IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,322

SECOND DISTRICT CASE NO. 88-914

RONALD J. SCHULTZ, as Property Appraiser of Pinellas County, Florida, and RANDY MILLER, as Executive Director of the Department of Revenue of the State of Florida,

Petitioners,

vs.

TM FLORIDA-OHIO REALTY LTD. PARTNERSHIP, an Ohio Limited Partnership, authorized and doing business in Florida,

Respondent.
_____/

Initial Brief of Amicus Curiae Joel W. Robbins, As Property Appraiser of Dade County

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STATEMENT OF THE CASE AND FACTS

The Dade County Property Appraiser adopts the Statement of the Case and Statement of the Facts set forth in the Initial Brief of Petitioners. All emphasis in this brief is supplied by undersigned counsel, unless otherwise indicated.

SUMMARY OF ARGUMENT

The District Court of Appeal decision violates the Florida Constitution in at least four different ways. Authoritative rulings of this Court hold that assessment of property at less than 100% of its fair market value is constitutionally "intolerable." By reducing the subject assessment below 100% of the property's fair market value, the District Court of Appeal majority decision violates the "just (fair market) value" clause, art. VII, §4, Fla. Const.

The subject assessment as reduced by the District Court of Appeal majority violates the equal protection clause of the Florida Constitution by establishing a preferential assessment standard applicable only to property rented at below-market rates. By creating an unauthorized class of property which benefits from more a favorable standard than all other property, the panel decision's judicial assessment manipulation also violates the art. VII, §2, Fla. Const., requirement of uniformity in taxation.

The District Court majority decision has the effect of exempting a portion of the subject property from taxation. This judicially-fashioned exemption violates the art. VII, §3 constitutional limitation on the creation of tax exemptions.

ARGUMENT

I. THE SUBJECT ASSESSMENT AS REDUCED BY THE DISTRICT COURT OF APPEAL MAJORITY VIOLATES THE JUST VALUE CLAUSE OF THE FLORIDA CONSTITUTION.

This Court has consistently and repeatedly 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); 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). In the aforementioned cases, this Court condemned acts by both the judiciary and the executive branch which had the effect of reducing property tax assessments to a level below fair market value.

Florida's firm constitutional mandate prohibits legislative as well as judicial and executive departures from the fair market value standard. 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 assessment on a basis other than market value 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, ruling that enactment of the just valuation clause, art. VII, §4, Fla. Const. (1968), eliminated the legislature's authority to create statutory exceptions to the constitutional requirement of full fair market value assessment.[1/] This Court has invalidated the Valencia Center Relief Act, Pope's Law, and the Rose Law as unauthorized legislative departures from the constitutional mandate of just valuation.

The Valencia Center Relief Act,[2/] §193.023(6), Fla. Stat. (Supp. 1986), provided for assessment based on actual use -- rather than on the generally applicable standard of highest and best use, §193.011(2) -- of specified improved property subject to a pre-1965 lease. Valencia Center, Inc. owned a valuable square-block of prime Coral Gables commercial property zoned for immediate development as 13-story highrise. A long-term lease to Publix contractually prevented such development. Valencia Center, Inc. v. Publix Super Markets,

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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.

2/ The curious tailoring of the statute to fit property owned by Valencia Center, Inc. gave rise to the statute's apt sobriquet.

464 So.2d 1267 (Fla. 3d DCA), rev. denied, 475 So.2d 696 (Fla. 1985). In Valencia Center, Inc. v. Bystrom, 543 So.2d 214 (Fla. 1989), this Court held the Valencia Center Relief Act facially violative of the art. VII, §4 "just value" clause of the Constitution and reinstated the Property Appraiser's assessments.

The Valencia Center dissent (by McDonald, J., with Overton and Kogan, JJ., concurring) would have authorized a reduced assessment only "so long as current market rents are the predicate for the capitalization and not the rents expressed in old leases." 543 So.2d at 217. Thus, in Valencia Center all seven justices of this Court would have required at a minimum that any income valuation be done on the basis of market -- rather than contract -- rent. It is this minimum standard which the Second District panel opinion has violated in reducing the assessment sub judice based on submarket rents contractually negotiated between a sophisticated lessor and lessee.

Pope's Law, §194.042(1)(b), Fla. Stat. (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.

Because the constitutional "just (fair market) value" mandate applies to assessment of all nonclassified properties, including the subject property, reduction of assessment below fair market value is as constitutionally impermissible when ordered by the executive or judicial branch as it is when enacted by the legislature. See, e.g., Bystrom v. Whitman, 488 So.2d 520, 521 (Fla. 1986); Spooner v. Askew; District School Board of Lee County v. Askew; Southern Bell Telephone & Telegraph Co. v. County of Dade; St. Joe Paper Co. v. Brown; Powell v. Kelly; Burns v. Butscher; Walter v. Schuler; Root v. Wood. Consequently, to the extent the majority opinion of the Second District panel sub judice reduces the assessment of the subject property below its fair market value, that judicial assessment reduction violates the "just value" clause, article VII, §4, Fla. Const. As will be demonstrated in the following section of this brief, the Second District majority did indeed reduce the taxpayer's assessment below fair market value.

II. THE SUBJECT ASSESSMENT AS REDUCED BY THE DISTRICT COURT OF APPEAL MAJORITY VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FLORIDA CONSTITUTION.

The taxpayer's expert sub judice testified that the Property Appraiser's assessment would not be excessive if the law required assessments to reflect the value of the unencumbered fee interest. (R.256; slip opinion, dissent at 50). The law does indeed require assessment of the unencumbered fee. By assessing something less than the unencumbered fee interest, the District Court majority applied a differential (and preferential) standard to the subject property. In so doing, it violated the equal protection clause.

The well-established common law rule in Florida requires that real property be assessed for tax purposes as though unencumbered. In Department of Revenue v. Morganwoods Greentree Inc., 341 So.2d 756 (Fla. 1977), this Court specifically held:

> We reaffirm the general rule that in the levy of property tax the assessed value of the land must represent all the interests in the land. Homer v. Dadeland Shopping Center, Inc., 229 So.2d 834 (Fla. 1970); McNayr v. Claughton, 198 So.2d 366 (Fla. 3d DCA 1967). This means that despite the mortgage, lease, or sublease of the property, the landowner will still be taxed as though he possessed the property in fee simple. The general property tax ignores fragmenting of ownership and seeks payment from only one "owner." See 1 Bonbright, Valuation of Property, 495-96 (1st ed. 1937). An encumbrance or restriction such as an easement will not per se reduce the assessment value of land simply because the owner has been divested of some proprietary interest.

341 So.2d at 758. The unencumbered fee includes the fair market value of both the lessor's and the lessee's interests in the property. Bystrom v. Valencia Center, Inc., 432 So.2d 108, 110 (Fla. 3d DCA 1983), rev. denied, 444 So.2d 418 (Fla. 1984) (hereinafter "Valencia I").

In the instant case, it is readily apparent that K-Mart as lessee has an advantage over its lessor. That advantage consists of below-market rental rates. Presumably, these rates were voluntarily agreed to at the inception of the lease term by sophisticated parties negotiating at arm's length. Mutual agreement by private parties not to escalate rental rates during the term of a lease cannot bind the property appraiser not to raise an assessment. This is true because it is the sworn constitutional responsibility of the property appraiser to reassess property annually. Art. VII, §1(d), Fla. Const.; §192.011, Fla. Stat. In so doing, the property appraiser must ascertain the fair market value as of January 1 of each year. §192.042, Fla. Stat. The advantage which K-Mart enjoys results from its negotiated rental rates. At the time of the contested assessment, these contract rents were undisputably below market rates.

The advantage which K-Mart enjoys has a distinct and measurable value. Valencia I, 432 So.2d at 111. The District Court majority reduced the assessment to a valuation representing the capitalized contract rent. Under the District Court ruling, the capitalized difference between market and contract rent escapes taxation. See Bystrom v.

Whitman, 488 So.2d at 521. This differential is the extent to which the assessment was reduced below market value.

The methodology by which the Property Appraiser equalizes assessments among comparable properties with differential rentals is the use of market rentals for all income capitalization valuations. Century Village v. Walker, 449 So.2d 378 (Fla. 4th DCA 1984). By imputing market rents to all properties assessed under the income approach, the property appraiser ensures that all property owners are assessed under the same standard and thereby treated equally. In failing to approve capitalized contemporaneous market rent as the basis for the Property Appraiser's assessment, the District Court applied a preferential assessment standard to the subject property. This preferential assessment standard consists of the capitalization of a below-market contract rent privately negotiated long ago between K-Mart and its lessor, without the Property Appraiser's advice or consent.

The fallacy in using below-market rentals instead of market rent as a basis for tax assessment has long been recognized by Florida courts:

> The error in only capitalizing the income from a lease to determine market value is apparent in the hypothetical situation where a lease is $1.00 per year for ninety-nine years. Thus, employing the income approach of evaluating real estate but using solely the capitalization of the income from that lease to determine value of the property would tend to yield an unrealistic result as to true market value for all the interests.

Overstreet v. Brickell Lum Corp., 262 So.2d 707, 709 (Fla. 3d DCA 1972). See also McNayr v. Claughton, 198 So.2d 366 (Fla. 3d DCA 1967) (involving the same property).

Assessing selected leased property subject to below-market-rent leases, and other, otherwise identical, property subject to market-rent leases, would violate the equal protection clause by arbitrarily favoring lower-rent leaseholds and affording a tax break based on the lack of foresight or poor judgment of the lessor/landowner. Such an unwarranted tax break is prohibited by law. As this Court observed in regard to the assessment of certain intangible property in Root v. Wood, 155 Fla. 613, 21 So.2d 133, 138 (1945) (en banc):

> The test of any formula is not whether it "milks" the taxpayer dry but whether or not it arrives at the "true taxable value" of the intangible. It is not to be confused with an income tax as was apparently done in this case. Skill in administration is the big factor in determining gross income from a tangible or intangible asset but it may have little relation to value in either case. Farmer Brown and Farmer Jones each own a farm, same acreage, same character of land, same distance from town and paved road, and same relation to other attributes that affect value.

This Court there ruled: "At assessing time, the Tax Assessor imposes the same value on both farms for taxable purposes." Id.

This Court went on to explain the rationale for assessing both properties the same, notwithstanding a marked difference in revenue streams. This Court said:

> Farmer Brown is of the old fashioned school who does his candle light stuff and gets with the grass and weeds and bugs as soon as he can see how, tills his soil well, husbands his live stock and makes a bumper crop. Farmer Jones is something of a modernist; candle light hurts his eyes and he cannot get up until after the sun sets the example. He is high up in the bench warmers' guild, trusts his crop to "providence" and gets off to the town park, as soon as his wife gives him breakfast, to enlighten his brotherhood as to solution of the problems of Church, State, and Nation. When harvest time comes, Farmer Brown has ten times as much crop as Farmer Jones but when taxpaying time comes, there is no theory under which ten times as much taxes can be exacted of the one as the other. So Farmer Brown has plenty of brown gravy to put on his biscuit but the Tax Assessor should not toss and tumble in his sleep because he does not find some way to scrape it off before he eats it. Even if Farmer Brown gets a "break" now and then, why worry? God knows, he is entitled to it and it is not a factor that would warrant a hike in his taxes. (Id.).

The judicial assessment reduction herein violates the equal protection clause by applying a differential assessment standard to a specific class of property, namely submarket leaseholds. Under the Second District holding sub judice owners of property leased at submarket rents get a tax break, while owners of otherwise indistinguishable property do not. The District Court ruling thus runs afoul of this Court's pronouncement that "[o]wnership in one party or another, however, would not be a valid criterion" for differential tax

assessment. Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d at 435.

The District Court ruling 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. Such discrimination violates fundamental precepts of equal protection of law.

The unauthorized and constitutionally impermissible assessment reduction herein therefore suffers from the same defect which this Court referred to in Interlachen Lakes Estates as "the fundamental unfairness of statutorily manipulating assessment standards and criteria to favor certain taxpayers over others." 304 So.2d at 435. Manipulation of assessment standards violates not only the equal protection clause, but the uniformity clause as well, as will be demonstrated in the following section of this brief.

III. THE SUBJECT ASSESSMENT AS REDUCED BY THE DISTRICT COURT OF APPEAL MAJORITY VIOLATES THE UNIFORMITY CLAUSE OF THE FLORIDA CONSTITUTION.

The Second District majority opinion has created an unauthorized class of property which benefits from more favorable assessment standards then all other property. Such judicial manipulation of assessment standards violates the art. VII, §2, Fla. Const., requirement of uniformity in taxation.

In Franks v. Davis, 145 So.2d 228, 230 (Fla. 1962), this Court condemned as a violation of the uniformity clause assessment of property at a lower or higher percentage of its value than other clauses of property. By reducing the subject assessment of the basis of submarket rents, the Second District majority sub judice has violated the firm contrary rule of Florida's constitution.

Furthermore, the Second District has used as an earmark for its special classification the supposed dichotomy between long-term and short-term leases. It did so in order to attempt to distinguish the facts at bar from those relating to the Valencia Center shopping center in Dade County. The attempted distinction between the subject property and Valencia Center, however, has no basis in fact or law. Valencia Center's lease runs from 1963 to 2001. Valencia Center v. Publix Super Markets, 464 So.2d 1267, 1269 (Fla. 3d DCA), rev. denied, 475 So.2d 696 (Fla. 1985). At the time of Valencia I (1980 assessment), the remaining lease term was 21 years. The lease sub judice has 26 years remaining from the date of assessment. Even assuming arguendo that the courts are authorized to treat two otherwise similar properties differently because one has a "long-term" and the other a "short-term" lease remaining, no such factual distinction dichotomizes the Valencia Center and K-Mart leases. Consequently, the Valencia Center lease qualifies as a long-term lease under the Second District's judicially-created long-term/short-term dichotomy. Thus, the subject property

falls within the scope of this Court's decision in Valencia Center, Inc. v. Bystrom, 543 So.2d 214 (Fla. 1989). There, even the dissent required at a minimum that income valuation be predicated on the capitalization of current market rents, rather than capitalization of submarket rents as called for by the the Second District decision herein. 543 So.2d at 217.

Even in the absence of the uniformity clause prohibition against manipulating assessment standards, e.g., Franks v. Davis, the length of a lease does not alter the value of property. The length of a lease merely alters the proportional value of the leasehold and leased fee. As the lease approaches the end of its term, the value of the leasehold decreases and the value of the leased fee increases. The total value of the property is unaffected by the number of years remaining on the lease. Since the property appraiser appraises property as though unencumbered, Morganwoods, and does not fragment the interests in property between lessor and lessee, id., there is no justification for adjusting the value of property based on the length of the lease.

The taxpayer's expert's "agree[ment] that Schultz's assessment would not be excessive if the law required assessments to reflect the value of the unencumbered fee interest," slip opinion, dissent at 50, is dispositive; the law does require such assessment. Morganwoods. Any other rule would permit the acts of private citizens to manipulate and control tax assessment functions; a private agreement to keep rents constant throughout the term of a lease could bind the

property appraiser to keep the assessment constant, despite increases in the property's market or actual cash value during the term of the lease. See §193.011(1), Fla. Stat. Under the Florida Constitution, however, tax assessment is vouchsafed not to private citizens, but to the county property appraiser. Art. VIII, §1(d), Fla. Const.

This Court has time and again pointed out the fundamental unfairness under the just value clause and the uniformity clause of statutorily manipulating assessment standards and criteria to favor certain taxpayers over others. Interlachen Lakes, 304 So.2d at 432; Walter v. Schuler; Franks v. Davis, 145 So.2d 228 (Fla. 1962); Schleman v. Connecticut General Life, 151 Fla. 96, 9 So.2d 197 (1942). Like the just value clause, the uniformity clause, art. VII, §2, Fla. Const., exists to correct inequalities and not to create them. Franks v. Davis, 145 So.2d at 230 n.7. By creating an inequality between the assessment of (a) long-term and short-term leaseholds; and (b) submarket and market rent leaseholds, the Second District majority's reduction of the assessment sub judice violates the uniformity clause of the Florida Constitution.

IV. THE SUBJECT ASSESSMENT AS REDUCED BY THE DISTRICT COURT OF APPEAL MAJORITY CREATES A CONSTITUTIONALLY IMPERMISSIBLE PROPERTY TAX EXEMPTION.

Art. VII, §3, Fla. Const., limits property tax exemptions to those enumerated in the constitution. Exempting leaseholds without constitutional authorization is therefore 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).

An unauthorized exemption is equally impermissible whether or not it is called an exemption. In Archer v. Marshall, 355 So.2d 781 (Fla. 1978), this Court invalidated a statute which required that rentals due to the Santa Rosa Island Authority on leases dated before December 1, 1975 would be reduced each year by the amount of ad valorem taxes for Escambia County and school purposes paid on the leasehold interests for the preceding year. Id. at 783. The Archer Court examined the history behind the special act, and found that the lessees on Santa Rosa Island had originally been promised that no ad valorem taxes would be levied against them, but that this exemption from taxation was repealed by the legislature in 1971. Id. at 782. The legislature then passed the act at issue in response to the "unfairness" of the lessees' situation.

The trial court in Archer rejected legislative findings of fact contained in the preamble of the Act to the effect that Escambia County had been unjustly enriched. 355 So.2d at 783-84. This Court characterized the special act as an invalid tax relief bill. Id. at 784. Archer held that regardless of the term used to describe the set-off, the

reduction in rent had the effect of a tax exemption and as such was unconstitutional, because the exemption was not within the provisions of the state constitution. Id., citing Williams v. Jones, 326 So.2d 425 (Fla. 1975); and Straughn v. Camp, 293 So.2d 689 (Fla. 1974). The Court found it "fundamentally unfair for the legislature to statutorily manipulate assessment standards and criteria to favor certain taxpayers over others." Archer, 355 So.2d at 784, citing Interlachen Lakes Estates v. Snyder, 304 So.2d 433 (Fla. 1974). The reduction in rent at issue in Archer, like the criteria set forth in the Second District decision as the basis for assessment reduction, effectuated an exemption from taxation for certain interests in leased property and as such was constitutionally impermissible.

Florida law and public policy prohibit the shifting of one taxpayer's burden to other taxpayers by unwarranted exemptions. Dade County Taxing Authorities v. Cedars of Lebanon Hospital Inc., 355 So.2d 1202, 1204-05 (Fla. 1978) ("[T]his is a democracy in which every parcel of property is expected to bear its due portion of the burden of government, "unless exempted by the legislature in the manner provided by . . . the Constitution." Accord, in a recent decision by this Court involving taxation of leaseholds, Redford v. Department of Revenue, 478 So.2d 808, 812 (Fla. 1985) ("[O]ne person's tax exemption will become another person's tax.") (Overton, J., specially concurring) (emphasis original).

The difference between capitalized market rent and capitalized contract rent represents a property interest which has a distinct and measurable value. See Valencia I, 432 So.2d at 111. This is the stick in the bundle of property rights which is impermissibly exempted from taxation by the District Court majority decision.

CONCLUSION

Based on the foregoing argument and authorities, the majority decision of the Second District panel should be reversed with instructions to remand the cause to the trial court for reinstatement of the Property Appraiser's preliminary assessment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was this 30th day of March, 1990, mailed to: ROBERT E.V. KELLY, JR., ESQ., Rydberg, Goldstein & Bolves, P.A., Attorneys for Petitioners, 220 East Madison Street, Suite 724, Tampa, FL 33602; SUSAN H. CHURUTI, ESQ., Pinellas County Attorney, 315 Court Street, Clearwater, Florida; KENT G. WHITTEMORE, ESQ., Whittemore & Ramsberger, P.A., Attorneys for Respondent, One Beach Drive S.E., Suite 205, St. Petersburg, Florida 33731; JOSEPH C. MELLICHAMP, III, ESQ., Assistant Attorney General, Department of Legal Affairs, Tax Section, Capitol Building, Tallahassee, Florida 32399-1050; GAYLORD A. WOOD, JR., ESQ., 304 Southwest 12th Street, Fort Lauderdale, Florida 3315-1521, and WILLA FEARRINGTON, ESQ., 105 South Narcissus Avenue, Suite 710, West Palm Beach, Florida 33401-5529, Counsel for Amicus Curiae Rebecca E. Walker, Palm Beach County Property Appraiser; and JOHN G. FLETCHER, ESQ., Counsel for Amicus Curiae Valencia Center, Inc., Suite 304, 7600 Red Road, South Miami, Florida 33143.

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