IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,548

VALENCIA CENTER, INC.,

Appellant,

vs.

FRANKLIN B. BYSTROM, etc.,
et al.,

Appellees.
_______________________________/

ON APPEAL FROM THE THIRD DISTRICT
COURT OF APPEAL OF FLORIDA
CASE NOS. 87-2404, 87-2405, 87-2406 and 87-2407

APPELLEES' ANSWER TO BRIEF OF AMICUS
INTERNATIONAL COUNCIL OF SHOPPING CENTERS

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STATEMENT OF THE CASE AND FACTS

The Appellees, Dade County taxing authorities, rely on their Statement of the Case and of the Facts set forth in their answer to Appellant's brief.

SUMMARY OF ARGUMENT

Amicus' position that the legislature has authority outside the Florida Constitution to classify property at less than fair market value is without merit. The broad legislative discretion applicable to pre-1968 assessments was eliminated by the 1968 constitutional revision. In his commentary to art. VII, §4, Talbot "Sandy" D'Alemberte notes:

> Subsection (a) of Section 4 contains entirely new language. The Revision Commission version would have allowed property to be classified on the basis of character or use by general law, with the rate still having to be uniform within each class.

Thus the legislative discretion to classify property for ad valorem tax purposes was proposed to and rejected by the Florida legislature.

Art. VII, §4 of the Florida Constitution of 1968 requires that all property be assessed at fair market value with the exception of agricultural land, land used for noncommercial recreational purposes, inventory and livestock. The cases cited by the Amicus to support a contrary position do not so hold.

The taxpayer's property consists of a complete city block of prime developable commercial real estate. Valencia Center, treated as though unencumbered, is immediately available for

development as a 13-story office highrise complex. See appendix (A.8-29) to Appellees' Answer Brief. Consequently, it is neither agricultural land, land used for noncommercial recreational purposes, inventory nor livestock. By specially classifying Valencia Center for assessment at less than fair market value, §193.023(6), Fla. Stat. (Supp. 1986), therefore violates the just value clause of the Florida Constitution.

Also, by arbitrarily distinguishing between pre-1965 leaseholds and other leaseholds, the relief act violates the equal protection clause. The district court declaration that §193.023(6) is facially unconstitutional is correct, is mandated by binding precedents issued by this Court, and should be affirmed.

ARGUMENT

SECTION 193.023(6), FLA. STAT. (SUPP. 1986), WAS CORRECTLY DECLARED UNCONSTITUTIONAL BY THE TRIAL COURT AND THE DISTRICT COURT.

1. Art. VII, §4, Fla. Const. (1968), prohibits reduction of assessments below fair market value and legislative enactments which violate this prohibition are unconstitutional.

Valencia's Amicus argues that the assessment criteria in §193.011, Fla. Stat., give the legislature authority to manipulate assessments so as to reduce them below fair market value. (Amicus Br. 4-7). In the instant case, the Amicus states that §193.023(6), Fla. Stat. (Supp. 1986), merely requires the Property Appraiser to utilize the income method of assessment with respect to a narrowly-defined class of properties. No one disputes that the income method substantially reduces the assessment of any underutilized property. It does this by focusing exclusively on the present use of the property rather than the highest and best use, as permitted by §193.011(2). "What a property is currently used 'as' is often _not_ the highest and best use. In the case _sub judice_, valuing the subject as a shopping center leads to a value less than fair market value." _Bystrom v. Valencia Center, Inc._, 432 So.2d 108, 110 (Fla. 3d DCA 1983) (emphasis original), _rev. denied_, 444 So.2d 418 (Fla. 1984) (hereinafter "_Valencia I_").

From this the Amicus argues that the Third District's rejection of this legislative directive constitutes judicial intrusion into the legislative branch of government. This argument is incorrect.

This Court has uniformly ruled that just value and fair market value are synonymous and that any departure from 100% of fair market value is constitutionally "intolerable." Spooner v. Askew, 345 So.2d 1055, 1057 (Fla. 1976) (England, J.); District School Board of Lee County v. Askew, 278 So.2d 272, 274 (Fla. 1973); Southern Bell Telephone & Telegraph Co. v. County of Dade, 275 So.2d 4, 8 (Fla. 1973); St. Joe Paper Co. v. Brown, 223 So.2d 311, 313 n.4 (Fla. 1969); Powell v. Kelly, 223 So.2d 305, 308 (Fla. 1969); Burns v. Butscher, 187 So.2d 594, 594 (Fla. 1966); Walter v. Schuler, 176 So.2d 85 (Fla. 1965); Root v. Wood, 155 Fla. 613, 21 So.2d 133, 138 (1945) (en banc).

The just value clause, art. VII, §4, Fla. Const. (1968), sets a single fair market value standard generally applicable to all property. The just value clause authorizes the legislature to specially classify for non-fair market value assessment agricultural land, noncommercial recreational land, livestock and inventory. Only these four (4) classes of property may be assessed at less than fair market value. Id.

This Court has recognized the clear mandate of the just valuation clause as a limitation on legislative power.[1/] This Court has ruled that the just valuation clause, art. VII, §4

1/ This discussion of the just valuation clause, art. VII, §4, Fla. Const. (1968), is taken directly from Fla. State and Local Taxes, Vol. II ¶8.05[3][b] (The Florida Bar 1984). William M. Barr's article insightfully examines the history of the just valuation clause and the Florida Tax Reform of 1971 and their treatment by this Court.

Fla. Const. (1968), eliminated the legislature's authority to create statutory exceptions to the constitutional requirement of full fair market value assessment. This Court thus invalidated both Pope's Law and the Rose Law as unauthorized legislative departures from the constitutional mandate of just valuation.

Pope's Law, §194.042(1)(b), Florida Statutes (1975), permitted taxpayers to challenge assessments by offering their property for sale at public auction in accordance with procedures that made the auction sale virtually illusory and contingent on the owner's willingness to sell. This Court declared the law unconstitutional as violative of the requirement of just valuation in ITT Community Development Corp. v. Seay, 347 So.2d 1024 (Fla. 1977).

The Rose Law, §195.062(1), Fla. Stat. (1971), was an attempt to grant a tax break in the form of reduced assessments to land developers. The law directed that unsold platted lots were to be assessed as similar unplatted acreage until 60% of the lands within the plat were sold. In Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1974), this Court held that the statute violated the mandatory requirement of just valuation.

Valencia's Amicus characterizes the Valencia Center Relief Act as "a legislative recognition that income capitalization should be applied by the [property] appraiser to assess ad valorem taxes encumbered by long-term leases." (Amicus Br. 7). This accurate characterization underscores the constitutional

infirmity of the relief act. In the instant case, it is readily apparent that Publix has Valencia Center at an extreme disadvantage because of Valencia's failure to place tax "stops" in its lease. The advantage which Publix enjoys has a distinct and measurable value. Valencia I, 432 So.2d at 111. If the only stick in Valencia's bundle of rights which is assessed is the leased fee as encumbered by the below-market-rent lease, the value of the leasehold escapes taxation. Id.

Assessing selected leased properties by assessing some of the sticks in the bundle (e.g., pursuant to §193.023(6)), and other leased properties by assessing all sticks in the bundle, violates the just value clause. It also violates the equal protection clause by arbitrarily favoring pre-1965 leaseholds.

Moreover, income capitalization is only one of three methods on which the property appraiser may rely in preparing his assessment. Blake v. Xerox Corp., 447 So.2d 1348 (Fla. 1984). The core issue in any tax assessment case is the amount of the assessment and not the methodology used in preparing the assessment. Bystrom v. Whitman, 488 So.2d 520, 521 (Fla. 1986). Consequently, it is constitutionally proper to require the taxpayer to exclude all three assessment hypotheses to overcome an assessment. Id. Any statute which runs afoul of this salutary principle destroys the identity between just value and fair market value. It does this by allowing just value to mean fair market value for some properties and fair market value minus-"x" for specially favored properties.

Valencia I. Such discrimination violates fundamental precepts of equal protection of law.

Valencia and its Amicus -- like Humpty-Dumpty in Alice in Wonderland[2/] -- believe that just value can mean anything that they and the legislature want it to mean. Not so. It is axiomatic that a state statute cannot constitutionally alter a prior court decision interpreting the state constitution. Sarmiento v. State, 371 So.2d 1047, 1051 (Fla. 3d DCA 1979), approved, 397 So.2d 643 (Fla. 1981). Were it otherwise, the legislature could de facto amend the constitution by simply redefining its terms to suit their fancy. But amending the constitution is a prerogative of the electorate, not the legislature. Art. XI, Fla. Const. (1968).

2. Section 193.023(6), Fla. Stat. (Supp. 1986), is an arbitrary classification scheme.

The Amicus fails in its attempt to distinguish Interlachen Lakes Estates v. Snyder, 304 So.2d 433 (Fla. 1974). As discussed in section 1 above, that case held unconstitutional a law which gave an ad valorem tax break to landowners holding 60% unplatted property. The Amicus admits that Interlachen held that the Constitution precludes any classification of property for tax purposes not authorized by art. VII, §4, but argues that Interlachen does not have the "scope" which

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2/ "When I use a word," Humpty-Dumpty said, "it means just what I choose it to mean -- neither more nor less." L. Carroll, Through the Looking-Glass and What Alice Found There, chapter 6 (Oxford University Press 1982).

Appellees have asserted. Amicus makes the tortuous argument that in Interlachen, "[T]he statute under review could not be considered a proper, in other words, reasonable, valuation criterion." (Amicus Br. 9). From this, Amicus argues, "Had Interlachen been addressing a statute which reasonably related to valuation then the result could be quite different." Id. Amicus has misread this Court's pronouncement. This Court held: "We find it impossible to consider Fla. Stat. §195.062(1), F.S.A. as establishing a proper valuation criterion. The statute does no more than establish a classification of property to be valued on a different standard than all other property." 304 So.2d at 435 (emphasis added).

Whether a tax statute is constitutional depends on whether the statute's provisions establish constitutionally permissible valuation criteria, not merely whether, as Amicus contends, the statute "reasonably relates to valuation". Both in the instant case and in Interlachen the offending provisions are very much related to valuation, but impermissibly result in reducing assessments below fair market value. Employing the "proper [i.e., constitutionally permissible] valuation criteria" standard announced in Interlachen, it is readily apparent that the instant statutory provision is invalid under both the just valuation and equal protection clauses of the Florida Constitution.

In Interlachen, this Court applied the rule of construction "expressio unius est exclusio alterius" to the new just valuation section, art. VII, §4. Unlike the old just

valuation clause of the 1885 Constitution, the new just valuation section specifically authorizes different assessment standards for agricultural land, land used exclusively for noncommercial recreational purposes, inventory and livestock. Thus, this Court ruled that "by clear implication no separate standards for valuation may be established for any other classes of property." This ruling marked an historic departure from the policy of judicial deference to legislative tampering with assessment standards expressed in Lanier v. Overstreet, 175 So.2d 521 (Fla. 1965).[3/]

In Lanier the Supreme Court upheld the constitutionality of the "greenbelt statute," which sanctioned assessment of agricultural land on the basis of agricultural value instead of fair market value. The Court ruled that the legislature could establish different assessment standards for different classes of property as long as the classification was reasonable. In Interlachen, the Court referred to "the fundamental unfairness of statutorily manipulating assessment standards and criteria to favor certain taxpayers over others." 304 So.2d at 435.

By citing Lanier in support of its request for judicial deference to the legislature, Valencia demonstrates that it is caught in a time warp. It asks this Court to wholly ignore the raft of decisions applying the 1968 Constitution's just value clause as a clear limitation on the legislature's power to

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3/ See footnote 1 at page 4, supra.

specially classify property for tax assessment purposes. Similarly, Valencia's Amicus cites a number of cases for the great deference to be given the legislature in matters of tax classification. These decisions are inapposite to the case at bar because they do not involve the just value clause limitations on legislative power to classify property for assessment below fair market value.[4/]

Amicus, as does Valencia, urges that the legislature has authority to enact provisions to separately classify property for ad valorem taxation, relying on Culbertson v. Seacoast Towers East, Inc., 212 So.2d 646 (Fla. 1968), and Markham v. Yankee Clipper Hotel, Inc., 427 So.2d 383 (Fla. 4th DCA), pet. for rev. denied, 434 So.2d 888 (Fla. 1983).

The error in this argument has been addressed in Appellees' Answer Brief at 15-16. In summary, Seacoast Towers was based on a January 1, 1967 assessment and therefore involved application of art. IX, §1, Fla. Const. of 1885. The broad legislative discretion applicable to the 1967 assessment there at issue was eliminated by the 1968 constitutional revision.

The Yankee Clipper case, a post-1968 decision, dealt with valuation of a building which was not substantially complete.

4/ See Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) (Amicus Br. 21); Day v. High Point Condominium Resorts, Ltd., 521 So.2d 1064 (Fla. 1985) (Amicus Br. 11); Eastern Air Lines, Inc. v. Department of Revenue, 455 So.2d 311 (Fla. 1984) (Amicus Br. 11); Culbertson v. Seacoast Towers East, Inc., 212 So.2d 646 (Fla. 1968) (Amicus Br. 10, 11, 14, 21). Compare ITT Development Corp.; Interlachen Lakes; Franks v. Davis, 145 So.2d 228 (Fla. 1962).

The Fourth District determined that the sale of an incomplete building constituted a forced sale and therefore did not fit within the definition of fair market value. Leaseholds and leased fees may be separately bought and sold in arm's-length transactions (R. Vol. IV, 97), and therefore do not fit the forced sale paradigm dispositive in Yankee Clipper. Accordingly, such property is valued outside the just value clause and is not eligible for assessment until completed. Yankee Clipper does not provide, as Amicus implies, authority for the legislature to classify property in violation of the Constitution.

Amicus, in contending that §193.023(6), Fla. Stat. (Supp. 1986), is constitutional argues that just valuation must include all interests in property except when the legislature authorizes the assessment of separate interests. From this, Amicus contends that the legislature may exempt certain interests in property. In support of this proposition, Amicus cites Dickinson v. Davis, 224 So.2d 262 (Fla. 1969), and Homer v. Dadeland Shopping Center, Inc., 229 So.2d 834 (Fla. 1969). This Court in Dadeland expressly stated that the effect of the Third District ruling was "to authorize assessment of less than the entire interest of the real property". Id. at 837. For this reason the Court quashed the opinion of the Third District. Consequently, under Dickinson v. Davis and Dadeland, assessment of separate interests in property at less than fair market value violates the Florida Constitution.

In the case at bar, the legislature has not provided for separate assessment of separate interests as implicitly

authorized in Dadeland. Rather, the legislature has wholly excluded or exempted the leasehold interests from assessment. Accordingly, Amicus' conclusion that Dadeland stands for the proposition that property restricted by agreement from its highest and best use may be assessed at a lower rate is not supported by that decision. See also Bath Club, Inc. v. Dade County, 394 So.2d 110 (Fla. 1981) (voluntary restrictions not controlling in formulation of assessments and weight accorded voluntary restrictions insufficient to overturn assessment); Straughn v. Tuck, 354 So.2d 368, 371 (Fla. 1978) (tax assessor -- not taxpayer -- may assign to §193.011(2) and other statutory factors such weight as he deems proper).

After the 1968 amendments, the legislature's power to authorize assessment at less than fair market value is restricted to agricultural land, land used for noncommercial recreational purposes, inventory and livestock. Consequently, cases such as Dickinson v. Davis, Dadeland, and Seacoast Towers are inapposite to the extent they do not involve application of the 1968 just value clause of the Florida Constitution.

In fact, the legislature has expressly repudiated the broad authority to classify property on the basis of character or use. In his commentary to art. VII, §4, Talbot "Sandy" D'Alemberte notes:

> Subsection (a) of Section 4 contains entirely new language. The Revision Commission version would have allowed property to be classified on the basis of character or use by general law, with the rate still having to be uniform within each class.

Thus, the legislative discretion to classify property for ad valorem tax purposes was proposed to and rejected by the Florida legislature itself.

3. Valencia II demonstrates the proper application of just value clause limitations to the Valencia Center Relief Act.

The statute declared unconstitutional by the district court, §193.023(6), Fla. Stat. (Supp. 1986), provides:

> 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.

Because it is curiously tailored to fit Valencia's property, the statute has been aptly nicknamed the "Valencia Center Relief Act." Consequently, the most fundamental policy consideration in testing the constitutionality of the statute is not, as Amicus would have it (Amicus Br. 21), whether the federal constitution is "intended to embody a particular economic theory," Lochner v. People of State of New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting), but more basic still, whether we have "a government of laws, and not of men." Marbury v. Madison, 1 Cranch 137 (1803).

If we have a government of laws which requires uniformity and consistency in Florida taxation and in which the legislature's power is limited by the state constitution, then the Valencia Center Relief Act cannot pass constitutional muster. If we have a government of men, then other men and their corporations can sponsor tax relief acts in the Florida legislature, permitting numerous definitions of "just value," depending on "just" what the sponsoring taxpayer's needs are.

In Walter v. Schuler, 176 So.2d 81 (Fla. 1965), this Court ruled that just valuation must mean fair market value for all taxpayers in order to avoid discrimination in favor of any taxpayer. The reason that the meaning of the just valuation assessment standard of art. VII, §4 of the 1968 Constitution was never subject to doubt or debate was that it was assumed from the outset that just value was synonymous with fair market value. Indeed, art. VII, §4 may be viewed as the constitutional adoption of Walter v. Schuler. See ITT Community Development Corp. v. Seay, 347 So.2d 1024 (Fla. 1977); District School Board of Lee County v. Askew, 278 So.2d 272, 274 (Fla. 1973).

Amicus relies on Clarke Associates v. County of Arlington, 369 S.E.2d 414 (Va. 1988), for the proposition that it is error to equate just value with market value in the presence of encumbrances. Clarke does not so hold. There, the court, while recognizing that all interests in property should be assessed at full market value, found fault with the appraiser's square-foot assessment. The Virginia court found that the

appraiser ignored the contract rent in determining the fair market rent, which, when multiplied by the total square footage of the property, yielded the assessment.

In the instant case, unlike Clarke, the record is clear that the income of the property was considered by the Property Appraiser. (R. Vol. IV, 85-86). Numerous comparable sales relied on by the Property Appraiser have been attached as an appendix (A. 3-4) to Appellees' Answer Brief. Since the Amicus has accepted the facts as stated by the Appellees, it cannot contest the ample fair market value evidence supporting the assessments.

In Pruneyard Shopping Center v. Robins, 447 U.S. 74, 82 (1980) (Amicus Br. at 21 n.10), the Court ruled that "one of the essential sticks in the bundle of rights is the right to exclude others." [Citations omitted]. Although Valencia may have bargained away this right to Publix, the lessee's right of exclusive occupancy is nonetheless taxable. See, e.g., Department of Revenue v. Morganwoods Greentree, Inc., 341 So.2d 756, 758 (Fla. 1977) ("[A]ssessed value of the land must represent all the interests in the land." [Citations omitted].).

Amicus also cites Morganwoods and contends that this decision requires encumbrances to be taken into account. Further, that consideration of encumbrances does not unconstitutionally fragment property for taxation purposes. (Amicus Br. at 15-16). Morganwoods distinguishes between mortgages, leases and subleases on the one hand and an encumbrance or easement on the other. Morganwoods holds that the landowner

will be taxed as though he possessed the property in fee simple "despite the mortgage, lease, or sublease of the property." 341 So.2d at 758. This Court there ruled, "The general property tax ignores fragmenting of ownership and seeks payment from only one 'owner'". Id. Accord Oyster Point Condominium Ass'n, Inc. v. Nolte, 524 So.2d 415, 416 (Fla. 1988); Day v. High Point Condominium Resorts, Ltd., 521 So.2d 1064, 1065 (Fla. 1988). In any event, the Property Appraiser did consider the lease restricting the property and found it an underutilization. Accord Valencia I, 432 So.2d at 110.

In Morganwoods, which involved the separate assessment of common areas of a condominium, this Court was concerned that the sum of the parts was greater than the whole. In the instant case, the Property Appraiser relied on twenty-one sales of highly comparable Coral Gables properties to ensure that the whole was assessed at and not in excess of fair market value. In stark contrast, the Amicus seeks to carve out from the whole the leasehold interest and exempt it from ad valorem assessment. Exempting leaseholds without constitutional authorization, however, is prohibited. Archer v. Marshall, 355 So.2d 781 (Fla. 1978). Moreover, where, as here, no portion of the subject property is used for exempt purposes, no interest in the property can be exempted from taxation. Markham v. Evangelical Covenant Church of America, 502 So.2d 1239, 1240 (Fla. 1987); art. VII, §3(a), Fla. Const. (1968).

Opinions from other jurisdictions cited by Amicus support the taxing authorities, not Valencia. In Darcel, Inc. v. City

of Manitowoc Board of Review, 137 Wis. 2d 623, 405 N.W. 2d 344 (1987), the Wisconsin Supreme Court concluded that

> an arms-length sale price is the best indicator to determine fair market value for property tax purposes and an approach that considers factors extrinsic to the arms-length sale is not statutorily correct and therefore in error as a matter of law.

405 N.W. 2d at 344-45.

The above-quoted ruling in Darcel parallels this Court's preference for the comparable sales approach (used by the Property Appraiser herein) over the income approach (used by Valencia herein):

> When sales of comparable properties are used to determine fair market value, as was done here, the Property Appraiser performs a standard appraisal. In so doing, he considers all and uses some of the factors set forth in section 193.011.

Oyster Pointe Resort Condominium Ass'n v. Nolte, 524 So.2d 415, 418 (Fla. 1988) (citing Valencia I).

The Darcel court upheld a tax reduction because the tax assessor used the income approach, imputing market rent without an adequate study of other leased properties and ignoring the comparable sales approach. 405 N.W. 2d at 347-49. Herein, it is Valencia's -- not the Property Appraiser's -- approach which suffers from the Darcel defect. Valencia's appraiser used actual rather than market rent in arriving at an absurdly low valuation. In so doing, he considered not a single comparable sale. More shocking still, by testifying to lack of demand for developable office highrise sites, he contradicted his own published reports which described in glowing terms the "boom"

in office rentals in Coral Gables. (Defendants' Ex.E, excerpts at A. 1-2 of Appellees' Answer Brief). Consequently, no competent evidence supports Valencia's and its Amicus' claim that Valencia Center was unconstitutionally assessed.

CONCLUSION

Based on the foregoing argument and authorities, the Valencia Center Relief Act violates the just value clause and the equal protection clause and creates an unreasonable tax classification. The district court's decision should be affirmed.

Respectfully submitted,

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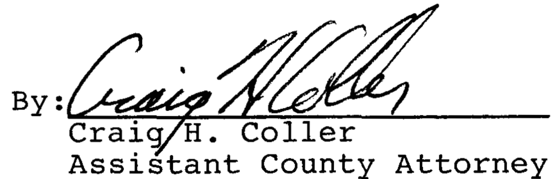
By: 
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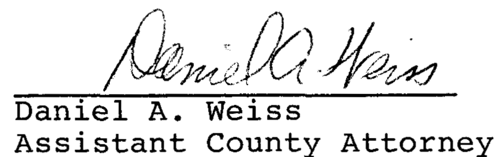
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 5 day of August, 1988, to: JOHN G. FLETCHER, ESQ., Suite 115, 7600 Red Road, South Miami, FL 33143; and to CHARLES AUSLANDER, ESQ. and ARTHUR J. ENGLAND, ESQ., Fine Jacobson Schwartz Nash Block & England, P.A., One CenTrust Financial Center, Miami, FL.

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