IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC02-2721

DELTA PROPERTY MANAGEMENT, INC.,

Petitioner,

vs.

PROFILE INVESTMENTS, INC.,

Respondent.
_____/

1DCA Case No. 01-3181

REPLY BRIEF OF PETITIONER DELTA PROPERTY MANAGEMENT, INC.

JOHN R. BERANEK, ESQ.
AUSLEY & McMULLEN
Co-counsel for Petitioner
227 S. Calhoun Street
P.O. Box 391
Tallahassee, FL 32302-0391
Telephone: (850) 224-9115

JOHN R. HARGROVE, ESQ.
W. KENT BROWN, ESQ.
HEINRICH GORDON HARGROVE
WEIHE & JAMES, P.A.
Co-counsel for Petitioner
500 East Broward Boulevard
Suite 1000
Fort Lauderdale, FL 33394
Telephone: (954) 527-2800

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ARGUMENT

The legal titleholder to the property in issue -- petitioner DELTA PROPERTY MANAGEMENT, INC. -- forfeited its property because the notice of tax sale was not mailed, as required by Florida law, to its address as specified on the "latest assessment roll." Instead, it was mailed to an outdated address appearing in an obsolete tax roll from the prior year.[1] The relevant statutes, namely Florida Statutes §§ 197.502(4)(a) and 197.522(1)(a), when read *in pari materia* make it clear that the clerk of the court must mail notice to the legal titleholder based upon the "latest assessment roll,"[2] and in this case the clerk did not do so.

Given this undisputed fact of record (notice mailed to the address on the *prior* year's assessment roll), the sole issue before this Court is what constitutes the "latest" roll? Since "mailing" is tied to the "latest assessment roll" in the same sentence of § 197.502(4)(a) and since the plain meaning of

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[1] As respondent concedes, (AB at 3, 12) the clerk mailed the notice of tax sale to DELTA's old address contained in the 1999 tax roll, rather than its current address appearing in the 2000 tax roll which had been certified two months earlier.

[2] Several of respondent's own cited authorities make this point. In Saggese v. Department of Revenue, 770 So. 2d 1244 (Fla. 4th DCA 2000), for example, the court observed that the "statute require[s] that notice be sent to the address appearing on the latest assessment roll," id. at 1246, and in Eurofund Forty-Six Ltd. v. Terry, 755 So. 2d 835 (Fla. 5th DCA 2000), the court noted that the clerk had complied with the statute by mailing the notice to the "names and addresses of the legal title holders as listed on the last assessment roll." Id. at 835.

"latest" is "last" or "most recent", see Merriam-Webster Collegiate Dictionary (11th ed. 2003), it is clear that "latest" refers to the most recent roll at the time the notice is mailed.[3] As such, the interpretive function does not need to go any further. But even if there were an ambiguity, the only way to reconcile these statutes with the United States Supreme Court's command that notice of a tax sale be provided by "means *as certain to ensure actual notice*" is to use the latest roll as of the date of mailing. See Mennonite Board of Missions v. Adams, 462 U.S. 791, 800 (1983) (emphasis added). This is the *only* interpretation "certain to ensure" that the most recent accurate address of record for the titleholder is used. In this case, the "latest" tax roll was certified in July of 2000, so the clerk's notice which was mailed in *September of 2000* should have been based upon this latest assessment roll.

While the majority opted to ignore Mennonite altogether, Judge Ervin in his dissent zeroed in on that decision — as did a unanimous panel of the Fourth District in Baron v. Rhett, 847 So. 2d 1032 (Fla. 4th DCA 2003), which set aside a tax sale under strikingly similar facts. (See IB at 19-22) As Judge Ervin explained:

> If the applicable notice statutes can be interpreted ... as authorizing the clerk to send a notice to a titleholder at an incorrect address based on a tax roll that had been superseded by a later roll containing the correct

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[3] As discussed in the initial brief, the problem arose in this case because a ***new*** tax roll was certified during the four-month time gap ***after*** the clerk received DELTA's address from the tax collector but ***before*** the clerk actually prepared and mailed the notice to DELTA. Three key dates in particular are essential to the analysis here:

- ***5/30/2000***: Clerk receives DELTA's old address
- ***7/1/2000:*** Tax roll certified with DELTA's new address
- ***9/4/2000***: Clerk mails notice to DELTA's old address

> address at the time of mailing, such interpretation ... would have serious constitutional implications. ... [A] reasonable interpretation of [these statutes] is that the clerk is simply directed to request the tax collector, once he is aware that the information contained in a statement may no longer be current because it was based on a tax roll since superseded, to supply him with a supplemental statement.

Delta Property Mgmt. v. Profile Inv., Inc., 830 So. 2d 867, 872 (Fla. 1st DCA 2002) (Ervin, J., dissenting). The Fourth District in Baron concurred with Judge Ervin and certified conflict with the majority opinion.

In its answer brief, respondent PROFILE INVESTMENTS, INC., attempts to justify the shortcomings in the majority's analysis in several respects. First, it contends that this case is "in no way impacted by the decision in Mennonite" and that DELTA "has no one to blame but itself for the current predicament in which it finds itself." (AB at 8-9) Second, PROFILE contends that DELTA is improperly seeking to impose on the clerk an unreasonable duty to search through the public records to discover a property owner's address. (AB at 26) And third, PROFILE contends that there is no evidentiary basis for DELTA's contention that the tax collector had actually completed the annual tax roll for the year 2000 before the clerk mailed out the notice of tax sale to DELTA. Each point is separately discussed.

I

VIOLATION OF DUE PROCESS UNDER MENNONITE

According to PROFILE, this case "is in no way impacted" by

Mennonite. Nothing could be further from the truth. The due process protections of Mennonite are to be scrupulously followed in *any* tax sale wherever it is conducted.[4] In fact, to ignore Mennonite as PROFILE urges would require this Court also to ignore its own ruling in Dawson v. Saada, 608 So. 2d 806 (Fla. 1992). Citing directly to both Mennonite and its antecedent Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), this Court in Dawson made it clear that Florida's tax sale statute embodies and implements fundamental due process principles set forth in Mennonite and Mullane, and that compliance with the notice provision of § 197.522 (1) is *mandatory* in order to survive constitutional scrutiny.

> A landowner whose property is to be sold for delinquent taxes undoubtedly has a vested ownership interest in the subject property and is therefore entitled to notice of a pending tax deed sale .... In any proceeding which is to be accorded finality, due process requires notice

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[4] The profound impact of Mennonite is underscored by the fact that following its issuance in 1983, a large number of states modified or entirely rewrote their tax sale laws to bring them into compliance with the tightened due process standards of Mennonite. See F. Alexander, Tax Liens, Tax Sales, and Due Process, 75 Ind. L. J. 748, 749-50, 768 (2000). Moreover, a survey of recent decisions from the supreme courts of sister states which have addressed the adequacy of tax sale notices reveals that they uniformly view Mennonite and its predecessor Mullane as integral to any analysis of such an issue. See, e.g., Kennedy v. Mossafa, 759 N.Y.S. 2d 429, 433 (N.Y. 2003) (upholding tax sale but noting that tax district would have had to take further steps to locate updated address had notice been returned as undeliverable); Southwestern Comm'l Capital, Inc. v. Cornett Packing Co., 997 P. 2d 849 (Okla. 2000) (mortgagee entitled to notice of pending tax sale even if it is aware that mortgagor defaulted on taxes); RTC Mortgage Trust v. Fry, 730 A. 2d 476 (Pa. 1999) (notice should have been sent to forwarding address of mortgagee after returned as undeliverable); Dime Savings Bank of New York v. Town of Pembroke, 698 A. 2d 539 (N.H. 1997) (even though mortgagee received notice of tax sale, it was invalid because it omitted warning that mortgage is extinguished if property not redeemed); Robert P. Quinn Trust v. Ruiz, 723 A. 2d 1127 (R.I. 1999) (invalidated tax sale where tax collector failed to notify all interested persons). Additional decisions from sister states supporting DELTA's position are discussed in the initial brief. (See IB at 18-19, n. 12)

> reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. ... *Without the notice mandated by § 197.522 (1), the fundamental requirement of due process has not been satisfied and the tax deed or sale is not valid.*

Dawson, 608 So. 2d at 808-09 (citations omitted; emphasis added). This is precisely what DELTA is arguing here. While PROFILE attempts to downplay Mennonite as well as Dawson's adoption of Mennonite, the fact remains that these decisions control the outcome of this case. See also Baron, 847 So. 2d at 1036 ("Florida's scheme for enforcement of property taxes ... is designed to afford due process ... as was addressed in Mennonite").[5]

As discussed in detail on pages 15-22 of initial brief, Mennonite imposes an elevated level of responsibility on the government to safeguard existing property ownership interests. In this regard, the Court held:

> Notice by mail or other means *as certain to ensure actual notice* is a *minimum* constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, *if its name and* address *are reasonably ascertainable*. ... [K]nowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending. The latter was the information which the [government] was constitutionally obliged to give personally....

Id. at 800 (emphasis added); see also Baron, 847 So. 2d at 1036. The *only* conclusion that can be reached in light of this directive is that the notice of tax sale should have been mailed to DELTA's address as it appeared in the *latest* tax roll of record for the year 2000. In fact, this is precisely what §

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[5] PROFILE attempts to distinguish Baron on the basis that it involved an outdated ***name*** of the owner, rather than an outdated ***address***. This is immaterial since the notice statute itself indicates that ***both*** pieces of information should be taken from the "latest assessment roll." § 197.502(4)(a), Fla. Stat. Apparently recognizing the tenuousness of this distinction, PROFILE ultimately argues that Baron "is erroneous and should be disapproved by this Court." (AB at 22)

197.502(4)(a) requires, yet this is precisely what was not done here.

PROFILE attempts to turn the tables on DELTA by arguing throughout its answer brief that DELTA has "no one to blame but itself" for losing the property.[6] (AB at 9, 23, 30) This very argument was rejected in Mennonite and Dawson. As Mennonite teaches, it is unconstitutional for the government to shift blame for its own procedural shortcomings onto a property owner. In no uncertain terms, the Court explained that "a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation" to provide adequate notice to interested persons regarding an upcoming tax sale. Mennonite, 462 U.S. at 799. Following Mennonite's lead, this Court in Dawson made the same point:

> While we agree that all taxpayers are under an obligation to know the tax status of their property, "knowledge of delinquency in the payment of taxes is not equivalent to

[6] On page 12 of its brief PROFILE blames DELTA for providing the tax collector with its updated address too late for it to be included on the *1999 tax roll*. This completely misses the point. As noted, the *only* tax roll that is relevant to the analysis here is the *latest* roll for the year 2000, and the record is undisputed that the 2000 tax roll did indeed contain DELTA's updated address. Moreover, on pages 14-15 of its brief PROFILE incorrectly contends that DELTA sought to set aside the tax sale below because it "did not receive proper notice." This mischaracterizes DELTA's argument. The tax sale is invalid because the government failed to provide proper notice to DELTA in the first place -– *not* because DELTA failed to receive it.

> notice that a tax sale is pending." *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800, 103 S.Ct. 2706, 2712, 77 L.Ed.2d 180 (1983). *The duty imposed upon owners of Florida land by section 197.332 does not relieve the state of its constitutional obligation to inform interested parties of the pendency of a tax sale. See id.* at 799, 193 S.Ct. at 2711-12.

Dawson, 608 So. 2d at 809-10 (emphasis added).

Not surprisingly, the majority of cases cited by PROFILE to support its argument that DELTA's failure to pay its 1997 property taxes should excuse the government from its notice obligations *predate* Dawson and are therefore inapplicable -- including Mullin v. County of Polk, 76 So. 2d 282 (Fla. 1954); Alwani v. Slocum, 540 So. 2d 908 (Fla. 2d DCA 1989); D.R.L., Inc. v. Murphy, 508 So. 2d 413 (Fla. 5th DCA 1987); Volusia County v. Passantino, 364 So. 2d 730 (Fla. 1st DCA 1978); and Stubbs v. Cummings, 336 So. 2d 412 (Fla. 1st DCA 1976). In fact, PROFILE's reliance on Mullin is particularly disingenuous because that case has been superseded by statute. The statute in effect at the time Mullin was decided -- which has since been repealed -- excused the clerk from even having to mail a notice of tax sale to an owner.[7] (See IB at 11, n.7) This is no longer the law, nor could it be in light of the due process requirements of Mennonite and Mullane. Simply put, not a single case cited by PROFILE even remotely supports an affirmance.

II

[7] In addition, PROFILE's reliance on Crane v. Martin, 741 So. 2d 1251 (Fla. 1st DCA 1999) is misplaced because that case dealt solely with *published* notice under subsection (2) of § 197.522. The distinction is critical because as Dawson explains, published notice under subsection (2) — unlike notice by mail under subsection (1) -- is *not* a mandatory requirement. Kerr v. Broward County, 718 So. 2d 197 (Fla. 4th DCA 1998), is likewise irrelevant since that case did not address the validity of a tax sale.

NO UNREASONABLE BURDEN ON CLERK

PROFILE argues that DELTA is improperly seeking to impose an unreasonable duty on the clerk to "look behind the information provided by the tax collector to discover DELTA's current address." (AB at 13) In fact, throughout its brief PROFILE complains that if this Court were to accept DELTA's argument, the clerk of the court would be forced to engage in a burdensome search of the public records to locate an owner's current address. (AB at 7, 26, 28-29) This is simply not true. DELTA has never suggested that the clerk needed to engage in a search of the public records or to look behind the tax collector's statement in order to verify the information therein. What DELTA does suggest, however, is precisely what Judge Ervin proposed in his dissent:

> [A] reasonable interpretation of [the notice statutes] is that the clerk is simply directed to request the tax collector, once he is aware that the information contained in a statement may no longer be current because it was based on a tax roll since superseded, to supply him with a supplemental statement reflecting any updated materials.

Delta, 830 So. 2d at 873 (Ervin, J., dissenting).

The fact that a new tax roll is certified each July 1st pursuant to statute should come as no surprise to the clerk of the court. See Florida Statutes §§ 193.023(1) & § 193.1142(1). Indeed, like all public officials the clerk is charged with knowledge of the law bearing on his or her responsibilities. See, e.g., City of Miami v. Gioia, 215 So. 2d 780, 783 (Fla. 3d DCA 1968). As such, it is certainly reasonable to expect the clerk to ask the tax collector for updated address information when he is preparing the notice of tax sale *after* July 1st but received the tax collector's information *before* July 1st. In fact, this is the *only* way to ensure compliance with the statutory requirement that notice be mailed to the address on the "latest assessment roll."

III

THE 2000 TAX ASSESSMENT ROLL

PROFILE argues that there is no evidentiary basis to support

DELTA's assertion that the 2000 tax assessment roll had been certified and was available to the clerk prior to the notices of tax sale being mailed in September 2000. (AB at 4-5, 12-13) This is incorrect. Although the printout of the 2000 tax assessment roll that was offered in the trial court does not contain an exact date when it was certified by the property appraiser, as Judge Ervin explained the court *must* presume that this tax roll was completed and available no later than July 1, 2000, as required by law. Delta, 830 So. 2d at 870-71 (Ervin, J., dissenting). As noted, Florida law prescribes a July 1st deadline for the property appraiser to complete the annual tax assessment roll, Florida Statutes §§ 193.023(1) & 193.1142(1), and like any public official the property appraiser is *presumed* to have performed this duty in a lawful and proper manner. See, e.g., Straughn v. Tuck, 354 So. 2d 368 (Fla. 1977); County of Palm Beach v. State, 342 So. 2d 56, 58 & n.1 (Fla. 1976). PROFILE, however, failed to offer a shred of evidence below to refute the presumption that the property appraiser complied with the statutory July 1st deadline. As such, it is actually PROFILE -- *not* DELTA -- which failed in its evidentiary burden below.

At the conclusion of its brief, PROFILE requests that the Court remand the case for a new evidentiary hearing if it adopts DELTA's "new rule of law." In this regard, PROFILE claims that it is entitled to establish "that the year 2000 tax roll was not certified and that DELTA's alleged new address was not therefore available to the circuit court clerk at the time the notice of [tax] sale were sent." (AB at 31-32) This argument fails for two reasons. First, DELTA is not arguing any "new rule of law" in this

appeal. To the contrary, DELTA requests reversal based on a straightforward application of the notice statutes (§§ 197.502, 197.522), Dawson and Mennonite. And second, the very subject of the "new" evidentiary hearing requested by PROFILE was part and parcel of the proceedings that were held below. PROFILE has already had its day in court on that issue and is not entitled to a second bite at the apple.

CONCLUSION

DELTA requests that the court quash the First District's opinion and reverse the case with instructions to enter final judgment in its favor.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this _____ day of October, 2003 to: William S. Graessle, Esq., William S. Graessle & Associates, 219 Newnan Street, 4th Floor, Jacksonville, FL 32202.

CERTIFICATE OF COMPLIANCE WITH FONT SIZE

The undersigned hereby certifies that the font of this brief is Courier New 12.

JOHN R. BERANEK, ESQ.
AUSLEY & McMULLEN
Co-counsel for Petitioner
227 S. Calhoun Street
P.O. Box 391
Tallahassee, FL 32302-0391
Telephone: (850) 224-9115

JOHN R. HARGROVE, ESQ.
W. KENT BROWN, ESQ.
HEINRICH GORDON HARGROVE
WEIHE & JAMES, P.A.
Co-counsel for Petitioner
500 East Broward Boulevard
Suite 1000
Fort Lauderdale, FL 33394
Telephone: (954) 527-2800

By:_____