

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

LEONARD J. ACCARDO and
LYNN M. ACCARDO, et al.,

Appellants,

vs.

DCA NO: 1D10-4072

GREGORY S. BROWN, Property Appraiser
for Santa Rosa County, Florida, and STAN C.
NICHOLS,
Tax Collector for Santa Rosa County, Florida,

Appellees.

APPELLANTS' MOTION FOR REHEARING AND/OR CLARIFICATION

Appellants, LEONARD J. ACCARDO AND LYNN M. ACCARDO et al., pursuant to Fla. R. App. P. 9.330, move for rehearing and/or clarification of the opinion filed in this matter on April 21, 2011, and show:

I. GROUND FOR REHEARING MOTION:

The Court overlooked or misapprehended the following points of law or fact:

A. The Court Misapplied the *Robbins* Case.

The Supreme Court has declared on a number of occasions that, with an ordinary lease, the lessee is nothing more than a tenant, and “has no equitable interest in the property.” e.g., *Leon County Educ. Facils. Auth. v. Hartsfield*, 698 So. 2d 526, 530 (Fla. 1997). This Court’s citation to the case of *Robbins v. Mt. Sinai Medical Center, Inc.*, 748 So. 2d 349 (Fla. 3d DCA 1999), at pp. 7-8, is curious because *Robbins*, citing the *Leon County* case, specifically held that “Florida courts have only granted a lessee equitable ownership of leased property when that lessee retained an option to purchase the leased property for *nominal value*.” 748 So. 2d at 351

(emphasis is original). This Court’s opinion recognized that Appellants have no such option, and, under the terms of the original grant, no such option can ever be available.

This Court’s opinion is “irreconcilable” with the *Robbins* case (*Aravena v. Miami-Dade County*, 928 So. 2d 1163, 1167 (Fla. 2006)), and there is express and direct conflict with the Third District opinion.

The Court which has certified this matter to be an issue of great importance also should certify this conflict under the authority of Fla. R. App. P. 9.030(a)(2)(A)(vi).

B. In Announcing a New Form of Ownership, “Equitable Owners for Ad Valorem Taxation Purposes,” the Court Misapplied the Tests of Equitable Ownership.

On page 6 of its opinion, the Court recites the factors derived from *Ward v. Brown*, 919 So. 2d 462 (Fla. 1st DCA 2005), *rev. den.*, 923 So. 2d 1165 (Fla. 2006), but fails to observe that most of these factors are present in virtually every lease.

Moreover, several of these factors are incompatible with ownership and full control of the property. The duty to maintain and insure the property is not an indication of ownership because a property owner can elect to maintain or not to maintain the property and purchase of insurance is at the owner’s sole discretion.

The leases have other terms incompatible with ownership, including restrictions on removal of improvements and, of course, the payment of rent in an amount set by the government.

C. The Opinion Fails to Address Important Questions That Arise From Its Determination That the Appellants Must Pay Ad Valorem Taxes on the Improvements and, for the First Time, on Land Owned by a Government.

The opinion held that the improvements and land within plaintiffs’ leaseholds are subject to local ad valorem taxes, but did not address the trial court’s ruling that the “Tax Collector has the right to sell tax certificates on these equitably owned interests of the Plaintiffs.” (Trial

Court's Judgment, p. 6). As Appellants pointed out in their briefs, this is not a minor detail but an issue that goes to the heart of the analysis. If there is to be a new form of ownership for purposes of ad valorem taxation, the other details of tax administration must be addressed.

Despite the fact that the Santa Rosa County Tax Collector has sold tax certificates and requested tax deeds to be issued under Chapter 197, Florida Statutes, to collect unpaid taxes on governmentally owned vacant land, this opinion fails to address the dilemma that, under settled Florida law, the Tax Collector has no lien to enforce and no right to issue tax certificates or tax deeds for collection of taxes levied against property whose legal owner is a governmental entity, such as Escambia County. Examples of a tax certificate and tax deed issued on one parcel are set out in the attached Appendix. The attached deed does not list Escambia County, Florida, as the legal titleholder of record, nor does it reflect that anything other than fee simple title is being conveyed by it. It is by no means clear how one could convey, under the tax deed statute, an "ownership" that is deemed for tax purposes only. See, §197.552, Fla. Stat. (with some limitations not applicable here, "no right, interest, restriction or other covenant shall survive the issuance of a tax deed...").

Section 196.199(8)(a), Florida Statutes, provides that taxes levied on such property "shall not become a lien on . . . the property itself but shall constitute a debt due," and the only means for recovering such debts shall be "by legal action or by the issuance of tax executions that shall become liens upon any other property in any county of this state of the taxpayer who owes said tax." Similarly, Section 197.432(9), Florida Statutes, provides:

A certificate may not be sold on, nor is any lien created in, property owned by any governmental unit the property of which has become subject to taxation due to lease of the property to a nongovernmental lessee. The delinquent taxes shall be enforced and collected in the manner provided in §196.199(8).

This Court has acknowledged that these statutes control. “[T]he Legislature has established an exclusive procedure for collection of taxes levied on all private leaseholds of governmentally owned real property.” *State Dep’t of Rev. v. Gibbs*, 342 So. 2d 562, 565 (Fla. 1st DCA 1977). Likewise, the Supreme Court of Florida verified that these statutes literally mean what they say: “Section 196.199(8)(a) prohibits any taxes on a leasehold by a nongovernmental lessee from becoming a lien on the governmental property itself. Instead, these taxes ‘constitute a debt due and shall be recoverable by legal action or by the issuance of tax executions that shall become liens upon any other property in any county of this state of the taxpayer who owes said tax.’ ” *Cason v. Fla. Dep’t of Mgmt. Servs.*, 944 So. 2d 306, 314 (Fla. 2006).

This opinion must be reconciled with statutory directives regarding the collection of taxes on private leaseholds of governmentally owned land and the affirmations of those requirements by this Court and the Florida Supreme Court to avoid confusion and inconsistency.

II. GROUNDS FOR CLARIFICATION MOTION:

The following points of law and fact are in need of clarification:

A. The Opinion Fails to Distinguish Between the Very Different Types of Leases That Are Involved in This Case.

It appears that the Court, by its comments at page 8, intended to declare that having “an option to renew their leases for additional ninety-nine-year terms” was necessary before lessees could be declared the equitable owners of the real property for ad valorem tax purposes. As stated in the opinion, a majority of Appellants would fall within that category. Some of the Appellants, who have either *no renewal provision*, or whose renewal option is for a shorter term (e.g., 40 years), should be excluded from the Court’s ruling of taxability.

B. The Opinion Does Not Provide Guidance for the Assessment of This New Type of Ownership.

Important questions arise about how this novel creature, “equitable ownership for property taxation,” is to be administered.

One of these questions is the effect on the “Save Our Home” amendment regarding those plaintiffs who, as leaseholders, have the right to claim the homestead tax exemption. Article VII, Section 6, Constitution of Florida. This is a matter of considerable consequence. Because Save Our Homes sets the assessed value as of the date of purchase and limits the increase in assessed value thereafter, it is important for the citizen to know how this extraordinary new “ownership” is to be treated.

To put this question in focus, we can look at a leaseholder who leased vacant land from Santa Rosa County and later built a residence on the lot. The lessee took on obligations that are never obligations of an owner -- to insure the property, maintain it, and pay rent. The lessee agreed not to remove improvements from the property. There was never a payment for the land and the leaseholder could never get title. What was the date of purchase? What was paid for the land?

A companion problem arises when the leasehold is of vacant land with no improvements, which is the situation with a number of leases involved in this case. When was the property acquired? What price was paid? No assessment-to-sales ratio study is possible because there has never been a sale.

Of course, the Court is not obligated to answer these questions but, if it fails to clarify, there is almost certain to be substantial litigation.

C. The Court Did Not Address the Constitutional Issue, Leaving Confusion in the Law.

By affirming the trial court's opinion without addressing the constitutionality of the statute or the standing of the taxing authorities to challenge the law, the Court essentially took away the basis for the trial court's decision, a decision reached by disregarding the legislative determination of the way that the property should be taxed.

The taxing statute, Section 196.199(2)(b), requires the leasehold interests of plaintiffs to be taxed **only** as intangible personal property. The statute declares that improvements, if owned by the lessee, are subject to local ad valorem taxes. There is no similar legislative directive regarding ad valorem taxation of land if a court deems the lessee to be equitable owner. The trial court declared Section 196.199(2)(b) (and the companion intangible tax provision, §199.023(1)(d) (2005)) to be unconstitutional, because its decision that plaintiffs could be taxed as if they were owners – instead of as lessees – directly contradicts the clear legislative mandate to tax the leasehold interest *only* as intangible personal property.

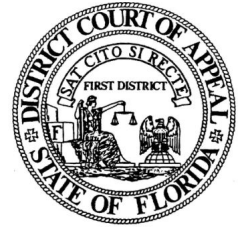
This Court's decision to affirm the ruling below that lessees have an ownership interest in the land that is subject to ad valorem taxation must likewise deal with the existing statute. If it does not, then this Court will have imposed double taxation upon the plaintiffs: first, an intangible tax payable to the State (because they lease government-owned land), and second, ad valorem local taxes payable to the Tax Collector (because they have been deemed "equitable owners [of the land] for ad valorem taxation purposes"). The statute's clear intent to make the leasehold subject *only* to intangible tax cannot co-exist with this Court's intent to tax it some other way.

It would appear that the trial court recognized the dilemma and resolved it by approving the constitutionality arguments, thus removing the statutory impediment to ad valorem taxation. This Court's affirmance would seem to leave that ruling in place. It is, of course, Appellants' position that the Tax Collector has no standing to make the arguments and that the challenge to constitutionality must fail.

RULE 9.330 CERTIFICATE

Because this motion seeks an opinion on issues not addressed in the Court's opinion, this certificate is included: I express a belief, based upon a reasoned and studied professional judgment, that a written opinion will provide a legitimate basis for Supreme Court review because the issues relating to (1) the constitutionality of the statutes in question and (2) the issuance of tax deeds, are resolved only by affirming the trial court, and these issues are not addressed in the opinion. The Tax Collector's lack of standing to challenge the statutes is explicitly addressed in court opinions in conflict with the outcome in this case. The propriety of tax deeds on government property is explicitly addressed by both statute and court opinions in conflict with the outcome in this case. If an opinion is written, these conflicts will be apparent.

/s/ Danny L. Kepner
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**INDEX FOR APPENDIX TO APPELLANTS'
MOTION FOR REHEARING AND/OR CLARIFICATION**

1. Tax Deed dated November 20, 2009
2. Tax Sale Certificate dated June 1, 2007

Property Identification No. 28-2S-26-9180-00400-0091
Tax Deed File No. 09-093

TAX DEED

State of Florida
County Of SANTA ROSA

The following Tax Sale Certificate Numbered 3033 issued on 6/1/07 was filed in the office of the Tax Collector of this County and application made for the issuance of the Tax Deed, the applicant having paid or redeemed all other taxes or tax sale certificates on the land described as required by law to be paid or redeemed, and the costs and expenses of this sale, and due notice of sale having been published as required by law, and no person entitled to do so having appeared to redeem said land; such land was sold on the 30th day of November, 2009, offered for sale as required by law for cash to the highest bidder and was sold to HOWARD R CICIO (UNDIV 50%); MICHAEL W HARRIS (UNDIV 25%); JARED M HARRIS (UNDIV 25%) whose address is 1940 S HWY 71, MARIANNA, FL, 32448 being the highest bidder and having paid the sum of his bid as required by the Laws of Florida.

Now, on 30th day of November, 2009, in the County of Santa Rosa, State of Florida, in consideration of the sum of (\$90,000.00) Ninety thousand dollars only, being the amount paid pursuant to the Laws of Florida does hereby sell the following lands, including any hereditaments, buildings, fixtures and improvements of any kind and description, situated in the County and State aforesaid and described as follows:

W 21.4' OF E 48.2' OF LOT 9, BLOCK 4, NAVARRE BEACH RESIDENTIAL SECTION 1,
ACCORDING TO PLAT RECORDED IN PLAT BOOK "F", PAGE 44, OF THE PUBLIC
RECORDS OF SANTA ROSA COUNTY, FL

Witness:

Debra Lawson
DEBRA LAWSON
Barbara Glover
BARBARA GLOVER

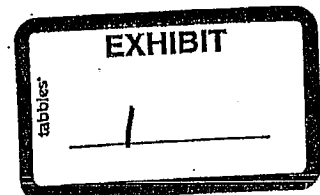
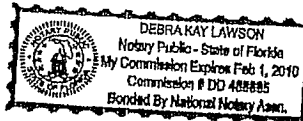
Mary M Johnson by Debra Kay Lawson
MARY M. JOHNSON (Seal)
Clerk of the Circuit Court
SANTA ROSA, FL

State of FL
County Of SANTA ROSA

On this 30th DAY OF NOVEMBER 2009, before me, Debra Kay Lawson, personally appeared, Susan Handless, personally known to me, to be the person described in, and who executed the foregoing instrument, and acknowledged the execution of this instrument to be their own free act and deed for the use and purposes therein mentioned.

Witness my hand and official seal date aforesaid.

Debra Kay Lawson
DEBRA KAY LAWSON, Notary Public



TAX SALE CERTIFICATE NO. 2007 / 3033.000

This Certificate will be void seven years from date of issue.

STATE OF FLORIDA

OFFICE OF TAX COLLECTOR

I, ROBERT G MCCLURE, Tax Collector for the County of

SANTA ROSA COUNTY, in the State of Florida, do hereby certify that

I did, at public auction, pursuant to notice given by law as required, on this 1st day of

June, 2007, issue to
(Year)

0001008
TARPON IV, LLC
PO BOX 100736
ATLANTA GA 30384-0736

a tax sale certificate covering the parcel(s) hereinafter described for the sum of 5447 DOLLARS and 51 CENTS, said sum being the amount due for taxes, interest, costs and charges of the described parcel(s) for the year 2006, that the above named purchaser of this certificate or assigns will therefore be entitled to apply for a Tax Deed of such parcel(s) in accordance with the law unless the same shall be redeemed within such periods of time as are provided by law, by payment of such amount and interest thereon from the date of this certificate at the rate of eighteen percent per annum, if purchased by the county or eighteen percent per annum (or at such lower rate of interest as may be bid by any purchaser other than the county).

Said parcel(s) are described as follows:

PARCEL NUMBER	EXEMPTION TYPE	VALUE	TAXABLE VALUE	CODE	ACRES
282S269180004000091	42	0	315,000	10	0

BODNAR GREG & DUCKWORTH JOHN
PO BOX 489
CENTERVILLE OH 45459-0489

DESCRIPTION:
W 21.4 FT OF E 48.2 FT OF LOT
9 BLK 4 NAVARRE BEACH
RES SEC 1 BEING UNIT 6
OR 992 PG 367 & OR 1125 PG 332
ESC CNTY

In the County of SANTA ROSA COUNTY, State of Florida.

The interest rate bid at the sale pursuant to Chapter 197, Florida Statutes, was 0.25 percent.

WITNESS my hand at MILTON, FL 32572, Florida, this 1st day of

June, 2007.

Signature: Robert G. McClure ph, Tax Collector

