregate listing on the tax roll for the entire time-share development. Thus, it is necessary that the Property Appraiser must reverse the process mandated under subsection 192.037(2), in order to notify the managing entity under s. 192.037(3) of the basis for assessing the various fee time-share estate owners for their respective proportionate share of the combined aggregate value as listed on the tax roll under the preceding subsection.

POINT II

THE DECISION OF THE DISTRICT COURT EXPRESSLY UPHOLDING THE CONSTITUTIONALITY OF SECTION 192.037(2), FLORIDA STATUTES, IS CORRECT AND SHOULD BE AFFIRMED BY THIS COURT.

Stated in the initial brief of the Taxpayers as:

> **POINT II - IF THE LEGISLATURE CAN BE DEEMED TO HAVE AUTHORIZED AD VALOREM ASSESSMENT OF DISCRETE PARTIAL OWNERSHIP INTERESTS IN THE SAME PHYSICAL UNITS OF PROPERTY, RATHER THAN OF THE PROPERTY ITSELF, THEN SUCH AUTHORIZATION EXCEEDS JUST VALUE, DENIES DUE PROCESS OF, AND EQUAL PROTECTION UNDER, THE LAW TO THE OWNERS OF THE PROPERTY AND REPRESENTS ILLEGAL DELEGATION OF A CONSTITUTIONAL OFFICER'S POWERS.**

The District Court rejected all of the constitutional claims raised by the Taxpayers in the proceedings below based on its simultaneous opinion rendered in Spanish River Resort v. Walker, supra. The District Court's brief opinion below is as follows:

> Affirmed on the authority of Spanish River Resort Corporation v. Walker, 497 So.2d 1299 which is being issued simultaneously herewith. We acknowledge that by our ruling we are expressly approving the constitutional validity of section 192.037(2), Florida Statutes (1985). (A. 8)

This Court should summarily affirm the holding of the District Court that s. 192.037 is constitutional because the Taxpayers failed to present any evidence to the trial court that they have suffered (or assuredly will suffer) any actual damage or injury due to the challenged statutory scheme.

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, 62 So.2d 5 (Fla. 1952). On page 8 of the Henderson opinion, this Court ruled 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, 47 So.2d 567 (Fla. 1950), 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).

It is undisputed in this proceeding that the suit filed in the trial court by the "managing entity" and other plaintiffs below placed into issue the validity of the assessment of each and every fee time-share estate on behalf of each and every fee time-share estate titleholder at the Oyster Pointe and Oyster Bay

resorts. Furthermore, it is also undisputed that there was no evidence (nor even any allegation by the Taxpayers) of any delinquent taxes or sale of tax certificates adversely affecting the property rights of the individual owners of fee time-share estates at Oyster Point and Oyster Bay resorts.

It can be seen from above that the list of potential deprivation of property rights alluded to in the Taxpayers' initial brief are merely speculative possibilities having absolutely no basis in the facts of record! Hypothetical damages 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 unconstitutional. Consequently, the constitutional Due Process and Equal Protection claims relating to the individual owners of fee time-shares at Driftwood Resorts should summarily be denied.

Furthermore, the constitutional claims of the Taxpayers are legally insufficient to warrant striking the challenged statutory provisions as constitutionally infirm, even if there was evidence of record of some present injury suffered by the taxpayers as the result of the alleged statutory scheme. This conclusion is compelled because the Taxpayers have failed to carry their heavy burden of overcoming the strong presumptions favoring the constitutional validity of actions of the Legislature. These presumptions applicable to judicial review of actions challenging the constitutionality of taxing statutes include, but are not limited to, the following:

1. 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.

2. 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. denied, 383 U.S. 958 (1966).

3. 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 Airlines supra, at page 314; Just Valuation & Taxation League, Inc. v. Simpson, supra, at page 232; and Madden v. Kentucky, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1940).

4. 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, 343 So.2d 9, 11 (Fla. 1977).

The Taxpayers rely in their initital brief on the case of High Point Condominium Resorts, Ltd. v. Day, 494 So.2d 508 (Fla. 5th DCA 1986). In the High Point Condominium case, the district court did hold the provisions of s. 192.037 facially unconstitutional. This decision was subsequently appealed as Day v. High Point Condominium Resorts, Ltd., No. 69,796 (Fla.), and oral argument has been heard by this Court. The Department respectfully submits that the judicial analysis of the district court in its opinion in the High Point Condominium case relating to the constitutionality of s. 192.037 is fatally flawed. The Department urges this Court to reject the analysis of the district court in the High Point Condominium case pertaining to the constitutionality of s. 192.037 and to adopt the rationale set forth in the opinion of the District Court in the Spanish River Resort case also now pending before this Court.

The rationale inherent in the district court's opinion in the High Point Condominium case erroneously assumes that there is an absolute legal requirement that every owner of a fee interest in real property in this state must be separately identified on the tax roll and must receive an annual tax bill in order for the annual ad valorem tax on their real property to be constitutionally valid. 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), 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 proof 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 nonpayment of taxes. (e.s.)

The above-cited provisions of s. 197.0151(1), Fla. Stat., place all owners of property in this state 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.

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.)

In reviewing the statutory concept embodied in s. 192.037 (and other related statutes), 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 Regulations.

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 period 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 Ch. 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 use of an agent designated to be statutorily responsible for remitting ad valorem taxes on fee time-share estates to taxing authorities is not a judicial 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 3332, 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 Oyster Point and Oyster Bay resorts, timely challenged the valuation of all the time-share unit weeks resulting in this proceeding now before the Court. Thus, any alleged deprivation of due process or equal protection exists solely in the minds of the disgruntled time-share developers.

In any event, 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 nonresidents. In 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 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 individuals 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.

Furthermore, both this Court and the U.S. Supreme Court have held that in taxation, even more than other fields, the Legislature proposes 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 Airlines, 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 currently 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 fee time-share use. This subdivision of a condominium unit into many fee time-share estates has also resulted in a significant increase in the total aggregate purchase price received for a single condominium unit subdivided into fee time-share estates. However, this ingenuous concept of real estate marketing has also created some serious problems for local government officials responsible for the assessment and collection of ad valorem taxes on condominium 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 condominium 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.

These ad valorem tax assessments 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 Law and Business of Timeshare Resorts," Tax Aspects, s. 7.03(5)(a), 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 owners' 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 conventional residential bill hovers around $1,000. (e.s.) (A. 11-12)

As indicated in the above-cited portion of the treatise on "The Law and Business of Timeshare Resorts," the notice and

collection 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. A statutory requirement that separate tax bills must be sent to numerous persons residing in various parts of the nation and 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 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 tax assessment and collection 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 comparison 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.)

This Court has acknowledged its approval of the rule of statutory construction that, if any state of facts can be conceived of which would sustain 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. See, State v. Bales, supra; 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 in other states and countries clearly supplies a reasonable 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 of the numerous fee time-share estates 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.

In concluding their argument under Point II, the Taxpayers also present a cursory argument concerning an alleged "unlawful delegation of constitutional powers." While s. 192.037 is admittedly not a classic model of statutory perfection, these provisions are far from being so broad with respect to the duties assigned to the managing entity to render them constitutionally defective on "unlawful delegation" grounds.

This claim of the Taxpayers that the provisions of s. 192.037, as interpreted, result in an "unlawful delegation of constitutional power" is without substantial merit. Only "fundamental and primary policy decisions" may not be delegated. Thus, it is the power to say what the law is that may not be delegated, rather than administrative and clerical functions. See, Microtel, Inc. v. Fla. Public Service Commission, 464 So.2d 1189 (Fla. 1985); and Dept. of Insurance v. Southeast Volusia Hospital Dist., 438 So.2d 815 (Fla. 1983).

The provisions of s. 192.037 in no way delegate to the managing entity any authority to make "fundamental and primary policy decisions" related to the assessment and collection of ad valorem taxes on fee time-share estates. The "managing entity" under s. 192.037 clearly functions in a ministerial capacity by allocating to the respective fee time-share estate owners their proportionate share of the tax liability as previously determined by the Property Appraisers. The "managing entity" then collects these sums, together with other charges owed by the time-share owners. There is no exercise of "constitutional powers" by the managing entity within the contemplation of the duties set forth in s. 192.037.

The Taxpayers also rely in their initial brief on the conclusion of the district court in the High Point Condominium case that the Legislature does not have the power to appoint a statutory agent for tax purposes because "the creation of an agency relationship requires a consensual agreement between the parties." However, the provisions of s. 721.06(1)(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(1)(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 consensual agreement deemed necessary by the district court decision in the High Point Condominium case to create an agency relationship is satisfied by the statutory mandate of s. 721.06((1)h).

The Department would direct the Court's attention to the critical fact that these provisions of s. 721.06(1)(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(1)(h) stand before this Court fully intact and unchallenged and should be accorded full force and effect.

POINT III

THE TAXPAYERS TOTALLY FAILED TO PROVE THAT THE APPRAISALS OF THE SUBJECT FEE TIME-SHARE ESTATES WERE NOT SUPPORTED BY ANY REASONABLE HYPOTHESIS OF A LEGAL ASSESSMENT.

Stated in the initial brief of the Taxpayers as:

> **POINT III WHEN THE PROPERTY APPRAISER RELIES SOLELY ON THE MARKET APPROACH TO VALUE, HE MUST NET FROM THE SALE PRICE ALL OF THE USUAL AND REASONABLE COSTS OF THE SALE TO THE SELLER, TOGETHER WITH THE COST OF ATYPICAL FINANCING, AND MUST ALSO, CORRESPONDINGLY, SUBTRACT ALL ELEMENTS OF THE PURCHASE PRICE OTHER THAN ITS REAL PROPERTY ELEMENT.**

It is undisputed that the Property Appraiser appraised the fee time-share estates at Oyster Pointe and Oyster Bay resorts based on a market approach utilizing sales data of comparable time-share periods sold as fee time-share estates. The uncontroverted testimony by the Property Appraiser's staff also established that the actual valuations allocated to any of the individual time-share periods sold as fee time-share estates were discounted 26% below the listed actual sale prices of any of the comparable fee time-share estates to reflect the Property Appraiser's determination of the weight given to "usual and reasonable costs of sale" and other criteria set forth in s. 193.011(8), Fla. Stat.

The Taxpayers and their expert witnesses who testified at trial soundly disagreed with the "market approach" used by the Property Appraiser and disagreed with the weight given for the criteria set forth in s. 193.011(8). However, disagreement by a taxpayer with the Property Appraiser's assessment methodology or disagreement with the weight given to any of the respective

statutory criteria, no matter how sincere, has been repeatedly held by the Florida appellate courts to be legally insufficient to overturn a tax assessment.

This Court has consistently held over the years that, as a constitutional officer, the actions of a property appraiser are clothed with the presumption of correctness, and that a taxpayer has the burden of overcoming this presumption of correctness by sufficient allegations and proofs excluding every reasonable hypothesis of a legal assessment. See, Blake v. Xerox, 447 So.2d 1348, 1351 (Fla. 1984); Straughn v. Tuck, 354 So.2d 368, 371 (Fla. 1977); District School Bd. of Lee Co. v. Askew, 278 So.2d 272, 277 (Fla. 1973); and Powell v. Kelly, 223 So.2d 305, 308 (Fla. 1969).

The proposition that appraisal of property necessarily involves a great deal of discretion and judgment on the part of each appraiser is a basic maxim of ad valorem tax law. The inherent ingredient of subjective judgment [often resulting in substantial differences in opinions of value of the same property by reputable appraisers] has been recognized by this Court as one of the underlying bases for the legal presumption of correctness of the property appraiser's assessments. See, District School Bd. of Lee Co. v. Askew, supra, Powell v. Kelly, supra, and Schleman v. Connecticut General Life Ins. Co., 9 So.2d 197 (Fla. 1942).

This Court observed at page 307 of its landmark opinion in Powell v. Kelly, supra, as follows:

> The fixing of a valuation on property by a tax assessor for the purpose of taxation is an

> administrative act involving the exercise of administrative discretion, and the Court will not in general control that discretion unless it is illegally or fraudulently exercised or exerted in such manner or under such circumstances as will amount in law to a fraud. (e.s.)

In the often-quoted opinion in the Schleman v. Connecticut General Life Ins. Co., supra, this Court stated on page 200 of the opinion that:

> We are fully aware of the difficulty of fixing with certainty the full cash value of property and the great variance in values set by persons of like experience and judgment, all making estimates conscientiously. Because of this inexactitude considerable leeway should be granted the official whose duty it is to make assessments and because of his position his valuations should not be easily disturbed . . . . (e.s.)

This Court also observed on page 309 of its opinion in Powell v. Kelly, supra, that:

> The appraisal of real estate is an art, not a science. There are various methods of approach in determining the market value of real estate, each approach involving the use of various guidelines. Although the use of such guidelines may be mandatory in appraisal work, their application to various situations calls upon the exercise of judgment. . . . (e.s.)

A detailed analysis by this Court of the presumptions and burdens of proof applicable to a suit challenging an ad valorem tax assessment is contained in the Court's 1984 opinion in Blake v. Xerox Corp., supra. In the Xerox Corp. case, the trial court's judgment upholding the property appraiser's assessment based on the "market" or "comparable sales" approach was reversed by the Third District Court of Appeal due to a conclusion by the district court that the income approach to value recommended by

Xerox's appraisers was the "better method" for determining the market value of the tangible personal property in question.

However, the decision of the Third District Court was quashed by this Court and remanded with instructions that the judgment of the trial court be affirmed. In so holding, this Court stated on pages 1350-1351 of the Xerox opinion as follows:

> The district court found that the income capitalization method put forward by Xerox was a better method of determining market value than the list-price-less-depreciation method used by the property appraiser. On the basis of this perceived superiority of one method over the other, the district court held that the income capitalization method should have been used. But see Xerox Corp. v. Blake, 415 So.2d at 1311 (Pearson, J., concurring) (income capitalization was the only possible legally correct method). We find that the district court applied an erroneous standard of review and we therefore quash the district court's decision.
>
> * * * * *
>
> . . . Although the trial court appears to have grounded its judgment on the finding that Xerox had failed to prove that its method was superior, this finding was unnecessary to the judgment. Regardless of which method was theoretically superior, the trial court was bound to uphold the appraiser's determination if it was lawfully arrived at and within the range of reasonable appraisals, that is, if it was supported by any reasonable hypothesis of legality.
>
> Like the trial court, the district court addressed the merits of the question of which method was theoretically superior, and simply disagreed with the trial court's determination. Although the trial court's determination was based in part on a finding that the property appraiser's method was the better one, the judgment should have been affirmed simply on the ground that the property appraiser's determination, having been lawfully arrived at and being supported by a reasonable hypothesis of correctness, was

> properly upheld. Homer v. Dadeland Shopping Center, Inc., 229 So.2d 834 (Fla. 1969). The size or scope of the sales market for Xerox copying machines should not have been regarded by the district court as determinative. The trial court found that there was a sufficient sales market to render the appraiser's method reasonable.
>
> * * * * *
>
> The district court may have been correct in concluding that the income capitalization method was the better method for determining market value, but that was not the legal question presented. (e.s.)

The holding of the Xerox v. Blake case has been followed by the district courts of Florida in the recent cases of Bystrom v. Bal Harbour 101 Condominium Association, Inc., 502 So.2d 1312 (Fla. 3rd DCA 1987); Vero Beach Shores, Inc. v. Nolte, 467 So.2d 1041 (Fla. 4th DCA 1985); and Daniel v. Canterbury Towers, Inc., 462 So.2d 497 (Fla. 2nd DCA 1984). The Bal Harbour decision represents the latest known opinion of the appellate courts of this state dealing with the presumptions and burdens of proof applicable to an action challenging the validity of an ad valorem tax assessment.

In the Bal Harbour case, the property appraiser's assessments of the individual condominium units were overturned by the trial court. However, the Third District Court of Appeal reversed the trial court and reinstated the property appraiser's valuations for all of the units in the Bal Harbour 101 Condominium. The taxpayer claimed that the property appraiser had merely increased last year's assessments on all of the condominium units by a flat percentage increase. The property

appraiser presented evidence that the assessments were based on prior sales of similar units in the same building.

The Bal Harbour opinion contains a detailed review of the recent appellate court decisions of Florida dealing with the legal requirements for overturning a tax assessment as follows:

> Since the Appraiser substantially complied with section 193.011, his valuation is entitled to the same presumption of correctness on appeal of the trial court's judgment as it was below. Markham v. June Rose, 495 So.2d 865 (Fla. 4th DCA 1986); see also Nolte, 467 So.2d at 1041. Therefore, the mere fact that the taxpayers disagree with either the weight to be accorded each factor or the method to be utilized in arriving at the valuation of the property is not a sufficient reason to overturn the Appraiser's valuation. See Blake v. Xerox Corp., 447 So.2d 1348 (Fla. 1984) (method of valuation is within discretion of appraiser so long as the determination is lawfully arrived at and within the reasonable range of appraisals); Bath Club, Inc. v. Dade County, 394 So.2d 110 (Fla. 1981) (weight accorded to each factor in assessing value is within the discretion of appraiser); Straughn v. Tuck, 354 So.2d 368 (Fla. 1977) (same); Daniel v. Canterbury Towers, Inc., 462 So.2d 497 (Fla. 2d DCA 1984) (weight accorded each factor and method used to reach valuation within appraiser's discretion); Blake v. Oceancoast Corp., 417 So.2d 1002 (Fla. 3d DCA), review denied, 424 So.2d 762 (Fla. 1982) (weight accorded each factor within appraiser's discretion); Bystrom v. Equitable Life Assurance Soc'y of the United States, 416 So.2d 1133 (Fla. 3d DCA 1982) (method used in valuation within discretion of appraiser), review denied, 429 So.2d 5 (Fla. 1983).
>
> The taxpayers had the burden of presenting proof which excluded "every reasonable hypothesis of a legal assessment." Calder Race Course, Inc. v. Overstreet, 363 So.2d 631 (Fla. 3d DCA 1978). The taxpayers failed to demonstrate that the valuation reached by the Appraiser was outside of the range of reasonable hypothesis. In fact, the appellees' own expert testified that if he

> reduced the amounts attributable to personal property in his own valuation, then the valuation reached by the Appraiser could fall within the expert's own valuation range. The expert further testified that the assessment of personal property is a judgment call. This type of judgment is within the Appraiser's discretion in valuing property for ad valorem tax purposes and should not be overturned absent proof that the Appraiser's valuation was arbitrary and unsupported by any reasonable hypothesis. See Xerox, 447 So.2d at 1350 (if assessment is within the range of reasonable appraisals it will be upheld); Powell v. Kelly, 223 So.2d 305 (Fla. 1969) (appraisal of real estate is an art not a science); Bystrom v. Bloom, 472 So.2d 819 (Fla. 3d DCA 1985) (though a lower valuation under the circumstances might be more reasonable, the appraiser's valuation will not be disturbed absent a showing that it was arbitrary and had no reasonable basis), review denied, 482 So.2d 347 (Fla. 1986). Therefore, the trial court erred in overturning the Appraiser's valuation. . . . (e.s.).

Id. at pages 1313-1314.

The appellate courts of Florida have even held that proof by taxpayers that the property appraisers' methodology was erroneous does not, of itself, entitle the taxpayers to any relief in an ad valorem tax challenge. See, Bystrom v. Whitman, 488 So.2d 520 (Fla. 1986); and City National Bank of Miami v. Blake, 257 So.2d 264 (Fla. 3rd DCA 1972).

In the City National Bank case, Id. , the district court stated on page 266 of the opinion as follows:

> . . . Based upon a virtual presumption of validity accorded to governmental decisions, the taxpayer in a court proceeding challenging the discretion of a tax assessor assumes a large burden. See: Markham v. Friedland, Fla. App. 1971, 245 So.2d 645. A tax assessment is presumed correct, and in order to successfully challenge it, the taxpayer must present proof which excludes every reasonable hypothesis of a legal

> assessment. That is, an assessor may reach a correct result for the wrong reason. (e.s.)

In Bystrom v. Whitman, supra, this Court recently observed that:

> We begin our analysis by noting the general proposition that the core issue in any action challenging a tax assessment is the amount of the assessment, not the methodology utilized in arriving at the valuation. Homer v. Connecticut General Life Insurance Co., 213 So.2d 490 (Fla. 3d DCA 1968). An appraiser may reach a correct result for the wrong reason. City of National Bank v. Blake, 257 So.2d 264 (Fla. 3d DCA 1972). (e.s.)

Id., at 521.

The citations from the above cases clearly establish that testimony by expert witnesses on behalf of the taxpayers as to their disagreement with the methodology used by the property appraiser is not sufficient to overcome the presumption of correctness accorded to the assessment. A taxpayer must affirmatively and clearly demonstrate that the property appraiser's ultimate valuation is so excessive as to be beyond the range of reasonable appraisals. Since the Property Appraiser's valuations in this case were based on the list or actual sales prices (less deductions required by s. 193.011(8), F.S.), the Taxpayers here have obviously failed to demonstrate that such valuations were totally arbitrary under the holdings of this Court in Blake v. Xerox, supra, and Southern Bell Telephone & Telegraph Co. v. County of Dade, 275 So.2d 4 (Fla. 1973).

The Taxpayers are not satisfied with the 26% adjustment made by the Property Appraiser to the sales prices of the fee time-share estates to reflect the "reasonable costs of sale" and other items under subsection 193.011(8). The Taxpayers have the

audacity to suggest to the courts of Florida that they are entitled to an approximately 80% discount off the list or sale prices of comparable fee time-share estates to account for alleged unusually high "marketing expenses" and "atypical" financing costs.

However, it is only when financing is demonstrated to have an effect on the price that any adjustments should be made to recorded sales prices for atypical financing terms. See, Bystrom v. Equitable Life Assurance Society of the United States, 416 So.2d 1133 (Fla. 3rd DCA 1982), at 1144, Headnote 17. The evidence presented at trial failed to establish that the costs of sale and financing terms of the fee time-share estates at Oyster Pointe and Oyster Bay were substantially different than those incurred at any other fee time-share project.

The Taxpayers' argument under Point III implies that the fair market value of the fee time-share estates is decreased by the marketing expenses involved in selling them. There is no legal precedent in this state to support such contention. To the contrary, the Florida Supreme Court has held that the price at which property sold, as indicated by documentary stamps on the instrument, is prima facie evidence of its value. Southern Bell Telephone & Telegraph Co. v. County of Dade, supra, at page 7. This is particularly true when, as here, there is no evidence of record that the Taxpayers have filed the form mandated by s. 195.027(6) to indicate that the costs and expenses of sale or terms of financing are unusual.

The Taxpayers' incredible claim that approximately 75-80% of the purchase price of a fee time-share estate should be excluded under s. 193.011(8) from the ad valorem appraisal process because of the high "marketing expenses" and "atypical financing costs" was rejected by the trial court which ruled in the amended final judgment below, with respect to s. 193.011(8), that:

> It is the Court's opinion under Florida Statutes 193.011, subsection 8, the Legislature did not intend that marketing, sales' commissions, and other expenses be allowed as deductions for ad valorem tax purposes but intended only to allow normal and reasonable costs of closing real estate transactions. (A. 4).

The conclusion that the term "reasonable fees and costs of sale" within the contemplation of s. 193.011(8) is limited to reasonable fees and costs typically associated with the closing of the sale of real property (such as brokers' commissions, title insurance fees, survey and appraisal costs, etc.), was expressly endorsed by the Fourth District Court of Appeal in its detailed opinion in the Spanish River Resort case, as follows:

> Moreover, as succinctly stated in a recent excellent law review article on the subject:
>
> > Florida's time-share assessment statute does not specifically recognize the marketing costs associated with selling time-share properties. Florida Statute section 193.011(8), however, does specify that the property appraiser must consider the net proceeds derived from the real property sale after "deduction of all of the usual and reasonable fees and costs of the sale." Such usual and reasonable fees and costs typically include reasonable attorney's fees, broker's commissions, documentary stamp costs, survey costs, appraisal fees, and title insurance costs. Internal expenditures such as marketing costs are

> generally not included within the scope of this section. **Thus, the Florida real property assessment statutes do not recognize the exorbitant internal expenditures incurred while marketing time-share properties.** (emphasis supplied.)
>
> Note, Ad Valorem Taxation of Time-Share Properties: Should Time-Share Estates be Separately Assessed and Taxed? 37 U.Fla.L.Rev. 421, 436 (1985).
>
> Finally, on the appraisal question, the "cost of the sale" criterion should not be over-emphasized. If comparable sales establish the market value of two identical properties, we know of no court decision which would allow the **buyer** of the first parcel to insist on a value 55% less than the second, because the **seller** of the former parcel chose to expend an inflated percentage sum to market his property in order to obtain a purchaser. This eighth criterion in section 193.011 must be read in pari materia with the first which limits the consideration of sales cost to "**reasonable** fees and costs of purchase." (emphasis supplied).

Id, at page 1304.

The Department is aware of the language relating to "marketing expenses" contained in the opinion of the district court in the case of Hausman v. VTSI, Inc., 482 So.2d 428 (Fla. 5th DCA 1985), rev. den., 492 So.2d 1332 (Fla. 1986).

However, the Department submits that the more restrictive interpretation of s. 193.011(8) set forth in the Spanish River Resort opinion constitutes the better reasoned judicial analysis because this ruling is more consistent with both principles of statutory construction and generally accepted practices in the real estate industry. Thus, if the Hausman decision is viewed as still viable case law with respect to the application of s. 193.011(8), the Department requests that this Court expressly

adopt the rationale of the Spanish River Resort opinion limiting the "reasonable fees and costs of sale" language of s. 193.011 to the standard closing costs in general acceptance among real estate brokers and real property appraisers.

In closing, the Department submits that the Taxpayers are really asking this Court to amend, by judicial fiat, the critical language in s. 193.011(8), to insert their preferred terminology **" all marketing expenses"** in lieu of the statutory terminology **"usual and reasonable fees and costs of the sale."** However, it is a well recognized rule of statutory construction that, in reviewing statutory language, the courts are not free to add words to steer a statute to a meaning which its plain wording does not supply; and when there is doubt as to the legislative intent, or when speculation is necessary, the doubt should be resolved against the power of the court to supply missing words. See, 49 Fla. Jur.2d, Statutes, s. 120.

If the Legislature had intended that **"all marketing expenses"** of the seller should be deducted under s. 193.011(8) in arriving at the net proceeds of the sale, then it would have been a simple matter for the Legislature to have utilized this critical terminology in the statute instead of the language **"usual and reasonable fees and costs of sale."** Consequently, the Taxpayers requested judicial amendment to the statutory lauguage of s. 193.011(8) should be rejected by this Court.

POINT IV

THE DECISION OF THE DISTRICT COURT SHOULD NOT BE REVERSED IN PART BASED ON AN ISSUE NOT PRESENTED TO THE DISTRICT COURT FOR ADJUDICATION.

Stated in the Initial Brief of the Taxpayers as:

THE COURT ERRED AS TO THIS PLAINTIFF BY FINDING AND DETERMINING THAT FIFTY-TWO MULTIPLE FAMILY DWELLING UNITS WOULD BE ASSESSED FOR 1983 AD VALOREM TAX PURPOSES PURSUANT TO THE PROVISIONS OF S. 192.037, FLA. STAT., (1982), WHEN ON JANUARY 1, 1983, SIX UNITS WERE COMPLETED AND WERE WHOLE ONWERSHIP CONDOMINIUM UNITS IN WHICH NO TIME-SHARE INTERESTS HAD BEEN CREATED.

In the separate brief filed in Oyster Point Resort Condominium v. Nolte,, Case No. 69,794, the Petitioners, for the first time on appeal, raise a purely factual issue in Point IV which was not presented to the District Court below. Included in the Appendix to the Department's Answer Brief is a copy of the Table of Contents to the Initial Brief of the Appellants filed in the District Court establishing that the Petitioners failed to present this issue to the district court for consideration. (A. 10).

It is a basic rule of appellate review that the Florida Supreme Court will not pass upon matters not raised and adjudicated in the lower courts. See, 3 Fla. Jur.2d, Appellate Review, s. 512; and Revitz v. Baya, 355 So.2d 1170 (Fla. 1977). Consequently, this issue belatedly raised by Petitioners should be summarily rejected by this Court.

CONCLUSION

The appraisals of the subject fee time-share estates at the Oyster Point and Oyster Bay resorts for the year 1983 were made in direct response to the mandate of the 1982 Act, which instituted comprehensive statutory changes with respect to the ad valorem taxation of fee time-share real property. The valuations of the subject fee time-share estates were made by the Property Appraiser based on adjusted sales data of similar fee time-share estates and there was substantial, competent evidence before the trial court to support the sufficiency of the market data. Also, the weight allocated by the Property Appraiser to the criteria set forth in s. 193.011(8) was within his sound discretion, and the Property Appraiser's determination of a 26% figure is certainly as reasonable as the exorbitant 75-80% figure proposed by the Taxpayers! Consequently, the valuation issue is controlled by the holding of this Court in Blake v. Xerox, supra, and the holding of the district court in Bystrom v. Bal Harbour 101 Condominium Assoc., Inc., supra.

Furthermore, there is clearly a conceivable, rational basis to support the constitutionality of the statutory scheme set forth in s. 192.037 and related statutes for separately appraising individual fee time-share estates and combining them into a single entry for listing purposes on the tax roll. The designation of an "on-site" statutory agent (managing entity) responsible for remitting to the Tax Collector the aggregate ad valorem taxes due from numerous fee time-share estate owners,

many of whom reside in other states and countries, represents a reasonable attempt by the Legislature to deal with the unique tax assessment and collection challenges arising from the recent creation of fee time-share estates in real property.

The decision below of the District Court affirming the validity of the challenged assessments and expressly upholding the constitutionality of the provisions of s. 192.037 as applied by the Property Appraiser in this case should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief on the Merits has been furnished by U. S. Mail to **ROBERT JACKSON**, Esq., 2165 15th Ave., Vero Beach, FL 32960; **MILES B. MANK, II**, Esq., P.O. Box 908, Vero Beach, FL 32961-0908; **MICHAEL O'HAIRE**, Esq., 3111 Cardinal Dr., Vero Beach, FL 32963; and **JAMES S. BYRD**, JR., Esq., P.O. Box 112, Orlando, FL 32802, this 12th day of June, 1987.

J. Terrell Williams
Assistant Attorney General