017

IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 75,322

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.

AMICUS BRIEF OF THE INTERNATIONAL COUNCIL OF SHOPPING CENTERS

In Support of the Position Of TM Florida-Ohio Realty Ltd. Partnership

ON REVIEW OF A CERTIFIED QUESTION FROM THE SECOND DISTRICT COURT OF APPEAL

Arthur J. England, Jr., Esq.
Eileen Ball Mehta, Esq.
Fine Jacobson Schwartz Nash Block & England
One CenTrust Financial Center
100 S.E. Second Street
Miami, Florida 33131
(305) 577-4000
Attorneys for International Council of Shopping Centers

Table of Contents

Table of Authorities

Cases — Page

Other Authorities

INTEREST OF THE AMICUS

The International Council of Shopping Centers is an international trade organization 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 28,000 members worldwide and over 1,600 in the State of Florida.

The Council's membership will be significantly affected by the Court's resolution of the question certified. The proper method of assessing for ad valorem purposes income-producing properties which are encumbered by long-term leases directly affects the members of the Council in the conduct of their businesses.

The Council has a substantial interest in the issue in this case, and the Council lends its voice to the Court as amicus curiae in support of the use of actual income from the property as the standard for the income method of assessing income-producing property.

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 role of amicus curiae to resolve conflicts between the parties as to factual matters. Rather, the Council's brief will address the

legal issues regarding the proper method of assessing for ad valorem purposes income-producing property which is encumbered by a long-term lease.

SUMMARY OF THE ARGUMENT

The Florida Constitution mandates that the laws which prescribe assessment methods for ad valorem purposes must ensure that the valuation of property is just. In Section 193.011, the legislature has identified the factors which a property appraiser must consider to determine just valuation. Meaningful consideration of the statutory guideposts by the property appraiser secures a just valuation and protects the taxpayer from the exercise of unbridled and unreviewable discretion.

Section 193.011 directs the property appraiser to consider the "income from said property" in arriving at just valuation. The just valuation of an income-producing property such as a shopping center requires meaningful consideration and application of the actual income from said property. The statute does not permit the property appraiser to discard the actual income from the property and to substitute a hypothetical income in its place.

The Court should reject the notion that just valuation of a shopping center can be ensured on the basis of hypothetical, market income. The synergistic nature of the shopping center

industry makes the concept of market income so imprecise that a valuation based on hypothetical, market income should not enjoy a presumption of correctness.

In the absence of other statutory factors which would warrant an appropriate adjustment, the just valuation of an income-producing property should be based upon the actual income attributable to that property.

ARGUMENT

THE PROPER METHOD OF ASSESSING FOR AD VALOREM PURPOSES INCOME-PRODUCING PROPERTY WHICH IS ENCUMBERED BY A LONG-TERM LEASE IS ONE WHICH INCLUDES MEANINGFUL CONSIDERATION OF ACTUAL INCOME AS SET FORTH IN SECTION 193.011, FLORIDA STATUTES

This appeal involves the meaning of one word -- "consideration" -- and one phrase -- "income from said property" -- as those terms are used in section 193.011, Florida Statutes. Section 193.011 requires a property appraiser to take into consideration certain enumerated factors in arriving at just valuation of property for ad valorem purposes. The Second District Court of Appeal has held that the Property Appraiser of Pinellas County failed to accord meaningful or lawful consideration to the income factor specified in subsection 193.011(7)--the income from

the property[1]--and that his failure resulted in an assessment which not only exceeded just valuation, but which was not within the range of reasonable appraisals.

The Property Appraiser contends that where actual income is less than hypothetical market income for similar properties, the income factor may be disregarded. The Council submits that the Property Appraiser's interpretation alters the meaning of the legislation by superimposing words or concepts not found within the statute. The Council further contends that, under the theory espoused, a property appraiser is left with unbridled discretion in the assessment process and that, in practical terms, it would be impossible for a reviewing court to determine whether the property appraiser has applied the statutory criteria in good faith. The Council respectfully suggests that a more tenable view, consistent with the plain language of the statute, would declare that "consideration" means relevant

---

1/ The statute provides in relevant part:

> In arriving at just valuation as required under s. 4, Art. VII of the State Constitution, the property appraiser shall take into consideration the following factors:
>
> * * *
>
> (7) The income from said property. . . .

(Emphasis added.)

application (as opposed to passing disregard) and that "income from said property" means exactly what it says.

A. An Assessment Must Secure A Just Valuation.

As a general rule, acts of public officials are presumptively valid. When the public official is a property appraiser, the general rule is applied with even heightened deference. In Schleman v. Connecticut General Life Ins. Co., 151 Fla. 96, 104, 9 So.2d 197, 200 (1942), the Court stated:

> We are fully aware of the difficulty of fixing with certainty the full cash value of property and the great variance in values set by persons of like experience and judgment, all making estimates conscientiously. Because of this inexactitude considerable leeway should be granted the official whose duty it is to make assessments and because of his position his valuations should not be easily disturbed . . . .

The property appraiser's discretion, however, is not unrestrained. His discretion must be exercised within the bounds of the constitutional mandate that the assessment secure a just valuation. Article VII, Section 4, Florida Constitution (1968). In order to establish just valuation, the legislature has declared in section 193.011 that the property appraiser must consider certain enumerated factors. Florida courts have required adherence to these statutory guideposts in the face of claims by property appraisers for excessive discretion. The classic

formulation of the balance that is required comes from Walter v. Schuler, 176 So.2d 81, 85 (Fla. 1965), where the Court declared that the statute

> . . . was not intended to give assessors an almost unbridled discretion in the performance of their duty to establish just valuation. Rather, we regard the Act as an attempt by the legislature to pin the assessors more firmly to the Constitutional mandate.

The Court's approach to reviewing the fairness of property appraisals and, therefore, the just valuation of property, has been to review the appraiser's action for conformity to the statutory guidelines, and then to verify that his discretion has been exercised in good faith. Reflecting upon its concern for even-handed application of the laws and criteria, the Court in Department of Revenue v. Morganwoods Greentree, Inc., 341 So.2d 756, 758-59 (Fla. 1976) stated:

> . . . the construction and implementing statutes must be interpreted so as to achieve an assessment at just full value; no construction or tax assessment may be allowed that would allow either the property owner an unjustified tax break or the government to collect more taxes that [sic] it is entitled.
>
> . . . The ultimate test is that the total valuation of the entire project must be just valuation, no more, no less.

The burden on a taxpayer who challenges a property appraiser's assessment is extraordinary. To overcome the presumption of validity which attaches to the assessment, the

taxpayer must show that the assessment is not supported by any reasonable hypothesis of legality. Blake v. Xerox Corporation, 447 So.2d 1348 (Fla. 1984). But the burden is not insurmountable. When it can be shown that the appraiser has failed to consider the necessary statutory predicates, the valuation will indeed be held invalid. Bystrom v. Equitable Life Assurance Society, 416 So.2d 1133, 1141 (Fla. 3d DCA 1982). That is the situation here.

B. The Property Appraiser Must Properly Consider the Income Factor as Required by Section 193.011.

The trial court in this case said that the Property Appraiser's assessment was "unconscionable." 553 So.2d at 1211. The district court then opined that no reasonable hypothesis supported the assessment, and observed that even the Property Appraiser acknowledged that his assessment appeared to have exceeded the property's fair market value. Id. at 1206, 1207. In the eyes of both courts, the assessment was not just, not fair, not equitable.

This case poses for the Court not just the proper assessment for respondent's property, but the more significant issue of establishing in general the proper method of assessing properties such as the respondent's. The Court must balance the public policy considerations which would afford a property appraiser broad latitude in the exercise of his discretion,

against the constitutional mandate that the valuation be just. The applicable statute is the touchstone. Discretion which would otherwise be unbridled is tempered by a proper and meaningful consideration of the factors contained in Section 193.011.

In cases involving income-producing property, proper and meaningful consideration of the income factor in subsection 193.011(7) must include an application of actual income. Actual income cannot be disregarded by an appraiser who says: "I see that income, but I refuse to give it any 'consideration' in the assessment process". In a complete perversion of the statute, the Property Appraiser in this case looked at actual income from the property and concluded, because it appeared to him to be below a hypothetical market value, that he would give no weight whatsoever to the income method of valuation for this income-producing property. 553 So.2d at 1205. The Property Appraiser defends this action by arguing that the only way to apply the income factor to leased property is to substitute market rents for actual rents -- in effect rewriting the statute to replace the words "income from said property" with the

formulation "hypothetical market income from allegedly comparable properties."[2]

The Property Appraiser's suggested methodology should not be adopted by this Court for several reasons. First, as stated, it would require the Court to rewrite the statute which, of course, is not the Court's role. See Dade County v. National Bulk Carriers, Inc., 450 So.2d 213 (Fla. 1984). Second, in discarding the income approach altogether the Property Appraiser has ignored the methodology which the courts have found to be the most relevant to shopping centers. Third, the Property Appraiser's method fails to understand the dynamics of the shopping center industry which make it virtually impossible to ascertain a true "market" rent. Finally, the Property Appraiser's failure to give meaningful consideration to the income factor constitutes an abdication of his responsibility under Section 193.011 in favor of unbridled and unreviewable discretion.

1. The use of the income approach in the assessment of shopping centers.

Section 193.011 is mandatory, specifying that the property appraiser shall consider each factor in making his

---

2/ A variation on the same theme is the Property Appraiser's alternate approach to add contract rents to the difference between market rent and contract rent. Another alternative, that the method of assessment should be based primarily on the replacement cost of the building and the land, has been rejected in Palm Corporation v. Homer, 261 So.2d 822 (Fla. 1972).

determination. The Court has said that while the property appraiser must consider each factor, he need not necessarily use each factor. Oyster Pointe Resort Condominium Association v. Norte, 524 So.2d 415 (Fla. 1989). There are many instances when one or more of the enumerated factors may not be applicable at all. The replacement value of improvements (subsection 193.011(5)) is irrelevant to vacant land, and the income factor can have no application to property which is not income-producing. When a factor from the statute is relevant, however, the property appraiser should be required to use the factor to some degree, in the exercise of discretion, along with others being weighed.

The Court has recognized that the income approach is particularly relevant in assessing shopping centers. In Homer v. Dadeland Shopping Center, 229 So.2d 834 (Fla. 1970), for example, the Court noted that shopping centers have unique characteristics. It went on to observe that the leasing of space in shopping centers differs from the usual treatment of commercial property, in that the shopping center concept denotes a unified complex of stores where individual leases complement one another in order to foster the goal of multipurpose or "one-stop" shopping. The Court recognized that the various components of a shopping center operate as an economic whole.

Shortly thereafter, the Court stated that the income factor is particularly applicable to shopping centers. Palm Corporation v. Homer, 261 So. 2d 822, 823 (Fla. 1972). In Palm the Court overturned a shopping center assessment based primarily on replacement cost. The income approach had not been used by the assessor because the taxpayer declined to provide evidence of actual income. Nonetheless, the Court held that the assessor was obliged to use the income approach for the center:

> In light of the failure by the assessor to use the very pertinent criterion of income applicable here, the trial judge was well justified in finding that the assessment did not satisfy legal requirements....

Id. at 823, 824. The same logic persuaded the court in Bystrom v. Equitable Life Assurance Society, 416 So. 2d 1133, 1138 (Fla. 3d DCA 1982) to hold that, as substantive evidence, the actual income of a shopping center property is clearly relevant in reaching a valuation that conforms to the willing buyer-willing seller concept.[3]

In this case, the Property Appraiser did not consider actual income; he ignored it. Although the data was available,

---

[3]/ In Bystrom v. Whitman, 488 So.2d 520 (Fla. 1986), the Court underscored the point by upholding a trial court order compelling the owners of a shopping center to respond to the assessor's request for production of actual net income data. The Court noted that any contention that data concerning the income generated by the property would not be relevant and discoverable would be frivolous. Id. at 522.

he hypothesized a market rent and discarded the actual income because it did not conform to his hypothesis. By rejecting actual income, which the courts regard as "particularly applicable," "clearly relevant" and "very pertinent" to the assessment of shopping centers, the Property Appraiser in fact based his assessment on the replacement cost factor which one commentator has described as "meaningless in the marketplace." Ancel, Determining Fair Market Value of a Shopping Center for Purposes of Property Tax Assessment, U. Ill. L. F. 253, 262 (1965).

The statutory phrase "income from said property" should be accorded its rightful and logical meaning, not shoved aside for hypothetical, market income. The principle of law which grants to the property appraiser the right to assign to each factor such weight as he deems appropriate is unprincipled if it means that in practice he can discard at whim any statutory criterion, let alone one which is highly pertinent and clearly probative of the constitutional standard of just valuation. If the property appraiser's outright dismissal of the most pertinent statutory factor constitutes adequate "consideration," the taxpayer will in every such case lose the protections which the Constitution contemplates to arbitrary and unbridled discretion.

The Council submits that the proper method of assessing shopping center properties must include meaningful consideration and application of actual income.

2. The elusive concept of market income.

The Property Appraiser argues that if actual income is used to determine just valuation, and the actual income is below a hypothetical market income, the assessed value will not represent all interests in the land. He argues that the only way that the income factor can properly assess both the lessor's interest and the lessee's interest is to substitute hypothetical market income for actual income because consideration of actual income will permit the lessee's interest to escape taxation and reward the owner's bad management. The Property Appraiser is wrong in several regards. The response to his contentions is found by posing the confounding inquiry: If just valuation by use of the income factor should be based on market income, as he contends, just how should the appraiser determine market income?

To the extent that the Property Appraiser believes that market income can be determined by averaging the rents on nearby properties, he does not understand the dynamic and synergistic nature of the shopping center industry. That lack of understanding is exacerbated by the suggestion that a lease below hypothetical market is necessarily the product of bad management. The fact is that what may seem a submarket lease to a property appraiser is to the property owner and tenant, in practice, consistent with the industry norm for both owners and lessees based on very astute management practices.

The developer of a shopping center is generally able to attract tenants, and command rents which are otherwise above hypothetical market, if he can secure a large, well-known anchor tenant. Skillful management in acquiring a major anchor tenant, albeit at a competitive and advantageous rate to the anchor, may make one shopping center a success while a shopping center of identical size and age on an adjacent property may fail. Because of its size, prestige, reputation, and drawing power, the anchor tenant may wisely be given a discounted rental rate in light of its disproportionately large gross rental area, the overhead attributable to substantial advertising campaigns that will benefit other tenants, or other factors. The discount rate for the anchor tenant under these circumstances is, in fact, the actual market rate for that particular type of tenant. One lease with a prestigious anchor tenant at 85% of hypothetical market, for example, may enable the developer to secure two or fifty leases with other tenants at 120% of that market.

It is improbable that any property appraiser would not "consider" and weigh appropriately the actual (but inflated) income from non-anchor tenants in determining just valuation. Obviously, he should not be permitted to use actual contract rates when they are above hypothetical market but ignore them when they are below that conjectural level. All of which is to say, simply, that an assessment becomes a "just" valuation, no

more and no less, when a property appraiser accepts that the legislature meant what it said when it required consideration of "income from said property."

There is another concern with the appraiser's substitution of hypothetical for actual rent. If the Property Appraiser simply discards the income factor in assessing the anchor property because the rent appears to him to be below a hypothetical market, neither the Property Appraiser nor the reviewing court will be able to determine if the income was, in fact, "sub" market. In the shopping center industry, in particular, a multitude of intangible factors must be considered in order to determine market rates accurately. The reputation and management skills of the owner of the shopping center, as well as the quality and recognizability of the tenants, may be just as determinative of rental rates as the more objective assessment factors such as location or quality of construction. This again ties back to the logic of the legislature's requirement that the property appraiser consider actual income.

The vast discrepancy in the testimony of the expert witnesses in this case illustrates how difficult it is to determine an abstract, hypothetical market income with any degree of confidence. The Property Appraiser's expert and the respondent's expert were more than one million dollars apart in their estimates of market rents. (R. 178,255). This is not surprising, as

the vagaries of the marketplace make the notion of market income an elusive concept. As applied particularly to shopping centers, the concept is so imprecise that a valuation based upon the assessor's estimate of market income should not be clothed with the presumption of correctness. The taxpayer's burden is heavy enough without forcing him to shadowbox with intangibles in order to secure his constitutional right to a just valuation.

C. The Effect of Actual Income on the Concept of a Willing Buyer and a Willing Seller.

Returning to the question of how an appraiser should determine market income for the income factor of the statute, the Council is well aware that the assessed value of the land must represent all interests in the land. Department of Revenue v. Morganwoods Greentree, Inc., 341 So. 2d 756 (Fla. 1976); Valencia Center, Inc. v. Bystrom, 543 So.2d 214 (Fla. 1989). The hypothetical market income approach, however, does not supply a reasonable method of assessing all interests in property which is subject to a long-term lease. Cf., Century Village v. Walker, 449 So.2d 378 (Fla. 4th DCA 1984). Last year's Valencia Center decision is not the contrary.[4]

---

[4]/ The Council appeared as amicus in Valencia Center, in opposition to the result eventually reached by the Court. While the Council is disappointed with the result in that case, this case is sufficiently different to call for a different conclusion.

In Valencia Center, the subject property was encumbered with a below-market lease to a supermarket, but the underlying zoning permitted the development of a thirteen story office building on the site. The highest and best use of the property -- a factor for the property appraiser to consider under subsection 193.011(2) -- was found to be a high rise office building. The Court applied the theory that the amount a willing buyer would pay for the property equals the value of the lessor's and the lessee's interests, and then reasoned that "a willing buyer most certainly would consider that Valencia's property is zoned for thirteen story buildings." Id. at 217.

In this case, unlike Valencia Center, the actual use appears to coincide with the highest and best use. There is no other, outside market force. A willing buyer for respondent's shopping center, and the seller itself, would most certainly have to reckon with the fact that the property is encumbered by a long-term, submarket lease. Under the circumstances, and as the Court recognized in Morganwoods Greentree, the effect of the encumbrance on the value of the land should be considered in determining just valuation.

In Morganwoods Greentree the Court affirmed a trial court order directing the assessor to re-evaluate property as to which the assessor had failed to consider restrictive encumbrances. The Court reaffirmed the general rule that the value of

the land must represent all interests in the land, but in doing so held that while an encumbrance or restriction will not per se reduce the assessed value of land,

> [t]his does not mean, however, that an assessment may be made without regard to the effect of an encumbrance on the value of the land. The encumbrance becomes one factor among many the assessor must consider in determining the just value of the property to be taxed.

Id. at 758.

The existence of a long-term, submarket lease unquestionably affects what a willing buyer would pay for the property. The longer the duration of the lease, the greater the affect on the willing buyer. Property taxes being an annual event, the appraiser can give due regard to the altering affect of the unexpired term of the lease on the value of the land with each annual assessment.

In the case of a shopping center, there is no basis to assume that the value of the lessee's interest is the difference between actual rent and hypothetical market rent. It is not the rental rate that makes one shopping center space more valuable than another. Rather, the tenant's economic survival depends upon its customers and its competitors. A rental rate of $10.00 per square foot may be more costly but far more valuable to the lessee than $5.00 per square foot, if the leased property is located in a high density area where the residents are relatively

affluent. Similarly, a submarket lease may add no value to the tenant's interest if the competition in the area is fierce.

In practice, shopping center leases are frequently negotiated on the basis of a factor tied to projected gross sales. The value of the lessee's interest in the property is a function of the commercial market, not the real estate market. Shopping center leases are much more intricate than, for example, residential or office leases, Homer v. Dadeland Shopping Center, supra, and the relationship between the lessor and the lessee is far more interactive.

The Court reflected keen insight in the Homer decision when it commented that the various components of a shopping center operate as an economic whole. The actual income from the leases is one of the components which comprise that economic whole, but the "whole" economic value for assessment purposes is not found by the mechanical act of adding the submarket landlord's interest on inflated value for lessees' interests. The lessees' interests are not necessarily augmented in value by the reciprocal of the lessor's economic undervaluation. The respective interests of the lessor and the lessee are simply components of an economic whole which a willing buyer would pay a willing seller to acquire fee simple title to the property. It follows that the search for a hypothetical "market" rent is nothing but an assumption waiting for a set of numbers to be plugged

in. Rather than starting at the end of the valuation process with a conclusion, the only proper method of assessing this type of property when subject to a long-term lease is to require meaningful consideration and application of actual income. If the actual income does not accurately reflect what a willing buyer would pay to acquire the fee simple interest in the land because of other relevant statutory factors, the assessment should be appropriately adjusted to ensure that the assessment represents just valuation, no more, no less. In the absence of some clearly defined, outside force pulling valuation of an income-producing property away from the actual income attributable to that property, however, a valuation based on actual income provides a just valuation for that unique and distinctive parcel.

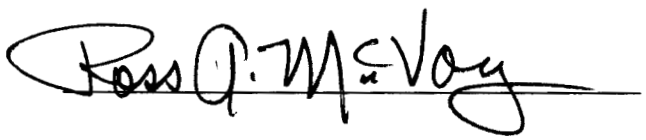
CONCLUSION

For the reasons expressed, the Court should affirm the district court's decision.

Arthur J. England, Jr., Esq.
Eileen Ball Mehta, Esq.
Fine Jacobson Schwartz Nash
Block & England
One CenTrust Financial Center
100 S.E. Second Street
Miami, Florida 33131
(305) 577-4000
Attorneys for International
Council of Shopping Centers

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to KENT G. WHITTEMORE, ESQUIRE, Whittemore and Ramsberger, One Beach Drive, SE, Suite 205, St. Petersburg, Florida 33701; GAYLORD A. WOOD, JR., ESQUIRE, 304 Southwest 12th Street, Ft. Lauderdale, Florida 33315-1521; WILLA FEARRINGTON, ESQUIRE, Fearrington & Hyman, 105 South Narcissus Avenue, Suite 710, West Palm Beach, Florida 33401-5529; SUSAN H. CHURUTI, ESQUIRE, 315 Court Street, Clearwater, Florida 34616; ROBERT A. GINSBURG, ESQUIRE, DANIEL E. WEISS, ESQUIRE and CRAIG H. COLLER, ESQUIRE, Metro-Dade Center, Suite 2810, 111 N.W. First Street, Miami, Florida 33128; JOHN G. FLETCHER, ESQUIRE, 7600 Red Road, Suite 304, South Miami, Florida 33143; ROBERT E. V. KELLY, JR., ESQUIRE, Rydberg, Goldstein & Bolves, 220 East Madison Street, Suite 724, Tampa, Florida 33602; and JOSEPH C. MELLICHAMP, III, ESQUIRE, Senior Assistant Attorney General, Dept. of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050 on April 30, 1990.



124LM0056E
042790/5/er
06698.0002