IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO. 69,794

OYSTER POINTE RESORT CONDOMINIUM ASSOCIATION, INC. etc., et al.,
Appellants,
v.
DAVID C. NOLTE, etc., et al.,
Appellees.

APPELLEE'S

ANSWER BRIEF ON THE MERITS

APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT
CASE NO. 85-1290

Respectfully submitted by:

Robert Jackson
Law Offices of Robert Jackson, P.A.
2165 - 15th Avenue
Vero Beach, Florida 32960
(305) 567-4355
Florida Bar No. 38960
Attorney for Appellee

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PREFACE

Appellants were Plaintiffs in the trial court and this Brief will refer to the parties as they appeared in the trial court, Appellees being Defendants.

References in this Brief will follow the Index prepared by the Clerk of the trail court (Circuit Court of the Nineteenth Judicial District in and for Indian River County, Florida), as follows:

R - indicates Record;

T - indicates Transcript;

Paintiffs' (or Defendants') Exhibit _____ - indicates exhibits marked for identification or in evidence (the numbering being the same) in the trial court.

Unless otherwise indicated, emphasis on quoted material is supplied by Respondent.

NOTE: This case was consolidated for trial and for appeal to the Fourth District Court of Appeal. The decision of the District Court of Appeal was rendered as a consolidated case. Oyster Pointe Resort Condominium Association, Inc., etc., et al v. David C. Nolte, as Property Appraiser for Indian River County, etc., et al. and Oyster Bay II Owners Association, Inc., etc., et al., v. David C. Nolte, as Property Appraiser for Indian River County, etc., et al., 497 So.2d 1306 (Fla. 4th DCA 1986). A motion to consolidate these cases before this Court is

pending. Since no order has been entered at the time of filing this Answer Brief, copies of identical briefs are being filed in both cases.

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND OF THE FACTS

Pursuant to the Florida Rules of Appellate Procedure, the Appellee, David C. Nolte, as Property Appraiser of Indian River County, Florida, will adopt the Statement of the Case and of the Facts of Appellants in their Initial Brief with the exception of the following minor points.

There was no substantial issue made in the lower courts as to the method of arriving at the sale prices of the Appellants' time share units. The Property Appraiser and the owners of the time share units cooperated together in arriving at the sales price of each time share unit week based on the market values of the units being sold by the Appellants. The Appellants did, of course, object to assessing each individual week.

SUMMARY OF ARGUMENT

This is one of a series of lawsuits concerning the assessment for ad valorem tax purposes of time share units being sold by warranty deed and title insurance that have progressed through the courts. The Property Appraiser, following Section 192.037, Fla. Stat, (1982) has assessed each unit based on its market value and deducted the reasonable costs of sale in the amount of 15% and further deducted 11% from the assessment because of the inclusion of personal property in the sales price. The Property Appraiser has merely attempted to carry out the mandate of the Legislature as to the method of assessment and also follow the dictates of this Court and the District Courts of Appeal in assessing the market value of the property if the market value approach is sustainable by reason of sufficient sales. There is no question in this case that there were sufficient sales to base a market value assessment and this was done by the Property Appraiser (T-340). The issues in this case have been determined by the rulings of the District Court in that the Fourth District Court of Appeal has certified this case to this Court requesting the answer to the following certified questions:

1. 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 condominium apartment unit without reference to its subdivision into time share units?

2. Were we correct in upholding the constitutionality of Section 192.037?

The second point was the result of the holding in High Point Condominium Resorts, Ltd. et al v. Robert Day, 494 So.2d 508 (Fla. 5th DCA 1986), in which the Fifth District Court held Section 192.037, Fla. Stat. (1982) to be unconstitutional because of the mechanics of the assessment and collection of taxes by the time share managing entity.

This suit involves the assessments for the 1983 tax year and even at that early date in the creation and sale of time share units, there were some resales (T-346) which were introduced into evidence which indicated that the sale price by the developers and the sale price to subsequent purchasers seem to confirm that the price of each time share unit. This would completely nullify the Appellants' contention that the sales price included all of the intangibles, perpetual hotel service, and vacation advance reservations, exchange vacations from one resort to another, atypical financing, and other unusual costs of sale claimed by the Appellants. All of the time share cases presently pending before this Court really revolve around the same issues, among those cases are: High Point Condominium Resorts, Ltd. et al v. Robert Day, 494 So.2d 508 (Fla. 5th DCA 1986); Driftwood Management Co., Inc. et al v. David C. Nolte, 497 So.2d 740 (Fla. 4th DCA 1986); and Oyster Bay II Owners' Association, Inc., et al, v. David C. Nolte, Et Al, 497 So.2d 1306 (Fla. 4th DCA 1986).

Mr. Jack Sherman, the chief appraiser for the Property Appraiser's office, testified that he assessed the fee simple interest in the time share unit weeks (T-340), which he did in compliance with Florida Statutes 192.037 (T-341). He determined the highest and best use of the property to be as time share units. He could not appraise it for something of a lesser use than for what it was actually being used in an effort to lower the assessment (T-342).

Mr. Sherman considered the hundreds of original sales and a number of resales. The resales came out reasonably close to the original sales price (T-343). He explained the comparison of the resale price as compared to the original price. Mr. Sherman concluded that the resales confirm the viability of the time share concept. Even though there were not as many resales as he would have liked, the original sales prices were sustained by the "after market" prices (T-347; Defendant's Exhibits 10 and 11). The resales, of course, do not have all the marketing costs claimed by the developer and therefore effectively rebut the developer's contentions. Thus the prices of various resales were introduced into evidence in Defendant's Exhibits 9, 10, and 11.

The present litigation really centers around the interpretation of Florida Statutes 192.037 which for the first time in Florida mandated how the property appraisers were to assess time share units. The assessment of property in Florida for ad valorem tax purposes has gone through

years of interpretation and refinement in order to arrive at the constitutionally mandated "just value" being placed on each parcel of property. As new concepts of marketing and utilizing property developed, the Legislature was required to direct how parcels were to be assessed. When the condominium concept started in Florida there was, of course, no statute which indicated exactly how these units were to be assessed and, of course, the owners contended that they should be assessed only on land value and the construction costs of the building thereby having an assessment far lower than the sales price or market price of the units. The Legislature then mandated that each condominium should be assessed for its market value and that the amenities, recreational areas and parking areas and the lot would all be calculated in the market value of each unit. With the advent of the time share unit which was a further breakdown in the condominium concept, the Legislature was called on again and in Section 192.037, Fla. Stat. (1982) mandated that each unit should be assessed, and the total sales price, less the reasonable costs of sale, should be the measure of assessment. While everyother taxpayer in Florida is, theoretically, paying the assessed value of his property based on the market value approach, Section 192.037, Fla. Stat. (1982) merely mandates the same treatment for the time share units. Therefore, if a time share developer, which are the Appellants' herein, sell a condominium unit for $300,000.00 and another person sells a lot for $300,000.00

then both parties should be assessed on the same basis of just value.

All of the circuit courts who have ruled on this issue have had no problem in sustaining the assessing of the market value of each unit week as is done with other property based on Section 192.037, Fla. Stat. (1982). The district courts have concurred in this method of assessment but the Fourth District Court of Appeal in this cause has certified the question to this Court as one of great public interest.

Another issue being raised by the Appellants is whether the usual costs of sale which are deducted from the assessment of all properties in Florida should also include the many intangibles raised by the Appellants, including their claimed extraordinary costs of sale. What they are really saying is that when a good faith purchaser pays $10,000.00 for a unit he is really only receiving a value of $2,500.00. This aspect of the issues was not certified to this Court by the Fourth District Court of Appeal. The market value approach eliminates all of these arguments because a good faith purchaser will pay the amount he thinks the property is worth and that is what the assessment should be based on. It is like saying that if a condominium owner wants to try to sell his units by hiring persons to walk the streets and beaches in Vero Beach, and another does not, and they both sell their units for the same price, that the one who hires additional employees to walk the street and beaches should

be given a further discount regardless that they are selling the property for the same price. This would put the property appraisers in a most untenable position of trying to determine other than the normal costs of closing a transaction.

Lastly, the Fifth District Court of Appeal in High Point Condominium Resorts, Ltd. v. Robert Day, supra, found Section 192.037, Fla. Stat. (1982) unconstitutional because of its method of assessment and collection of taxes of time share property.

Needless to say, the time share concept increased the number of persons on the tax roll by at least 51 times for each condominium parcel. The whole concept caused both the time share industry and the property appraiser problems in the assessment and collection of taxes quickly and efficiently both for the property appraiser and the time share entity. The time share entity needs the ability to pay the tax on the time share units promptly and for the time share entity to have a lien on the property in order to foreclose it quickly if taxes are not paid by the owner. By this method a time share unit would not be tied up and inactive and without the payment of maintenance or taxes for the extended period of time. The purchasers, prior to closing, are properly notified of this procedure before they purchase a time share unit.

The developers are utilizing a method of selling real estate at huge prices and profits but do not want to pay

taxes based on the same assessment method of all other property owners in Florida.

ARGUMENT

POINT I

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

This case was affirmed on the basis of Spanish River Resort Corp. v. Walker, 497 So.2d 1299 (Fla. 4th DCA, 1986). The Property Appraiser feels that he has merely followed the mandates of the statutes in assessing the property of the Appellants which was upheld by the Fourth District Court of Appeal in Spanish River Resort Corp. v. Walker, supra. All of the points made in said case, the Appellee feels should be affirmed on appeal by this Court.

Time share ownership was recognized by the Legislature by enacting Florida Statutes, Sections 721; 718.103(10), (19), and (20). Florida Statutes, Section 718.120, mandated condominium property committed to time shares be assessed according to Section 192.037, Fla. Stat. (1982) which stated in part as follows:

> The assessed value of each time share development shall be the value of the combined individual time share periods or time share estates contained therein.

As stated by the Fourth District Court of Appeal property taxes are of a purely statutory nature which can be levied, assessed, and collected "only by the express method pointed

out by the statute." State Ex Rel Seaboard Airline Railroad v. Gay, 160 Fla. 445, 335 So.2d 403, (Fla. 1948).

The Property Appraiser must appraise all fee simple interest in real estate at just value. Just value has been determined to synonymous with market value. State Department of Revenue v. Markham, 462 So.2d 486 (Fla. 1983). Further, market value necessarily takes into considerations all eight (8) criteria of Florida Statutes, Section 193.011(2). Bystrom v. Equitable Life Assurance Society of the United States, 416 So.2d 1133 (Fla. 3rd DCA 1982).

The Appellants seem to be saying that their good faith purchaser for value were being misled in a rather gross fashion. They somehow that became unwilling purchasers and that regardless of the market value of the property being sold that the property appraiser should give some extraordinary treatment to them not authorized by statute. For example, if each owner, was selling his identical property for the same price and one is giving away free tv sets and paying 50% for a real estate commission and the other was not, the just value of the land would somehow not be the same. Further, as another example, if one sells one of 20 lots in a subdivision and another sells all 20 their relative per lot marketing costs would be very different but the market price remains the same.

The Appellants merely want to have their property assessed as something it is not, and want the Court to

classify it as a condominium when it is not being sold as a condominium.

POINT II

IF THE LEGISLATURE CAN BE DEEMED TO HAVE AUTHORIZED AD VALOREM ASSESSMENT OF DISRETE 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 OF THE ONWERS OF THE PROPERTY AND REPRESENTS ILLEGAL DELEGATION OF A CONSTITUTIONAL OFFICER'S POWERS.

The same argument to Point I applies to Point II except that the Appellants are also complaining that the mechanics of keeping the assessment rolls and of collecting the taxes makes the statute unconstitutional. They, of course, cite High Point Condominium Resorts, Ltd. v. Robert Day, supra, as authority for this position. There is a direct conflict here between the Fifth District of Appeal and the Fourth District Court of Appeal and both Courts have expressed quite clearly their positions as to the method of collection of taxes.

It is obvious that the Legislature intended to correct and facilitate the efficient collection of taxes by the time share units without destroying any of the constitutional rights of an owner. The Petitioner herein, of course, adopts the argument of the Fourth District Court of Appeal which finds the statute valid. As stated by the Fourth District Court of Appeal, Florida Law requires extremely strong proof to set aside a statute as unconstitutional. Every presumption will be indulged in in favor of the constitutionality of a statute and it must be proven to be invalid beyond a reasonable doubt. Knight and Wall Co. v.

Bryant, 178 So.2d 5 (Fla. 1965). The obvious result of finding the statute unconstitutional in the method of collecting taxes would result in a most inefficient and unacceptable method of collection of taxes by both the time share industry and the property appraisers. As times change certainly the Legislature not only has the right, but the duty to promote efficient collection of taxes and it is submitted that the decision of the Fourth District Court of Appeal is the proper approach to the Legislature's decisions in this matter.

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 ELEMENTS.

The Appellants want this Court to hold that all marketing, construction, preparation of brochures, tv sets, radios, baseball bats, employees, repairs, and all other expenses, ad infinitum, be deducted as the "usual and reasonable fees and costs of sale" under Florida Statutes, Section 193.011(8). Developers paid documentary stamps on the full purchaser price including furnishings. They were given a credit against the furnishing. They were given a credit against the furnishings of 11% of the market value and 15% for the "usual and reasonable costs of the sale". For example, Appellants want this Court to hold and direct the Property Appraiser to determine the just value of a time share estate purchased by a good faith purchaser for $10,000 to be $2,000, even though the just value of any other type of property purchased by a good faith purchaser would be $8,500 (after deducting 15% for the costs of sale). This doesn't appear "just" to the Property Appraiser.

Appellant even says that the number of people who look at a piece of property before paying a stated sum should somehow reduce its value. They also want a deduction because the owners of the units can purchaser or not purchase annually to exchange their week with another time

share owner. They go on and on about the amenities being offered, but it must be remembered that the physical amenities such as location, weather, roads, pools, neighbors, etc. all are part of the market value of real estate being paid by the purchaser.

The Property Appraiser does not have the right or duty to indulge in fancy ideas or speculation. The must see if there is sufficient market data, if so, he arrives at the market value, then deducts the reasonable and usual costs of sale. How can anyone say the just value of time shares are really 20% of the sales price? The discretion of the Property Appraiser is presumed correct unless by all hypotheses it is found incorrect. A 20% assessment for time share units (which were being resold for comparable sales prices) would create a tax roll that was not uniformly assessed.

POINT IV

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 SECTION 192.037, FLA. STAT. (1982), WHEN, ON JANUARY 1, 1983, SIX UNITS WERE COMPLETED AND WERE WHOLE OWNERSHIP CONDOMINIUM UNITS IN WHICH NO TIME SHARE INTERSTS HAD BEEN CREATED.

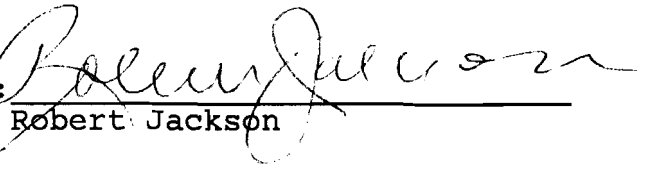
This point was not an issue before the Fourth District Court of Appeal and was ot certified to the Supreme Court for review and, therefore, no argument is deemed necessary.

CONCLUSION

In conclusion, the Appellee herein prays that the Court will uphold the decision of the Fourth District Court of Appeal in Spanish River Resort Corp. v. Walker, 497 So.2d 1299 (Fla. 4th DCA 1986) and reverse the decision in High Point Condominium Resorts, Ltd. v. Day, 494 So.2d 508 (Fla. 5th DCA 1986) where it finds unconstitutional the mechanics of assessment and collection of taxes which have been mandated by the Legislature and are for the best interests of all parties.

Respectfully submitted,

Law Offices of Robert Jackson,P.A.
2165 - 15th Avenue
Vero Beach, Florida 32960
(305) 567-4355
Attorney for Appellee

By: 
Robert Jackson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee has been served, by mail, this 21st day of May, 1987, to Michael O'Haire, Esq., 3111 Cardinal Drive, Vero Beach, Florida 32963, Attorney for Appellants, Oyster Pointe Resort Condominium Association, Inc. et al; Miles B. Mank, II, P.A., P.O. Box 908, Vero Beach, Florida 32961-0908, Attorney for Appellee, Gene E. Morris; and J. Terrell Williams, Esq., Assistant Attorney General, The Capitol, Room LL04, Tallahassee, Florida 32301, Attorney for Appellee, Randy Miller, Department of Revenue.

Robert Jackson