IN THE SUPREME COURT OF FLORIDA

Case No.: SC11-554
L.T. No.: 3D09-3427

PEDRO J. GARCIA, AS PROPERTY APPRAISER OF MIAMI-DADE COUNTY,

Petitioner,

vs.

DAVID ANDONIE AND ANA L. ANDONIE; AND LISA ECHEVERRI, AS EXECUTIVE DIRECTOR OF THE STATE OF FLORIDA, DEPARTMENT OF REVENUE,

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW FROM A DECISION OF THE THIRD DISTRICT COURT OF APPEAL

AMICUS CURIAE BRIEF OF FLORIDA ASSOCIATION OF PROPERTY APPRAISERS IN SUPPORT OF PETITIONER

MESSER, CAPARELLO & SELF, P.A.
THOMAS M. FINDLEY, ESQ.
Florida Bar No.: 0797855
ROBERT J. TELFER III, ESQ.
Florida Bar No.: 0128694
P.O. Box 15579
Tallahassee, FL 32317
Telephone: (850) 222-0720
Facsimile: (850) 224-4359

Attorneys for Amicus Curiae Florida Association of Property Appraisers

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Florida Constitution

Laws of Florida

Other

STATEMENT OF THE IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Florida Association of Property Appraisers ("FAPA") is a statewide professional organization comprised of locally elected, constitutionally authorized property appraisers. FAPA member counties represent over 80% of the total taxable real estate value and population in Florida.

In Florida, property appraisers are responsible for receiving and granting applications for homestead exemption. *See* Chapter 196, Florida Statutes; Florida Administrative Code, Rule 12D-7.001. As the issues addressed in this case have considerable implications for the duties and operations of the constitutional officers of which it is comprised, FAPA has a significant interest in the outcome of this case.

SUMMARY OF THE ARGUMENT

The homestead exemption applies only to individuals who can establish that a residence is intended to be a "permanent residence." In this case, the Respondents have acknowledged that they do not claim the right to a homestead exemption based on their own status, but on the status of their minor children. Yet, the case law establishes that the domicile of minor children is presumed to be that of the parents. The Third District's decision not only ignored this principle, but also ignored controlling Florida Statutes. The Third District expressly concluded that it would not comply with portions of Section 196.031(1)(a), Florida Statutes, which requires that the person claiming a homestead exemption must permanently "reside thereon." The Third District's conclusion that it could ignore this statutory language on the grounds that it was a "a vestige of the past" exceeded the court's lawful authority.

ARGUMENT

I. THE THIRD DISTRICT ERRED IN HOLDING THAT SECTION 196.031(1)(a)'s REQUIREMENT THAT A HOMESTEAD APPLICANT PERMANENTLY "RESIDE THEREON" WAS LEGALLY INEFFECTIVE.

The Homestead Exemption, currently established in Article VII, Section 6(a), Florida Constitution, has a deep-rooted history in Florida Constitutional law. As noted by the Third District, the former Article X, Section 7 of the Florida

Constitution was added to the Florida Constitution by the people in a General Election in 1934. When amended in 1938, Article X, Section 7 read as follows:

> *Section 7.* Every person who has legal title or beneficial title in equity to real property in this State and *who resides thereon* and in good faith makes the same his or her permanent home, or the permanent home of another or others legally dependent upon said person, shall be entitled to an exemption from all taxation, except for assessments for special benefits, up to the assessed value of Five Thousand Dollars on the said home and contiguous real property for the year 1938 and thereafter.

Art. X, § 7, Fla. Const. (1885) (amended 1938) (emphasis added). Additionally, the Florida Legislature, prior to the passage of the 1938 constitutional amendment, passed Chapter 17060, Laws of Florida, to read as follows:

> Section 2. Every person who is a citizen and resident of the State of Florida and who has legal or beneficial title in equity to real property in the State of Florida, including vendees in possession under bona fide contracts to purchase and such instruments by and under which such title is claimed are recorded with the Clerk of the Circuit Court of the County in which said homestead property lies and *who resides thereon* and in good faith makes the same his or her permanent home shall be deemed to be the head of a family and entitled to an exemption from all taxation except for special assessments for benefits, up to the assessed valuation of Five Thousand Dollars on said homestead.

Ch. 17060, Laws of Florida (1935) (emphasis added). Chapter 17060 eventually became Section 196.031, Florida Statutes.

Subsequently, in 1968, Article X, Section 7 was amended and renumbered to Article VII, Section 6. As noted by the Third District, the language "who resides

thereon" was eliminated. However, this provision uses the language "maintains thereon." Article VII, Section 6, provides as follows:

> *SECTION 6.* Homestead Exemptions ---
>
> (a) Every person who has the legal or equitable title to real estate and *maintains thereon* the permanent residence of the owner, or another legally or naturally dependent upon the owner, shall be exempt from taxation thereon except assessments for special benefits, up to the assessed valuation of five thousand dollars, upon establishment of right thereto in the manner prescribed by law. The real estate may be held by legal or equitable title, by the entireties, jointly, in common, as a condominium, or indirectly by stock ownership or membership representing the owner's or member's proprietary interest in a corporation owning a fee or leasehold initially in excess of ninety-eight years.

Art. VII, § 6(a), Fla. Const. (1968).

The Legislature enacted Chapter 17060, Laws of Florida, in 1935; that statutory provision can now be found at Section 196.031, Florida Statutes, which states:

> (1)(a). Every person who, on January 1, has the legal title or beneficial title in equity to real property in this state *and who resides thereon* and in good faith makes the same his or her permanent residence, or the permanent residence of another or others legally or naturally dependent upon such person, is entitled to an exemption from all taxation, except for assessments for special benefits, up to the assessed valuation of $25,000 on the residence and contiguous real property, as defined in s. 6, Art. VII of the State Constitution.

The Third District noted the 1968 revision to Article VII, Section 6(a), which removed the "who resides thereon" language, but also noted that this language remained in Section 196.031(1)(a). The Third District concluded that "[a] review

of the history of [this] phrase reveals that it is a vestige of the past, probably inadvertently carried forward into the modern statutory scheme relating to section 196.031, and thus, legally ineffective." *Saiz de la Mora v. Andonie*, 51 So. 3d 517, 523 (Fla. 3d DCA 2010).

The Third District's opinion on this issue is incorrect for two reasons. First, the requirement that a homestead applicant must permanently "reside thereon" is not a vestige of the past, but rather, a requirement that property appraisers must follow pursuant to controlling statutes and administrative provisions. Second, the Third District's opinion is incorrect because it incorrectly held that the Legislature had repealed this provision of Section 196.031(1)(a) by implication.

1. Section 196.031(1)(a)'s requirement that a homestead applicant must permanently "reside thereon" is found in other supporting and controlling statutes and administrative provisions.

The Legislature had defined "permanent residence" as:

> [T]hat place where a person has his or her true, fixed, and permanent home and principal establishment to which, whenever absent, he or she has the intention of returning. A person may have only one permanent residence at a time; and, once a permanent residence is established in a foreign state or country, it is presumed to continue until the person shows that a change has occurred.

Fla. Stat. § 196.012(18) (2010).[1]

[1] Section 196.012(17) defines "permanent resident" as "a person who has established a permanent residence as defined in subsection (18).

The Legislature has delegated to the Property Appraiser the duty of making the factual determination of whether a homestead applicant is a permanent resident of Florida. *See* Fla. Stat. § 196.015 (2010). It provides that the property appraiser may consider the following relevant factors in determining the intent of a person claiming a homestead exemption to establish a permanent residence in Florida:

> (1) A formal declaration of domicile by the applicant recorded in the public records of the county in which the exemption is being sought.
>
> (2) Evidence of the location where the applicant's dependent children are registered for school.
>
> (3) The place of employment of the applicant.
>
> (4) The previous permanent residency by the applicant in a state other than Florida or in another country and the date non-Florida residency was terminated.
>
> (5) Proof of voter registration in this state with the voter information card address of the applicant, or other official correspondence from the supervisor of elections providing proof of voter registration, matching the address of the physical location where the exemption is being sought.
>
> (6) A valid Florida driver's license issued under s.322.18 or a valid Florida identification card issued under s.322.051 and evidence of relinquishment of driver's licenses from any other states.
>
> (7) Issuance of a Florida license tag on any motor vehicle owned by the applicant.
>
> (8) The address as listed on federal income tax returns filed by the applicant.

(9) The location where the applicant's bank statements and checking accounts are registered.

(10) Proof of payment for utilities at the property for which the permanent residency is being claimed.

Rule 12D-7.007, Florida Administrative Code, provides additional clarity to the homestead residence requirement. Rule 12D-7.007(1) provides "[f]or one to make a certain parcel of land his permanent home, *he must reside thereon* with a present intention of living there indefinitely and with no present intention of moving therefrom." (emphasis added).

These statutory and administrative provisions demonstrate the analysis which a property appraiser must undertake to determine whether an applicant is a permanent resident and thus entitled to the homestead exemption. These laws and rules have always required that the applicant must have the intent to actually reside on the property. The "resides thereon" language in Section 196.031(1)(a) is consistent this historical statutory framework, and is also consistent with Article VII, Section 6(a)'s language that the owner "maintain thereon" the permanent residence. The Third District's decision that the "resides thereon" language was a "vestige of the past" is belied by these other statutory and administrative provisions that provide the property appraiser with the requirements and criteria for determining permanent residence for the homestead exemption.

2. The Third District incorrectly held that the Legislature had repealed by implication Section 196.031(1)(a)'s requirement that an owner must permanently "reside thereon."

The Third District's holding that Section 196.031(1)(a)'s requirement that an owner must permanently "reside thereon" was legally ineffective is incorrect for another reason: it effectively holds that the enactment of Article VII, Section 6(a) in 1968 impliedly repealed the "resides thereon" portion of Section 196.031(1)(a). Contrary to the Third District's opinion, Article VII, Section 6(a) is not a self-executing provision; that is, it "conditions exemption upon establishment of the right in accordance with the **manner prescribed by law.**" *Haddock v. Carmody*, 1 So. 3d 1133, 1135-36 (Fla. 1st DCA 2009) (emphasis added). Article VII, Section 6(a) clearly states that every person with legal or equitable title to real estate "and maintains thereon the permanent residence of the owner, or another legally or naturally dependent upon the owner, shall be exempt from taxation thereon, except assessments for special benefits, up to the assessed valuation of five thousand dollars, *upon establishment of right thereto in the* ***manner prescribed by law***." (emphasis added). *See also Zingale v. Powell*, 85 So. 2d 277, 284 (Fla. 2004) ("article VII, section 6, which conditions the exemption 'upon establishment of the right thereto in the manner prescribed by law."); *Horne v. Markham*, 288 So. 2d 196, 199 (Fla. 1973) (holding that Article VII, Section 6 does not establish an absolute right to a homestead exemption, but rather, it provides that a taxpayer

shall be granted an exemption only "upon establishment of right thereto in the manner prescribed by law.").

In *In re Advisory Opinion to the Governor*, 132 So. 2d 163, 169 (Fla. 1961), this Court held:

> In considering the effect of constitutional amendments upon existing statutes, the rule is that the statute will continue in effect unless it is completely inconsistent with the plain terms of the Constitution. However, when a constitutional provision is not self-executing, as is the case here, all existing statutes which are consistent with the amended Constitution will remain in effect until repealed by the Legislature. Implied repeal of statutes by later constitutional provisions is not favored and the courts require that in order to produce a repeal by implication the repugnancy between the statute and the Constitution must be obvious or necessary. Pursuant to this rule, if by any fair course of reasoning the statute can be harmonized or reconciled with the new constitutional provision then it is the duty of the courts to do so.

See also Barley v. South Fla. Water Mgmt. Dist., 823 So. 2d 73, 83 (Fla. 2002) (quoting above advisory opinion and finding no inconsistency between legislative enactment and constitutional amendment).

Thus, the test to determine whether there has been an implied repeal of Section 196.031(1)(a)'s requirement that an owner permanently "reside thereon" is whether such language is repugnant to Article VII, Section 6(a)'s requirement that the owner "maintain thereon" his or her permanent residence. FAPA submits that there is no repugnancy here. These two provisions, as well as other statutory and administrative provisions, provide the property appraiser with the criteria to

undertake a factual analysis to determine if an owner is a permanent resident, entitled to the homestead exemption. Critical to this analysis is whether the owner/applicant intends to reside on the property he or she claims as his or her homestead (with certain, unrelated exceptions). The Third District's decision fails to undertake this analysis, and rather rejects an enactment of the Florida Legislature as legally ineffective and a simple "vestige of the past, probably inadvertently carried forward into the modern statutory scheme . . . ." *Andonie*, 51 So. 3d at 523. The Third District had no authority to reject this binding statutory language, which implemented the constitutional provision.

Finally, it should be noted that the legislative history of Section 196.031 and its predecessors reveals that the Legislature has amended Section 196.031 twenty-seven times since the 1968 revision to Article VII, Section 6(a), and the language of "resides thereon" remained in each amendment. The Legislature presumably was well aware of the Florida Constitution, and the statutory scheme implementing the homestead exemption, each time it amended Section 196.031. As Section 196.031 is not repugnant to Article VII, Section 6(a), the Third District's decision that the 1968 revision impliedly repealed Section 196.031 is incorrect as a matter of law.

CONCLUSION

Based on the foregoing, FAPA respectfully requests that this Court reverse the Third District's opinion.

Respectfully submitted,

MESSER, CAPARELLO & SELF, P.A.
P.O. Box 15579
Tallahassee, FL 32317
Telephone: (850) 222-0720
Facsimile: (850) 224-4359

By:_____
THOMAS M. FINDLEY, ESQ.
Florida Bar No.: 0797855
ROBERT J. TELFER III, ESQ.
Florida Bar No.: 0128694

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail this 26th day of August, 2011 to:

Melinda S. Thornton, Esq.
Shanika A. Graves, Esq.
Assistant County Attorneys
Office of Miami-Dade County Attorney
Stephen P. Clark Center, Suite 2810
111 N.W. 1st Street
Miami, FL 33128
Counsel for Petitioner

Joseph C. Mellichamp III, Esq.
Chief Assistant Attorney General
Revenue Litigation Bureau
PL-01, The Capitol
Tallahassee, FL 32399-1050

Daniel A. Weiss, Esq.
Tannebaum Weiss, PL
Museum Tower – Penthouse 2850
150 West Flagler Street
Miami, FL 33130
Counsel for Respondents

Loren E. Levy, Esq.
Ana C. Torres, Esq.
The Levy Law Firm
1828 Riggins Lane
Tallahassee, FL 32308
Counsel for The Property Appraisers' Association of Florida, Inc.

Kenneth P. Hazouri, Esq.
Jeffrey S. Elkins, Esq.
de Beaubien, Knight, Simmons,
Mantzaris & Neal, LLP
332 North Magnolia Ave.
Orlando, FL 32801
Counsel for Orange County Property Appraiser, Bill Donegan

THOMAS M. FINDLEY, ESQ.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

THOMAS M. FINDLEY, ESQ.