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June 2, 2014

Re: TAXATION OF IMPROVEMENTS ON PENSACOLA BEACH

Dear Client:

You have a decision to make before June 23, 2014.

On March 20, 2014, the Florida Supreme Court issued its opinion in our Pensacola Beach tax case, approving the decisions of the lower courts, and concluding that, at least for ad valorem tax purposes, it considers each of you to be owners of the improvements on your leaseholds. The opinion can be found at www.pbeachtaxsuit.com.

On your behalf, we filed a motion for rehearing or clarification as to certain points and that motion can also be found at the referenced website. The Property Appraiser and the Tax Collector, through their attorneys, filed legal memoranda opposing the motion, and on May 22, 2014, the Court denied our motion without comment. There is no other motion we can file, and no higher court to which we can appeal. As your attorney – and in some instances, your friend – I cannot express how disappointed I am at this outcome.

The Supreme Court's decision here ends with absolute finality the litigation we began in 2004, challenging the taxation of the improvements on your residential leaseholds. You may have withheld paying your taxes, as the statute allows, while the cases have been pending. That statutory protection of you ended on May 22, but we have been told that the Tax Collector will be sending out new tax notices within the next two weeks or so. From the date on the Collector's notice, you will have 30 days to pay your taxes for all prior years, and be charged simple interest at the 12% rate. If you miss that deadline, starting on the 31st day the interest rate, calculated from the beginning of your involvement in the case, will be ***18%*** per year. PLEASE DO NOT MISS THE DEADLINE, or you will have to pay 6% more interest, as described above. If you have been paying your taxes to the Tax Collector annually, or paid them in a lump sum, there is no additional interest or penalty due from you now.

As you know, each year we were required to file a new lawsuit, in order to preserve the suits filed in previous years. The Supreme Court's decision involved suits filed the first five years (2004, 2005, 2006, 2007, and 2008). As required by the statutes, we continued to file cases in 2009, 2010, 2011, and 2012, all of which have been kept pending at the trial court level ("stayed"), awaiting the decision of the highest court in our state[1]. Now that that decision has been rendered (March 20) and finalized (May 22), the trial court cases for 2009-2012 must be dealt with. Since you were part of the litigation during at least one of those four years (2009-2012), you have a decision to make.

[1] I failed to file the 2013 case by the deadline, and it has now been dismissed. If you have not paid the 2013 taxes as we previously recommended, you will be required to do so now.

It is our firm's professional opinion that the pending cases for 2009-2012 have no realistic chance of obtaining a different result for you, regarding taxation of the improvements. The taxing officials will be filing motions to dismiss these cases because the Supreme Court has now ended the dispute in favor of taxation and the trial courts are required to follow the March 20 decision. Because we do not believe you have any viable legal or factual grounds to continue with these pending cases, we recommend filing a *voluntary* dismissal of the 2009-2012 cases for each of you.

We represent in excess of 2100 persons and entities in these four pending cases. Although a Liaison Committee served you well during this 10-year battle, that Committee cannot decide for you whether to dismiss – each client must make that decision.

Besides the fact that we believe you will lose if you continue to pursue the 2009-2012 cases, a Florida statute (Section 57.105) could cause you to be obligated to pay attorney's fees to the taxing authorities for fighting a battle that has already been lost. That same statute could penalize your lawyers if the opponents ask for it to be applied and your attorneys were in agreement with you to continue litigating. Because that statute can be so penalizing, in our opinion it is in your best interest to voluntarily dismiss the cases we filed for you in 2009 through 2012.

If you choose not to have us enter a voluntary dismissal for you, we have no choice but to withdraw as your attorneys in these cases. If you want to continue the litigation on your own behalf, of course you can retain other counsel to take our place; or, if you are individual(s), you also have the option, under Florida law, to represent yourselves. Again, it is our recommendation that you *not* continue this litigation.

We need for you to tell us your choice and enclose herein a "Client Directive Form" and a self-addressed envelope (please affix a stamp) to use in sending it back to us (email and fax are also acceptable). As you can see, the form offers you the choice to give us (a) permission to dismiss or (b) permission to withdraw. But we also need to tell you that if you send nothing back by June 23, 2014, or if you fail by your markings to give us permission to do either (a) or (b), we will still file a motion to withdraw from representing you, and if necessary schedule a hearing on that motion at some point in the future. We will not be able to assist you with any 57.105 motions that may be filed.

All funds paid by you and your fellow plaintiffs for the litigation involving the improvements have now been expended. We greatly appreciate the opportunity we have had to represent you in this long legal battle. We also appreciate the hard work of the volunteer members of the Liaison Committee.

DO NOT FORGET TO FILL OUT, SIGN AND DATE, AND SEND BACK THE ENCLOSED CLIENT DIRECTIVE FORM. *[U.S. Mail, facsimile, or email are all acceptable formats for returning the form.]* These need to be back in our offices on or before close of business on **June 23, 2014.**

Very truly yours,
Shell, Fleming, Davis & Menge

Danny L. Kepner

DLK/jer
Enclosure

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ATTORNEYS AT LAW

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June 2, 2014

Re: TAXATION OF LAND ON PENSACOLA BEACH

Dear Client(s):

On March 20, 2014, the Florida Supreme Court issued its opinions in the *1108 Ariola, LLC v. Jones* (Pensacola Beach) and *Accardo v. Brown* (Navarre Beach) cases. Representing both groups, we filed motions for clarification, and the Supreme Court denied those motions, without comment, on May 22, 2014. The Supreme Court decisions of March 20 thus became final for all purposes on May 22. There are no further motions or pleas that we can make, and no higher court to which we can appeal regarding the issues raised.

But the *1108 Ariola* case dealt only with taxation of improvements built on Pensacola Beach residential leaseholds; it did not address taxation of the land itself. The Property Appraiser taxed only the improvements until tax year 2011. In addition to the cases regarding the improvements, we filed three separate cases challenging taxes on the land, for 2011, 2012, and 2013. As you know, because of my mistake, the 2013 suit was not timely filed and we have dismissed it.

As to the 2011-2012 land cases, we are presented with a situation complicated by the comments made by the Florida Supreme Court in the *1108 Ariola* case. Most of you know that taxation of the land at Navarre Beach was challenged in the companion case of *Accardo v. Brown*, in which the Supreme Court ruled that the lessees there own the land for tax purposes. Attached to this letter is a copy of page 5 of the *1108 Ariola* (Pensacola Beach) decision, where the Supreme Court declared that its holding in *Accardo* turned "on the fact that the leases are perpetually renewable." "In contrast," the Court said, "this case presents leaseholds that are not perpetually renewable." But in the footnote, the Court also said, "The record does show, however, that some of the leases at issue are perpetually renewable."

In our motion for rehearing/clarification, we asked the Supreme Court to explain which Pensacola Beach leases it deems to be perpetually renewable, but the Court denied that motion without comment, as noted above. As your attorneys, we have given careful consideration of what one might expect the courts to do with the 2011-2012 cases challenging taxation of the land on Pensacola Beach. **Because of the Supreme Court's footnote, quoted above and shown on the attachment, we are hereby recommending to our clients with leases that have renewal provisions for 99 years, on like terms, "including an option for further renewals," that they NOT continue to contest taxation of the land.** We believe such leases have already been deemed "perpetually renewable," per the Court's footnote and language in the *Accardo* opinion. In our opinion, fighting to get a different result than the *Accardo* ruling on the land is futile for our clients with leases containing the foregoing renewal language. In addition, the opposing attorneys plan to file motions asking the court to award attorneys' fees against all of our clients in the land cases. We believe there is a strong likelihood that the court will award such fees against clients with the leases described in this paragraph, if they choose to fight a battle that has already been lost.

Of course, the adverse court ruling in *Accardo* also means that, if your lease is of the type discussed in the foregoing paragraph, you will need to pay all unpaid taxes. We have been told that the Tax Collector will issue tax notices (bills) to our clients within the next couple of weeks. Under the statute, if you pay the taxes within 30 days after the date of that notice, you will be required to pay simple interest of 12%. However, if you miss that deadline, per the

statute, the interest rate will jump to 18%, charged from the beginning. We urge you to timely pay the tax notice and avoid this 6% additional interest penalty.

CATEGORY I

If your lease fits in the category described above, that is, the original term is for 99 years and includes an option to renew for another 99 years on like provisions which include an option for further renewals, your present choices are:

(a) to allow us to voluntarily dismiss you and your parcel(s) from the 2011-2012 land cases; or

(b) to allow us to withdraw from representing you, meaning you or other counsel you retain will handle the 2011-2012 land cases thereafter.

CATEGORY II

We now shift focus to those of you whose leases have no enforceable renewal provision at all, or which renew for relatively short periods of time, such as 25 or 30 years. For such leases, it seems to us that there is at least a chance the courts will agree that ad valorem taxation of the land is not allowed under Florida statutes, even if the improvements have been deemed taxable in the *1108 Ariola* case. Thus, we are willing to continue the litigation in the 2011-2012 land cases for the "Category II" plaintiffs who choose to go forward, although success in such an effort, on reflection, seems rather unlikely.

Pursuing these cases is extremely risky, because:

- The courts, including the Supreme Court, do not like our position, even though we are relying on a statute that says your leasehold land cannot be subjected to ad valorem tax.
- The court can deem our position "frivolous," and award attorneys' fees to the other side, which you, and possibly our firm, would be required to pay. While unlikely, we know that is what the opponents will ask for.
- If you hold back paying your taxes during the suit, and if we lose, the court can add 10% per year to the taxes you owe (on top of the 12%) as a penalty, if it finds you held back the money in bad faith.
- Any local judge will feel pressured to rule in favor of taxing you.

The chances of winning may not be any greater than 10-15%. That is a harsh reality, but we would be less than candid if we did not say it. Because of the low percentage of likelihood you will succeed, we really cannot recommend that you continue to litigate these claims. However, if you are willing to push on despite the limited chance that you will win, and in the face of the risks of paying additional fees to my firm, accruing further interest on your unpaid taxes, and possibly even owing an amount for the opponents' attorneys' fees if we do not prevail, we are willing to continue to represent you. Our belief that you are on the right side of this issue has not wavered. It is just difficult to be optimistic after all the court rulings that have gone the other way.

If you still want to fight after that pessimistic overview, we have some work to do for you. We have spent some time reviewing your leases, but because the chain of "title," so to speak, is often hard to follow, we will need for you to let us know (1) if you believe your underlying lease fits into one of the categories listed below, and (2) if so, whether you wish to continue to participate in the land litigation. In order to go forward with the land cases, your underlying lease **must** have one of the following renewal terms:

- Renewal for an unspecified term of years
- Renewal terms "negotiable" or "subject to negotiation"
- Renewal terms of less than 99 years (for example, 25 years, or 30 years)
- No renewal provision at all

Because we have no way to estimate how many of you can or will go forward, it is not possible to predict how much each of you will need to pay as fees and costs to us to keep the cases going. We plan to charge you hourly rates that are competitive in our area. To date, all of you have paid in $350 per parcel but we have nearly exhausted those funds. Because the number of clients will have been reduced considerably, we will need for each of you going forward to pay in a retainer amount and to sign an engagement letter. We will not be able to calculate the individual retainer amount until we know how many clients are truly committed to going forward. Please also be advised that should I, Danny Kepner, be unable for any reason to complete the case for you, at this point our firm has no other attorney who is prepared to step in and take over primary responsibility for the litigation, and you would need to retain other counsel.

To return to your choices; if your lease has no renewal, or meets any of the other criteria in the list above, your options are:

(1) to remain in the litigation as our client(s); or

(2) to direct us to withdraw from representing you, meaning you or other counsel you retain will handle the land cases thereafter; or

(3) to direct us to voluntarily dismiss the land cases, as to you and your parcel(s).

To enable you to exercise the choices available to you in your particular circumstances, either Category I or II, we have enclosed a Client Directive Form, along with a self-addressed envelope for you to use (attach a stamp, please) to return it to us. Faxing or emailing the forms are also acceptable. If we receive nothing back from you by June 23, or if you fail by your markings to indicate your choice, we will have to file a motion to withdraw from representing you, and if necessary, schedule a hearing on that motion at some point in the future. Under such circumstances, we will not be able to assist you with any motions for attorneys' fees that may be filed by the opponents.

Regardless of your decision, we greatly appreciate the opportunity we have had to represent you in this long legal battle. We also appreciate the hard work of the volunteer members of the Liaison Committee.

PLEASE FILL OUT, SIGN AND DATE YOUR FORM AND RETURN IT TO OUR OFFICE NO LATER THAN JUNE 23, 2014. *[U.S. Mail, facsimile, or email are all acceptable formats for returning the form.]*

Very truly yours,
Shell, Fleming, Davis & Menge

Danny L. Kepner

DLK/jer
Attachment & Enclosures

P.S. You can view the two Supreme Court opinions discussed in this letter, and also the respective motions we filed for clarification at www.pbeachtaxsuit.com and www.navarrebeachtaxsuit.com.

a lessee under a lease for a limited term has the right to acquire legal title for nominal consideration, that right is not always a feature of equitable ownership.

Our holding in Accardo that the taxpayers in that case are the equitable owners of both the improvements and the underlying land, turns on the fact that the leases are perpetually renewable. In contrast, this case presents leaseholds that are not perpetually renewable.[1] We conclude, however, that this distinction—along with the absence of the right to obtain legal title for a nominal consideration—is not sufficient to remove the improvements on the properties at issue here from the scope of the equitable ownership doctrine.

Florida law recognizes that regardless of how legal title is held, the improvements on lands owned by a governmental entity may—for ad valorem tax purposes—be "owned" by the lessee of the lands. The final sentence of section 196.199(2)(b) provides that "[n]othing in this paragraph shall be deemed to exempt personal property, buildings, or other real property improvements owned by the lessee from ad valorem taxation." Of course, the reference to "owned by the lessee" must be viewed in the context of Florida's law concerning equitable ownership and thus cannot be restricted to the holders of legal title to improvements. And nothing in the text of the statute or in the broader legal

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1. The record does show, however, that some of the leases at issue are perpetually renewable.