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IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 72,548

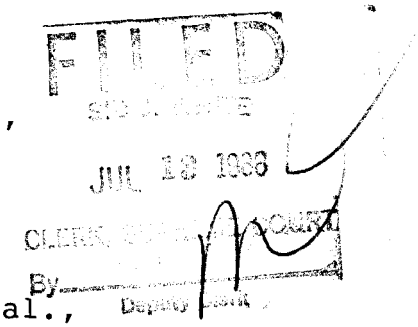
VALENCIA CENTER, INC.,

Appellant,

v.

FRANKLIN B. BYSTROM, et al.,

Appellees.

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Amicus Brief of the International
Council of Shopping Centers
in support of the position of Valencia Center, Inc.

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On Appeal from the Third District Court of Appeal

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## Table of Contents

## Table of Authorities

Cases — Page

**Constitution and Statutes**

## Interest of the Amicus

The International Council of Shopping Centers is the trade association for the shopping center industry. Its members include shopping center owners, developers, retailers, investors and managers. Its membership is open to all individuals who express or have a professional or business interest in the shopping center industry. The Council has over 26,000 members worldwide and over 1,700 members in the state of Florida.

The Council's membership is significantly affected by the Third District Court of Appeal's decision in Valencia Center, Inc. v. Bystrom, 13 F.L.W. 1118 (Fla. 3d DCA May 10, 1988). That decision's declaration of the unconstitutionality of section 193.023(6), Florida Statutes (1987), means that shopping center properties will be assessed by the property appraiser for ad valorem taxation purposes without regard for the most significant encumbrance on those properties, namely, the long-term shopping center lease generally used in the industry.

The logical attraction of high density uses to shopping center locations results in other, possibly more valuable uses of adjacent or nearby properties at a time when shopping center property value is suppressed by a long-term lease. Property appraisers are prone to value shopping centers by neighboring values, rather than the underlying property's "just valuation."

The district court's decision is errant as a matter of law. It also fails to take into consideration the practical

aspects of property appraisal which the legislature took into consideration when it enacted section 193.023(6). Because of the deep interest which its membership has in the constitutionality of that statute, the Council lends its voice to this court as an amicus curiae in this proceeding.

## Statement of the Case and Facts

The Council will adopt the statements of the case and facts presented by the parties in their briefs. It is not the object of this amicus curiae brief to resolve conflicts among those parties as to the factual matters. The Council's brief will address the purely legal issue of whether section 193.023(6) is constitutionally consistent with the just valuation mandate of Article VII, Section 4 of the Florida Constitution.

## Summary of Argument

In Article VII, Section 4 of the Constitution of the State of Florida, the legislature is called on to develop laws to ensure the just valuation of property in the state. Section 193.011 is designed to require the appraiser to consider various factors in ascertaining the value of property. Section 193.023(6) further defines the role of the appraiser by limiting his discretion to valuing properties encumbered by long-term lease to the highest and best use allowed by the lease.

Section 193.023(6) is an enactment founded on reason. It requires thus encumbered property to be valued in a manner consistent with the traditional income capitalization method for appraising property. The statute is not an arbitrary classification scheme since it bears a reasonable relationship to the just valuation of property.

Valencia Center, Inc. v. Bystrom, 13 F.L.W. 1118 (Fla. 3d DCA May 10, 1988) is incorrectly decided. In that decision, the Third District has taken on the role of lawmaker. That court has decided, quite improvidently, that just valuation can be obtained only by applying market valuation techniques when they are available.

This sole basis for the district court's declaration of the unconstitutionality of section 193.023(6) is a substitution of its judgment for that of the legislature in determining a framework for the valuation of property. The just valuation

clause of the Constitution was not meant to be infused by the courts with a particular appraisal methodology which ignores other reasonable appraisal factors. Section 193.023(6) is a constitutionally drawn tax statute that is reasonably related to just property valuation.

## Argument

## Section 193.023(6) is constitutional.

**1. The purely legislative function of guiding and limiting the property appraiser's function is usurped by the "Valencia II" decision.**

This appeal concerns the constitutionality of section 193.023(6), Florida Statutes (1987),[1] which calls for the property appraiser to determine ad valorem taxation on certain property subject to lease on the basis of the highest and best use permitted by the lease, rather than on a use not permitted by the lease.[2] The Third District Court of Appeal has held this section to be an unconstitutional infringement on the just valuation clause of Article VII, Section 4 of the Florida

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1/ This amicus curiae brief will not address the appropriateness of the property appraiser's ad valorem tax assessment in this instance. That issue is properly addressable by the parties' to this dispute.

2/ The statute states: In making his assessment of improved property which is subject to a lease entered into prior to 1965 in an arm's length, legally binding transaction, not designed to avoid ad valorem taxation, and which has been determined by the courts of this state to restrict the use of the property, the property appraiser shall assess the property on the basis of the highest and best use permitted by the lease and not on the basis of a use not permitted by the lease or of income which could be derived from a use not permitted by the lease. This subsection shall apply to all assessments which are the subject of pending litigation.

Constitution.[3] Valencia Center, Inc. v. Bystrom, 13 F.L.W. 1118 (Fla. 3d DCA May 10, 1988) ("Valencia II").

In its decision, the Third District has re-defined the just valuation clause of the Constitution, and has given that provision an unnecessarily restrictive scope. It has substituted its judgment for that of the legislature in prescribing the methodology for achieving just valuation in certain situations. Inadvertently, but most tellingly, the Third District's decision produces the effect of "constitutionalizing" the guidelines set forth for property appraisal in section 193.011, Florida Statutes (1987), although the Constitution itself assigns that responsibility to the legislature.

Section 193.011 delineates the factors which the property appraiser should consider in determining the just value of any parcel. The legislature was given the responsibility and authority to prescribe these factors in Article VII, Section 4 of the Constitution. The statute does not, by its terms or by the decisions of this court, determine which of those factors should actually be used by the appraiser in any particular instance, or even to what degree any factor should be used once it is applied. Powell v. Kelly, 223 So.2d 305 (Fla. 1969).

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3/ This section provides in relevant part: By general law regulations shall be prescribed which shall secure a just valuation of all property for ad valorem taxation..."

One of those factors, number seven, allows the appraiser to consider, among other factors, the traditional income approach to a determination of ad valorem taxation of a particular parcel. In Valencia II, the Third District has effectively decided that the property appraiser may determine the just valuation of leased property without regard to actual income received from the property.[4] This result mandates a reversal of this declaration of unconstitutionality, to redress the balance between the legislative and judicial branches which the district court has destroyed.

There is a legislative scheme by which appraisers practice their trade. That scheme is within the province of the legislature, not the courts, under the Constitution.[5] Section 193.011 sets out factors the appraiser should consider in assessing ad valorem tax. The courts have uniformly described those factors as guideposts for the appraiser's consideration, not for his use in every circumstance. Straughn v. Tuck, 354 So.2d 368 (Fla. 1978); Bystrom v. Equitable Life Assurance

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4/ Although this brief leaves to the parties the obligation of sorting out whatever facts may be relevant to the property appraiser's valuation of Valencia's property, obviously, if section 193.023(6) is constitutional the appraiser is limited to an assessment consistent with that statute.

5/ The legislature has also mandated the Department of Revenue to develop rules and regulations for the assessment of taxes and has directed the department to promulgate standard measures of value to assist appraisers in establishing the valuation of property. §§ 195.027, 195.032, Fla. Stat. (1987).

Society, 416 So.2d 1133 (Fla. 3d DCA 1982), rev. denied, 429 So.2d 5 (Fla. 1983). The factors enumerated in section 193.011 reflect the varying and traditional alternative appraisal routes the property appraiser may take in ascertaining "just valuation." The courts will sustain the assessor's discretion where the tax is levied on the assessor's determination that just valuation is achieved by the income capitalization approach which utilizes the actual income derived from a property. See Palm Corporation v. Homer, 261 So.2d 822 (Fla. 1972); Bystrom v. Hotelerama Associates, Ltd., 431 So.2d 176 (Fla. 3d DCA), rev. denied, 441 So.2d 631 (Fla. 1983). The traditional assessment approach of income capitalization is consistent with the statutory scheme provided in the section 193.011 factors.

Section 193.023(6) is a legislative recognition that income capitalization should be applied by the appraiser to assess ad valorem taxes on parcels encumbered by long-term leases. If the assessor may constitutionally apply the legislative criterion of income capitalization, it is certainly appropriate for the legislature itself to restate that criterion through enactment of a general law.

**2. Section 193.023(6) is not an arbitrary classification scheme.**

The trial court determined, in part, that section 193.023(6) violated the Florida Constitution by unconstitutionally classifying a set of properties for disparate

treatment and hence avoiding just valuation of those properties.[6] In order to defend this determination by the trial court on appeal, Dade County argued in the Third District that this court's decision in Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1973), precludes any classifications of property not authorized by the constitutional language of Article VII, Section 4. Although that decision stands for the proposition asserted, it does not have the scope argued by the county.[7]

In Interlachen, the court considered a legislative enactment which classified platted lots as unplatted, if under 60% of the acreage in any particular development remained unplatted. The court determined that this was an arbitrary classification of property violative of Article VII, Section 4. The legislation simply treated certain platted lands more favorably than other platted lands solely because of their arbitrary grouping, for taxation purposes, with undeveloped

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6/ The district court did not address the classification issue, resting its opinion instead on the sole ground that section 193.023(6) violates the just valuation requirement of Article VII, Section 4.

7/ The Interlachen decision was the linchpin of Dade County's argument in the district court. The county argued that Interlachen determined that any discretion to classify property for tax purposes possessed by the legislature under the 1885 Constitution was removed by Article VII, Section 4 of the 1968 Constitution. Interlachen, however, is beside the point to the present dispute. As discussed in this brief, Interlachen does not dispossess the legislature of authority to enact laws reasonably related to valuation of property.

parcels. The court was exceedingly careful to admonish that the statute under review could not be considered a proper, in other words reasonable, valuation criterion. Id. at 435. Had the court in Interlachen been addressing a statute which reasonably related to valuation then the result would have been quite different. The court would not have determined that the statute was a mere, arbitrary classification scheme.[8]

This court has previously articulated that a just valuation of property for tax assessment purposes must include all interests in the property "except when the Legislature authorizes the assessment of separate interests." Homer v. Dadeland Shopping Center, Inc., 229 So.2d 834, 836 (Fla. 1969); Dickinson v. Davis, 224 So.2d 262 (Fla. 1969). It is this quoted passage which the Third District has stripped of meaning in declaring section 193.023(6) unconstitutional.

For example, in Homer, this court reviewed a district court opinion which recognized that certain encumbrances on land may restrict its use for purposes other than its highest and best use. The assessment of a shopping mall property was at issue.

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8/ In the district court, Dade County also relied on the decision of this court in Archer v. Marshall, 355 So.2d 781 (Fla. 1978), for the proposition that section 193.023(6) has the effect of arbitrarily classifying property for valuation purposes. Archer dealt with a special act of the legislature which exempted property from ad valorem taxation. Application of that decision has previously been limited to that particularly extreme form of legislative classification having nothing at all to do with the just valuation of property. See Miller v. Higgs, 468 So.2d 371, 377 (Fla. 1st DCA), rev. denied, 479 So.2d 117 (Fla. 1985).

That part of the shopping center which the district court found to be overvalued by the property appraiser was the parking area. This court determined that the appraiser had properly assessed the parking area since he was justified in placing the same value on it as on the improved parcels in the shopping center. The court recognized that the parking area is just as integral to the development of the shopping center as is the improved land containing the shops. Nonetheless, the court recognized the general principle that real property actually restricted by agreement from its highest and best use may be assessed at a lesser rate should the legislature authorize it. Homer, 229 So.2d at 836-837.

The reasoning in Homer is a logical extension from that of the Culbertson v. Seacoast Towers East, Inc., 212 So.2d 646 (Fla. 1968) decision.[9] That decision dealt with the constitutionality of a statute reducing the rate of taxation for properties on which improvements had only been substantially completed at the time of the assessment. The court recognized the reasonableness of the legislative just valuation scheme and required no more of the statute. This separate classification of property bore a "reasonable relationship to the legislative power

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9/ Culbertson's reasoning was recently re-affirmed in Markham v. Yankee Clipper Hotel, Inc., 427 So.2d 383 (Fla. 4th DCA 1983), thus undermining Dade County's position before the Third District that the legislature, with the intervening constitutional revision, no longer has discretion to enact laws reasonably related to valuation.

to prescribe regulations to secure a just evaluation of property." Id. at 647. The statute provided for just valuation because an assessment at the intended, higher use -- when improvements were completed -- would only be delayed, not denied.

The legislative authorization to classify through its enactments is limited only by the requirements that the legislature proceed on a rational basis and not resort to a palpably arbitrary classification which bears no reasonable relationship to the purpose of the legislation. Day v. High Point Condominium Resorts, Ltd., 521 So.2d 1064, 1066 (Fla. 1985); Eastern Air Lines, Inc. v. Department of Revenue, 455 So.2d 311, 314 (Fla. 1984). Section 193.023(6) bears a reasonable relationship to the just valuation of property.

**3. The "Valencia II" decision is an erroneous substitution of judicial standards for legislative standards in designing valuation criteria consistent with the Constitution.**

Walter v. Schuler, 176 So.2d 81 (Fla. 1965), decided that just value and fair market value are synonymous and that each term recognizes that a 100% fair market valuation of any property is the proper basis on which to levy the ad valorem tax. In that case, the court was faced with the significant undervaluation of the tax roll of Duval County. Faced with this situation and the obvious legacy of abused discretion by the tax assessor of that county, the court sought to rein in that discretion by requiring the assessor to consider each of the

factors set forth in section 193.011 (then section 193.021) in deriving just valuation.

The court recognized this statute as the legislative implementation of what is necessary to accomplish the just valuation of property for ad valorem taxation purposes. The factors set forth in that section were viewed as "seven guideposts" (now eight factors in the present statute) which the assessor should consider, although not necessarily use, in performing his function of achieving just valuation. Id. at 86.

In reviewing a challenge to the tax assessor's valuation of timberlands in Bradford County, this court again recognized that the statutory framework setting forth factors by which to determine just valuation is just that -- a framework -- by which the assessor's function is guided. Powell v. Kelly, 223 So.2d 305 (Fla. 1969). In that particular case, the taxpayers had complained that the tax assessor should have utilized a regulatory manual issued by the state and requiring timberlands to be assessed by the capitalization of income method. The court upheld the assessor's valuation on the basis of the scope of the exercise of his administrative discretion unless exercised in an illegal or fraudulent manner. Id. at 307.

Foremost in the court's decision is that the assessor's discretion is bound by a substantive requirement that he perform his function in good faith and a further requirement that he follow the process delineated by statute. Id. at 307-308. In

this manner, the constitutional requirement of just valuation, as derived through the factors set forth by the legislature, may be attained and excessive imbalances in valuation resulting from the otherwise independent use of discretion by the county assessors may be minimized. Id.

The Walter and Powell decisions are the seminal decisions by this court in the area of ad valorem taxation. They set out the substantive goal of the tax assessor and the procedural steps he must take under the current statutory framework to provide the taxpayer with due process. The statutory goal, of course, mirrors the constitutional requirement of determining just valuation by valuing property at the amount a "purchaser willing but not obliged to buy, would pay to one willing but not obliged to sell." Walter v. Schuler, 176 So.2d 81, 86 (Fla. 1965). The appraiser's good faith consideration of the statutory factors, but not necessarily their use in any given circumstance, affords the procedural due process necessary for the taxpayer. Powell v. Kelly, 223 So.2d 305, 307-308 (Fla. 1969).

These decisions arose in a context warranting this court's intercession between the tax assessor and the taxpayer in order to articulate substantive and procedural due process guidelines for what could otherwise devolve into an arbitrary system of property appraisal for ad valorem taxation purposes. Neither of these important decisions, nor any other decisions of

this court, were designed or intended to restrict the legislature from articulating property valuation criteria by statute, so long as that articulation is reasonably related to valuation. If that reasonable relationship to valuation exists, then the legislative criteria rest within the constitutional rubric and are not voidable as arbitrary classifications favoring certain properties over others for no justifiable reason. Culbertson v. Seacoast Towers East, Inc., supra. Section 193.023(6) is a statute reasonably drawn and rationally related to a determination of just valuation.

This statute simply confines the property appraiser to measuring highest and best use of property encumbered by a long-term lease to the highest use allowed by the lease. In many ways, section 193.023(6) is simply a refinement of factor two listed in section 193.011(2). That section calls for the property appraiser to consider the highest and best use to which the property can be expected to be put in the immediate future and, as well, the actual, present use of the property. Section 193.023(6) more carefully defines the legislative delegation of authority to the property appraiser when evaluating properties encumbered by a long-term lease entered into prior to 1965. It advises the appraiser that the phrase "immediate future" in section 193.011(2) can only be defined by reference to the lease itself. As a refinement of subpart two of section 193.011, this

legislation is sufficiently and reasonably related to the valuation of property.

A reasonable relationship to a valuation purpose is all that the court should require in this context. None of the decisions of this court have even come close to restricting valuation criteria enunciated by the legislature, as has the Third District here. Recently, Department of Revenue v. Morganwoods Greentree, Inc., 341 So.2d 756 (Fla. 1977), supports the rationality of the legislative framework.

In Morganwoods, the assessor failed to consider restrictive encumbrances on the common areas of a townhouse development. Id. at 758. Since the assessor had failed to consider the effect of this encumbrance on the just value of the property, as required by section 193.011(2), the assessment was reversed. The Morganwoods decision is rather instructive. First, it clarifies the constitutional validity of the legislative requirement that encumbrances on property be taken into account when the tax is assessed. Id. at 758. Second, it determined that the recognition of encumbrances on the property in the valuation process is not an unconstitutional fragmenting of the ownership of that property for taxation purposes. Recognition of an encumbrance on the property does not defeat the intent of collecting the ad valorem tax from one owner. Id. Third, the decision recognized the validity, in given

circumstances, of the assessor's utilizing varying methodologies in determining the tax. Id.

Another decision of this court is instructive on these points, in the context of the ad valorem taxation of leased personal property. Blake v. Xerox Corporation, 447 So.2d 1348 (Fla. 1984). In Blake, the Third District had ruled that the property appraiser should have utilized the income capitalization method of assessing ad valorem tax on leased machinery, rather than the list-price-less-depreciation approach. Id. at 1350. The Supreme Court reversed, recognizing the "substitution of judgment" approach which the Third District had used. This court re-established, quite succinctly, that "just valuation" is achieved when the appraiser exercises his discretion within the statutory framework adopted and applies a particular assessment methodology in good faith. Id. at 1350-1351. Accord, Straughn v. Tuck, 354 So.2d 368, 371 (Fla. 1977); Powell v. Kelly, 223 So.2d 305 (Fla. 1969).

The hallmarks of this court's approach to reviewing the fairness of property appraisals, and therefore the valuation of property, has been to review the appraiser's action for consistency with the statutory guidelines for assessment and to verify that his discretion has been exercised in good faith. This Court's decisions demonstrate a uniform concern with the constraints of procedural due process in the realm of taxation. The starting point, of course, is always that the appraiser's

delegated authority is constrained by the legislative guidelines enacted in Chapter 193. These guidelines do not mandate that the appraiser select a particular valuation methodology, however, and any judicial attempt to impose a particular methodology is condemned as a judicial infringement on legislative terrain. Blake v. Xerox Corporation, 447 So.2d 1348 (Fla. 1984).

Unfortunately, the Third District's opinion in this case suffers the same defect which required reversal in Blake. There the players were somewhat different. In Blake, the Third District substituted its judgment for that of the appraiser in selecting a particular theory of appraisal methodology. Valencia II also reflects an unmasked substitution of judgment by the district court, but this time the court has gone farther and replaced the judgment of the legislature, not the appraiser, with its own notions. Valencia Center, Inc. v. Bystrom, 13 F.L.W. 1118 (Fla. 3d DCA May 10, 1988).

Perhaps the best way to focus in on the nature of that error is to review the antecedent Valencia case, on which the Third District's determination in this case is predicated. Bystrom v. Valencia Center, Inc., 432 So.2d 108 (Fla. 3d DCA 1983), rev. denied, 444 So.2d 418 (Fla. 1984) ("Valencia I"). In that case, the district court upheld the validity of the property appraiser's tax assessment based on the present value of the parcel. The appraiser selected a market valuation approach to appraisal after considering all the various methodologies and

thereby complying with section 193.011. Based on the authority of the numerous opinions of this court discussed in this brief, the district court's analysis should have stopped there. It did not, unfortunately. Instead, the district court went on to "harmonize" the guidelines articulated by the legislature in section 193.011 with Article VII, Section 4 of the Constitution. Valencia I, 432 So.2d at 110. This harmonization was reached by a determination that the appraiser "must perform a standard appraisal using normal techniques" -- in other words, the appraiser must use the market valuation appraisal methodology -- when sales of comparable properties exist. Id. at 110. This so-called harmonizing justified the district court's making an analytical progression it believed, quite incorrectly, was necessary to its decision.

The court first held that an internal conflict in the section 193.011 factors between the "highest and best use" of the property and the current use or that immediately available -- is resolvable because the assessor must use market studies when they are available, according to this view of the district court. Valencia I, at 110. The court then followed this reasoning with a determination that the highest and best use of the property (which is only a part of the subsection 2 factor of section 193.011) is achievable, only by using (not just considering) market-sale comparables to determine the tax assessment.

Given this view, it was only a short, though errantly taken, step for that court to declare section 193.023(6) unconstitutional. The district court's rationale for decision in Valencia I left it no choice other than to strike a legislative methodology for valuation when market evidence is available, effectively imposing judicial methodology in its place. Valencia II, 13 F.L.W. at 1118.

The district court's reasoning is not consistent with the sound reasoning of this Court's many decisions on this subject, however. It comes at the cost of dispensing with the grounds for decision in those landmark precedents. An even higher cost is paid by the declaration of the unconstitutionality of section 193.023(6).

This court's opinions have centered on the achievement of balance between the unbridled discretion of the property appraiser and the rights of the taxpayer, as those competing forces operate under guidelines provided by the legislature. The court has been faithful to the Constitution, which states explicitly that the legislature must prescribe valuation criteria. This court has not given constitutional status to the guidelines articulated by the legislature, nor has the basis for its decisions ever shown a desire to do so. Particularly anathema to this court's reasoning in numerous past cases would be the declaration by the courts of the mandatory use of a

particular valuation methodology governed by potential rather than actual use.

In Valencia I, the district court mandated the use of market valuation techniques. It determined that the highest and best use guideline is, when market valuation techniques are available, the only factor which can be used to determine just valuation. In fact, the Third District equated that phrase with just value, so that the legislature itself can not repeal its enactment of the highest and best use criterion in section 193.011.

This court's decisions cannot be read to "constitutionalize" one of the factors provided by the legislature for consideration by appraisers in achieving a just valuation of property. So long as the legislative enactment is rationally drawn and reasonably related to valuation criteria, the legislation is sustainable and consistent with Article VII, Section 4, and must be sustained.

There are obvious reasons that the just valuation clause should not be re-defined by the courts as meaning only a market valuation of property, to the exclusion of other reasonable appraisal factors. Imbuing this clause with a particular market-based theory of appraisal is reminiscent of the ill-advised decision of the United States Supreme Court which struck a ten-hour-day labor law for bakery employees by, in the dissenting words of Justice Holmes, "enact[ing] Mr. Herbert

Spencer's Social Statics" into the due process clause of the 14th Amendment of the United States Constitution. Lochner v. People of State of New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). Just as later decisions have agreed with Justice Holmes' admonishment that the "Constitution is not intended to embody a particular economic theory,"[10] so too the Florida Constitution does not confine just valuation to market value. To say otherwise at this time would effectively overrule decisions of this court allowing encumbrances on property to be used in determining just value,[11] and to deny the legislature's authority to draw tax statutes reasonably related to just property valuation. See, for example, Culbertson v. Seacoast Towers East, Inc., 212 So.2d 646 (Fla. 1968); Markham v. Yankee Clipper Hotel, Inc., 427 So.2d 383 (Fla. 4th DCA), rev. denied, 434 So.2d 888 (Fla. 1983); and see Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973). Section 193.023(6) is a constitutional enactment of the legislature.

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10/ Id. at 76; Pruneyard Shopping Center v. Robins, 447 U.S. 74, 93 (1980).

11/ Interestingly, courts in other states have found it necessary for the tax assessor to consider and use long-term lease encumbrances to determine the appropriate, just valuation of properties so encumbered. Clark Associates v. County of Arlington, ___ S.E.2d __ (Va. 1988) (available on West Law; 1988 WL58818 (Va.)); and see Darcel, Inc. v. City of Manitowoc Board of Review, 137 Wis.2d 623, 405 N.W.2d 344 (Wis. 1987). While not binding on this court, these decisions suggest the error of equating just valuation with market value in the presence of obvious encumbrances on the property.

## Conclusion

For the foregoing reasons, the court should reverse that part of the decision of the Third District declaring section 193.023(6) unconstitutional.

Respectfully submitted,

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## Certificate of Service

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