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IN THE SUPREME COURT

STATE OF FLORIDA

CASE NO. 72,548

VALENCIA CENTER, INC.,

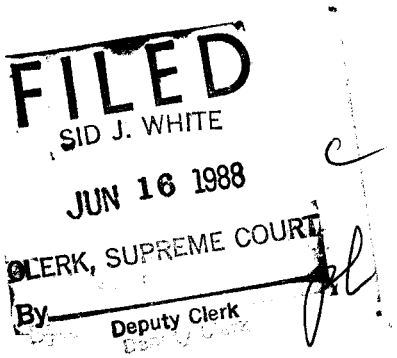
Appellant,

vs.

FRANKLIN BYSTROM, et al.,

Appellees.

_____/



APPELLANT'S INITIAL BRIEF

Appeal From a Decision
of the District Court of
Appeal, Third District
Declaring Invalid a State Statute

John G. Fletcher
Attorney for Appellant
Suite 115
7600 Red Road
South Miami,
Florida 33143

(305) 665-7521

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STATEMENT OF THE CASE AND OF THE FACTS

Valencia Center Inc. ("Valencia") is the owner of a parcel of real property in the City of Coral Gables. In accordance with Coral Gables zoning the property is a shopping plaza containing a Publix Super Market and a number of other stores, with outdoor parking provided. Although the zoning code also permits highrise offices (up to thirteen stories) the plaza is obviously not designed therefor.

Valencia's shopping plaza has been and remains subject to a long term, arm's-length, binding lease agreement with Publix entered into prior to 1965 which lease substantially restricts the rental income. The lease was not designed to avoid taxation, having been entered into prior to the enactment (not at Valencia's request) of the ordinance permitting highrise development on the subject property and on all property similarly zoned. The Courts have previously determined, in litigation between Valencia and Publix, that the lease agreement restricts the use of the property to a shopping plaza. (R.Vol.III, p. 10-16.)

The property has a legal history. Valencia Center had (as to 1980 taxes) challenged the 1980 tax assessment on the subject property, contending that the lease agreement precluded the development of the property for a highrise office building, thus the property was required to be assessed

as a shopping plaza in accordance with Section 193.011(2), F.S. This statutory subsection requires assessments to be predicated upon:

> ". . . The highest and best use to which the property can be expected to be put in the immediate future and the present use of the property. . ."

However, the Third District Court of Appeal, in Bystrom v. Valencia Center, Inc., 432 So.2d 108 (Fla., 3rd DCA, 1983), petition for review denied, 444 So.2d 418, determined that the shopping plaza was required to be assessed for the tax year 1980 predicated on sales of "comparable" property sold for highrise office development and that the lease agreement between Valencia and Publix Super Market Co., Inc., which was highly beneficial to Publix, had to be ignored. The Court construed the language of Section 193.011(2), F.S., (requiring assessments to be based on actual use or immediate future use) in such a fashion as to permit the Property Appraiser to consider remote future uses, concluding that the subsection would otherwise be unconstitutional. This instant appeal (a consolidation) relates to the same property, but for the tax years 1981, 1982, 1984 and 1985.

After the Third District Court's decision as to the 1980 assessment the Florida Legislature addressed the matter, enacting Section 193.023(6), F.S., (through Chapter 86-300, Section 14, Laws of Florida), which subsection reads (A.3):

> "(6) 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."

Section 193.023(6), F.S., is applicable to the subject property and requires the tax assessments to be made based on the shopping plaza use.

At the non-jury trial herein, for the tax years 1981, 1982, 1984 and 1985, the evidence revealed that the assessments were based not on the shopping plaza use but rather on sales of property, in fact assemblages of property, to be developed as highrise offices. (R.Vol.III, p. 63-67.) The property appraiser had done no study to determine whether there was a market demand for the conversion of the subject property to a highrise use (R.Vol.III, p. 65), notwithstanding that the property appraiser admitted that there must be a demand for a projected future use prior to an assessment being predicated on such future use (R.Vol.IV, p. 70). In fact the property appraiser admitted that his assessment was based solely on "whatever the zoning allows to be built there" (R. Vol.III, p.64).

Valencia's expert appraisal witness, Michael Y. Cannon, testified that there is (and was) no demand for the subject property to be developed for highrise offices. (R.Vol.III, p. 29-31). The highest and best use for the subject years, Mr. Cannon testified, was a shopping center (R.Vol.III, p.31).

The Circuit Court entered four Final Judgments determining Section 193.023(6), F.S., to be unconstitutional as an unreasonable classification and as providing other than "just valuation". The Court also determined that the reliance on sales of highrise office zoned property is a sufficient basis for assessing property on a future use rather than its existing use. (R.Vol.I, p. 124-126; Vol.II, p. 243-245; Vol.II, p. 318-320; Vol.II, p. 378-380).

The following table reflects the tax year, the Property Appraiser's assessment valuation, and Valencia's valuations as testified by its expert appraisal witness:

Tax Year	Property Appraiser's Valuation	Valencia's Valuation
1981	$4,581,730	$2,179,090
1982	4,581,730	2,304,060
1984	9,153,470	2,440,210
1985	9,153,470	2,507,170

Valencia appealed the four judgments to the Third District Court of Appeal. After consolidation of the cases (into case no. 87-2407) that Court declared Section 193.023(6), F.S., to be unconstitutional. Valencia Center, Inc. v.

Bystrom, 13 FLW 1118 (Fla., 3rd DCA, 1988). A copy of the slipsheet decision may be found in the appendix at A.1-2. In addition the District Court also determined that Section 193.011(2), F.S., would be unconstitutional if interpreted as to require assessment to be based on the shopping plaza use.

This appeal ensued.

SUMMARY OF ARGUMENT

The Circuit Court erred in holding unconstitutional Section 193.023(6), F.S. The subject statute reads (A.3):

> "(6) 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."

This section merely implements Section 193.011(2), F.S., which requires that property tax assessments be based on either the present use of the property or the use to which it is expected to be put in the immediate future. As such, Section 193.023 (6), F.S., is a regulation which assists in securing just valuation and is in accord with Article 7, Section 4, Florida Constitution.

Assuming, arguendo, that Section 193.023(6), F.S., is ineffective, Section 193.011(2), F.S., governs, requiring clearly and unambiguously that property be assessed based on its present use or the use to which the property is expected to put in the immediate future. In the instant

case, the tax assessment was based on a highrise office use notwithstanding that the property is designed for and used presently as a shopping plaza and there is no evidence of an expected conversion in the immediate future to any other use. The tax assessment thus violates Section 193.011(2), F.S., and is invalid.

ARGUMENT

Section 193.023(6), F.S., is constitutional.

This entire matter, including the Third District Court's decision in Bystrom v. Valencia Center, Inc., supra, as to the 1980 taxes, the enactment of Section 193.023(6), F.S., (A.3) and this appeal, is a battle of wills between the Florida Legislature and the Third District Court of Appeal. As the District Court acknowledged in its opinion Section 193.023(6), F.S., was enacted in 1986 to overrule the Valencia Center decision as to the 1980 taxes (A.2).

Obviously the legislature disagreed with the result reached by the District Court in the 1980 tax assessment matter and again made it clear that its intention is to limit assessment valuations to the actual present or immediate future use. The question then is clear: does the legislature have the power to disagree with the judicial construction of statutory language and correct what it perceives as an unjust result? The answer, as will be seen, is in the affirmative.

Article 7, Section 4, Florida Constitution, places the duty on the Florida Legislature (not the judiciary) to prescribe the standards to be followed by the property appraisers in valuing property for ad valorem tax purposes:

> "By general law regulations shall be prescribed which shall secure a just valuation of all property

for ad valorem taxation. . ."

Pursuant to these constitutional provisions the Florida Legislature has enacted a number of statutory provisions, including Section 193.011, F.S., setting forth factors that must be taken into consideration in reaching just valuation. In relation to these factors (now 8, then 7, in a renumbered statute) this Honorable Court stated, Walter v. Schuler, 176 So.2d 81 (Fla., 1965), at page 86:

> "If assessors will apply that test [that of willing buyer/willing seller] and in doing so observe the seven guideposts in Section 193.021, justness should be secured to the taxpayer. . ." (Emphasis supplied.)

This Court thus concluded that the statutory criteria had to be observed, not only as a simple matter of correct administrative law, but as the method of securing just valuation.

Included within the statutory criteria of Section 193.011, F.S., is the highest and best use section (subsection 2) which requires that the property be assessed utilizing either the present use of the property or:

> ". . . The highest and best use to which the property can be expected to be put in the immediate future. . ." (Emphasis supplied.)

The statutory words are clear and their ordinary meaning must be applied. Rinker Materials Corporation v. City of North Miami, 286 So.2d 552 (Fla., 1973). Indeed as it is a taxing statute it must be construed in favor of

the taxpayer and strictly against the taxing entity. Mikos v. Ringling Bros-Barnum & Bailey Combined Shows, Inc., 475 So.2d 292 (Fla., 2nd DCA, 1985), opinion approved, 497 So.2d 630 (Fla., 1986); Florida S & L Services v. Department of Revenue, 443 So.2d 120 (Fla., 1st DCA, 1983).

Notwithstanding the clear statutory language, the Third District Court as to the 1980 assessment, Bystrom v. Valencia Center, Inc., had determined that "just valuation" required assessment based on the most intense use permitted by the applicable zoning (highrise office). The District Court had thus defined "just valuation" as its version of "fair market value" with or without the statutory criteria. Fair market value, however, is a matter of great disagreement, spawning lengthy books, appraisal manuals, split case decisions, and now specifically corrective legislation of Section 193.023(6), F.S. Examples of the Court opinions troubled by determining "fair market value" include Department of Revenue v. Greentree, 341 So.2d 756 (Fla., 1977) (encumbrances must be considered) as opposed to Bystrom v. Valencia Center, Inc., supra (encumbrances must not be considered); Atlantic International Inv. Corp. v. Turner, 381 So.2d 719 (Fla., 1st DCA, 1980), cert. denied, 388 So.2d 1119 (any development delay caused by governmental action must be considered), as opposed to Florida Rock Industries, Inc. v. Bystrom, 485 So.2d 442 (Fla., 3rd DCA, 1986), petition for review denied, 492 So.2d 1332 (delay in development caused by

Corps of Engineers permit denial is not to be considered); Spanish River Resort Condominium v. Walker, 497 So.2d 1299 (Fla., 4th DCA, 1986) (discounted sellout method too speculative to be used) as opposed to Savers Federal S & L v. Sandcastle Beach Joint Venture, 498 So.2d 519 (Fla., 1st DCA, 1986) (use of discounting bulk sale of condominium units is to be used).

Simply put the Courts have been struggling to decide, on an ad hoc basis, what fair market value is to be. But what has been forgotten is that the state constitution does not use the words "fair market value", but "just valuation", and that this Court mandated in Walter v. Schuler, supra, p. 86, not only that "fair market value" standards be used but that the appraiser in using that tool must:

> ". . . observe the seven [now 8] guideposts in . . ."

the statutory regulations. These regulations are not enacted by appraisers, not by tax assessors, not by the Appraisal Institute, not by the Courts, but by the Florida Legislature as constitutionally mandated.

After Bystrom v. Valencia Center, Inc., supra, the legislature reasserted its intention of Section 193.011(2), F.S., which ties an assessment to the existing use or use for which the property is expected to be put in the immediate future. It did it emphatically by enacting Section 193.023(6), reciting the basic facts of Valencia, and thus mandating assessment as a shopping plaza.

The legislature by Section 193.023(6) clearly and unequivocally expressed its intent and prescribed that the Property Appraiser return to the written language of Section 193.011(2) as intended by the legislature. The legislature made it clear that the Third District Court had misconstrued Section 193.011(2). The true impact, then, of Section 193.023(6), F.S., is to light a candle to guide the Courts back into the legislative goal of "just valuation" based on the highest and best use, either actual or immediately expected. Such legislative guidance is well recognized by this Court, as in VanBibber v. Hartford Acc. & Indemn. Ins. Co., 439 So.2d 880 (Fla., 1983), at page 883:

> "While this Court may determine public policy in the absence of a legislative pronouncement, such a policy decision must yield to a valid, contrary legislative pronouncement."

The Second District Court of Appeal succinctly stated in American Liberty Ins. Co. v. West and Conyers, 491 So.2d 573 (Fla., 2nd DCA, 1986), at page 575:

> "The legislature has the last word on public policy."

This Court has previously recognized that the legislative interpretations of just valuation may permissibly vary from the Property Appraiser's interpretation of "fair market value". Thus in Culbertson v. Seacoast Towers East, Inc., 212 So.2d 646 (Fla., 1968), attacks were made on the "substantial completion" statute, then Section 193.11(4), F.S.,

now Section 192.042(1), F.S., another "just valuation" policy enactment which precludes the taxation of buildings under construction until they are substantially completed. There Dade County's agents had contended that such a treatment required assessment at other than fair market value. This Court (in a unanimous decision) upheld the statutory section, stating, at page 647 of Culbertson:

> "The statute constitutes only a temporary postponement of valuation and assessment of incomplete improvements on real property provided the prescribed conditions are met on the annual assessment date. The requirement is simply that the separate classification of such property shall bear some reasonable relationship to the legislative power to prescribe regulations to secure a just evaluation of property. Factors analogous to those here involved have in numerous instances been made the basis for special statutory treatment."

The foregoing language might have been tailored for the instant case. Sections 193.011(2), F.S., and 193.023(6), F.S., constitute only a temporary postponement of valuation and assessment of property based on a remote future use until that future use is imminent or occurs. That is a reasonable and just procedure. It is not an unreasonable classification.

This Court has not been alone in its temporary postponement of valuation conclusion. The Fourth District Court of Appeal in Markham v. Yankee Clipper Hotel, Inc., 427 So.2d 383 (Fla., 4th DCA, 1983), petition for review

denied, 434 So.2d 888, specifically construed Article VII, Section 4, Fla. Const. (1968) and reviewed this Court's decision in Culbertson v. Seacoast Towers East, Inc. The Fourth District Court concluded that Culbertson is still applicable and, in doing so, expressed the law relating to legislative tax classifications which postpone valuation:

> "The legislature's determination that an incomplete structure, unusable for the purposes intended upon its completion, should not be assessed in that condition is a matter of perception. To this Court it appears as a choice based on reason, although in the eyes of the property appraiser the property is escaping ad valorem taxation."

This Court has emphasized the legislature's discretion, phrasing the conclusion identically in Eastern Air Lines, Inc. v. Department of Revenue, 455 So.2d 311 (Fla., 1984), page 314, and Day v. High Point Condominium Resorts, Ltd., 521 So.2d 1064 (Fla., 1988), at page 1066:

> "In the field of taxation particularly, the legislature possesses great freedom in classification. The burden is on the one attacking the legislative enactment to negate every conceivable basis which might support it. The state must, of course, proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. A statute that discriminates in favor of a certain class is not arbitrary if the discrimination is founded upon a reasonable distinction or difference in state policy."

It should be obvious that there is a rational basis for the state to require assessment predicated upon a limi-

tation to the present, or immediate future, use. As the assessor visits yearly he will with certainty assess the property on the basis of the future use when it occurs, as in Culbertson v. Seacoast Towers East, Inc., and Markham v. Yankee Clipper Hotel, Inc., supra. Thus the owner of a business or other property, who has spent his life creating a viable use, will not be forced to put his property on the auction block to pay his or her taxes based on some as yet undeveloped use.

Such is not a capricious goal on the part of the legislature. Indeed the Canadian Supreme Court has found such a limitation (to present or immediate future use) to be a proper legislative action. Grierson v. The City of Edmonton, 58 Can. S. Ct. 13 (1917). That Court stated through its Chief Justice (page 14):

> ". . . It is important to bear in mind that the statute provides that, in estimating its value, regard may be had to the situation of the land, the purposes for which it is used or could or would be used if sold in the next succeeding twelve months. So that it is not the absolute value of the land that is to be ascertained, and the assessment being only for the current year, the limitation of the statute is a very proper one." (Emphasis supplied.)

As the Canadian Supreme Court has found it reasonable and "very proper" for assessments to be limited to immediately expected future uses, it would seem that, at the very least, such a classification is fairly debatable and thus the

Florida Legislature acted constitutionally in establishing it.

Courts of other jurisdictions dealing with legislation which so limits the taxing authorities have applied them. In Addis Co. v. Sroga, 434 N.Y.S.2d 489 (N.Y., S.Ct., App.Div., 1980), the Court was faced with a situation where both parties agreed that the property's highest and best use was reconversion from its actual, present use (an apparel retail store) to an apartment building. Notwithstanding this the Court noted the statutory requirement and stated (page 490):

> "Property is assessed for tax purposes according to its condition on the taxable status date. . . and may not be assessed on the basis of some use contemplated in the future."

Florida, of course, also has a taxable status date (January 1st) and property is to be assessed as thereof. Section 192.042(1), F.S.

Further, in Allied Stores of New York, Inc. v. Finance Administration, 428 N.Y.S.2d 316 (N.Y., S.Ct., App. Div., 1980) the property's existing use was claimed to be not viable. The property was sought to be assessed as if it was subdivided into retail stores. The Court stated (p. 317):

> "This is not permissible in a proceeding to reduce an assessment for a prior period. Should the subdivision ever occur then an application for further reduction would be appropriate."

Simply put, the postman may always ring twice, but the assessor's visits never end. When the use changes so will the assessment valuation. Section 193.023(6), F.S., is constitutional.

ARGUMENT: Issue No. 2

> Section 193.011(2), F.S., must be applied as specifically intended by the Florida Legislature, thus the property must be assessed for its present and immediate future use as a shopping plaza.

Assuming that Section 193.023(6), F.S., is unconstitutional and does not legally exist, Section 193.011(2), F.S., still does exist and requires assessment valuations to be predicated upon:

> ". . . The highest and best use to which the property can be expected to be put in the immediate future and the present use of the property. . ."

In relation to the subsection (previously 193.021(2), F.S.) this Honorable Court held, Lanier v. Overstreet, 175 So.2d 521 (Fla., 1965), at page 524:

> "The latest legislative directive on this subject, Ch. 63-250, Acts of 1963, appearing as Section 193.021, Fla.Stat. 1963, F.S.A., is in accord with its previous pronouncements in this field. By authorizing tax assessors to consider, as one of the factors' [i]n arriving at a just valuation' of property, the use to which the property 'can be expected to be put in the immediate future' (emphasis added), the Legislature has, under the familiar rule of expressio unius est exclusio alterius, prohibited tax assessors from considering potential uses to which the property is 'reasonably susceptible' and to which it might possibly be put in some future tax year, or, even, during the current tax year. To be considered, the use must be expected, not merely potential or a "reasonably susceptible" type of use; it must be expected

> immediately, not at some vague uncertain time in the future."

In 1965 in Lanier this Court specifically determined that the applicable statute precludes an assessment valuation predicated upon a "potential" or "reasonably susceptible future use" and one which is not "expected immediately". Subsequently in 1983, the Third District Court (in the 1980 tax matter, Bystrom v. Valencia Center, Inc., supra) held that potential uses not expected immediately can be used by the Property Appraiser otherwise Section 193.011(2), F.S., would be unconstitutional. The Florida Legislature, in subsequently enacting Section 193.023(6), made its intentions clear, i.e., that this Court's conclusion in Lanier, supra, is the correct one. Then in 1988 in the instant matter, the Third District Court reasserted to its earlier policy conclusion, that Section 193.011(2), F.S., would be unconstitutional if it limited the Property Appraiser's consideration to present and immediate future uses.

What has occurred in the instant case is that a clear and unequivocal statutory intent has been deliberately discarded by the District Court and a different, judicial, intent grafted thereon. The District Court was acting outside its powers in so doing. As this Court held in McDonald v. Roland, 65 So.2d 12 (Fla., 1953), at page 65:

> "Where the legislature's intention is clearly discernible, the court's duty is to declare it as it finds it, and it may not modify it or shade it out of any consideration of pol-

> icy or regard for untoward consequences. If the statute involved here is to encounter constitutional objection, it must then stand or fall on its own merits. See State ex rel. Bie v. Swope, 159 Fla. 18, 30 So.2d 748; Curry v. Lehman, 55 Fla. 847, 47 So. 18."

The District Court's (and the Circuit Court's) refusal to apply Section 193.011(2), F.S., as the legislature so clearly intended was thus an ultra vires act, even though the Court concluded that the statutory section would be unconstitutional if otherwise construed. The Court's duty was to apply Section 193.011(2), F.S., and, only if its constitutionality had been challenged, to determine its validity. As the Appellees' pleadings did not challenge the constitutionality of that section the Court could not pass on the constitutionality thereof. E.g., State v. Turner, 224 So.2d 290 (Fla., 1969).

The evidence in the Circuit Court revealed that the Property Appraiser had valued the shopping plaza by using sales of property for highrise office uses, looking solely thereto. Indeed, he candidly admitted that his conclusion as to highest and best use is (R.Vol.III, p.64):

> "Whatever the zoning allows for."

The property appraiser had fallen into the simplistic trap of assuming that because a parcel of land is zoned for an intense use, that use is its highest and best one, especially for tax purposes.

The conclusion then is simple: the Circuit Court had

the duty to require an assessment valuation based on Section 193.011(2), that is on the present shopping plaza use and not on a potential highrise office use. The District Court had the duty to reverse the Circuit Court for failing to apply the clear and unambiguous statute, the constitutionality of which had not been challenged by the pleadings.

The result of the foregoing would have been clearly in accord with Security Management Corp. v. Markham, 516 So.2d 959 (Fla., 4th DCA, 1987) wherein the Fourth District Court of Appeal stated as to Section 193.011(2), F.S., (page 963):

> "The statute does not allow an appraiser to look to months or years in the future when, possibly, a set of plans may be approved and a building permit issued."

When the plans are approved and a permit issues, if ever, then a highrise office use is "expected immediately" but not before.

CONCLUSION

Section 193.023(6), F.S., was the Florida Legislature's clearly stated conclusion and intention that the Third District Court was in error in its prior Valencia Center decision as to the 1980 taxes, as recognized by the District Court in the instant decision (A.2). The statutory section does nothing more than reinforce Section 193.011(2) F.S., which requires assessment valuations to be based upon the property's present or immediately expected use, a reasonable categorization, fairly debatable in nature. Section 193.023(6), F.S., is constitutional.

The Third District Court also erred in determining that the clear and unambiguous legislative intent of Section 193.011(2), F.S., must be discarded as it would result in an unconstitutional statute. The District Court exceeded its judicial powers by substituting its policy for that of the legislature. As the constitutionality of this section was not challenged the Court was in error in not applying it as intended by the legislature.

The decision of the District Court should be reversed. Ultimately the Circuit Court must be instructed to strike the assessment valuations and substitute therefor Valencia's assessment valuation figures, as set forth in the Statement of Facts.

John G. Fletcher
Attorney for Appellant
Suite 115
7600 Red Road
South Miami,
Florida 33143

(305) 665-7521

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing and of the appendix has been mailed to Daniel A. Weiss and Craig Coller, Assistant County Attorney, Suite 2810, 111 N.W. 1 Street, Miami, Fl 33128 and to Lealand L. McCharen, Assistant Attorney General, Tax Section, The Capitol, Tallahassee, Fl 32301 this 14th day of June, 1988.

John G. Fletcher