IN THE SUPREME COURT OF FLORIDA

RONALD J. SCHULTZ, as Property Appraiser of Pinellas County, Florida, et al., Petitioners, vs. TM FLORIDA-OHIO REALTY LTD. PARTNERSHIP, an Ohio Limited Partnership, Respondent.	CASE NO. 75,322

ANSWER BRIEF OF RESPONDENT, TM FLORIDA-OHIO REALTY LTD. PARTNERSHIP

KENT G. WHITTEMORE, ESQ.
Whittemore & Ramsberger, P.A.
One Beach Drive SE, Suite 205
St. Petersburg, Florida 33701
(813) 821-8752
Florida Bar No. 166049
Counsel for Respondent

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PRELIMINARY STATEMENT

In this Answer Brief of Respondent, Petitioners, RONALD J. SCHULTZ, as Property Appraiser of Pinellas County, Florida, and RANDY MILLER, as the Executive Director of the Department of Revenue of the State of Florida, will be referred to as "SCHULTZ" and "MILLER" respectively, or in the alternative, collectively as "Petitioners". The Respondent, TM FLORIDA-OHIO REALTY LTD. PARTNERSHIP, an Ohio Limited Partnership authorized and doing business in Florida, will be referred to as the "TAXPAYER", or in the alternative as "Respondent". The trial court in this cause was The Honorable David Seth Walker of the Sixth Judicial Circuit in and for Pinellas County, Florida, which court will be referred to as the "TRIAL COURT". The appellate court in this cause was the Second District Court of Appeal, which court will be referred to as the "DISTRICT COURT". The following symbols are adopted for references:

"R" for original record on appeal

"T" for court transcript

"PX" for Plaintiff's (Respondent's) Exhibit

"DX" for Defendant's (Petitioner's) Exhibit

The Respondent was the Plaintiff in the trial court while the Petitioners were the Defendants in the trial court.

STATEMENT OF THE CASE AND FACTS

The Respondent, TAXPAYER, prefers to restate the Case and Facts as follows:

At the conclusion of the presentation of testimony and evidence on December 10, 1987, and after TAXPAYER and SCHULTZ had rested, the TRIAL COURT, after considering the expert testimony and other evidence presented by TAXPAYER and SCHULTZ, found that the amount of taxation established by SCHULTZ was either grossly excessive and subject to judicial striking, or was a mistake, or was arbitrary (R-61). In making these findings, the TRIAL COURT noted that there had been an 89.1% increase in the valuation by SCHULTZ from 1985 to 1986, and indicated that no one to the TRIAL COURT'S satisfaction had explained how the 1986 valuation, if correctly done, could exceed the prior year's valuation to such a great extent (R-61). The TRIAL COURT, upon its own inquiry, requested further information to be provided by SCHULTZ to answer questions with regard to the same and stated that without some explanation of the increase, the COUNTY was going to lose (R-65). Over TAXPAYER'S objection, a further hearing was held on February 19, 1988, to give SCHULTZ an opportunity to present additional testimony to answer the TRIAL COURT'S concerns. Following the presentation of testimony by witnesses for SCHULTZ and inquiry by the TRIAL COURT, the TRIAL COURT overturned SCHULTZ'S original assessed valuation and established a just valuation of $2,950,000.00 for the subject property, finding, in addition

to those findings of December 10, 1987, that the 89.1% increase in the 1986 valuation was judicially unconscionable (R-89).

TAXPAYER presented evidence of the fair market value of the subject property via the testimony of its expert, MR. JAMES PARHAM, an MAI and SREA designated real estate appraiser (R-106). MR. PARHAM testified that his opinion of the fair market value of the property was $2,950,000.00 (R-197). MR. PARHAM further indicated that he was familiar with §193.011, Florida Statutes, and, during the course of direct examination, indicated that he had considered all of the factors set forth therein (R-204 - 210). MR. PARHAM further testified that:

1) The fair market value as determined by SCHULTZ was not within a reasonable range of values sustained by recognized appraisal methods (R-120);

2) Such valuation was grossly excessive and unreasonable (R-210);

3) SCHULTZ did not apply proper appraisal techniques and standards in determining the fair market value of the property when he gave no weight to either the income approach or the market data approach (R-211);

4) The capitalization rate used, or that was typically used in 1986 assessments by SCHULTZ for similar properties, was outside the reasonable range of capitalization rates commonly accepted within the appraisal community (R-212);

5) Failure by SCHULTZ to give any weight to the income approach or market value approach would be arbitrary if done without a substantial basis (R-212);

6) Failure by SCHULTZ to reduce the value of the subject property due to functional or economic or external obsolescence resulted in an improper application of commonly accepted appraisal standards using the cost approach (R-215), and that the same, if done without a reason, was arbitrary and that reasons existed to apply functional economic and external obsolescence to the subject property (R-215);

7) There was essentially no increase in market value for properties comparable to the subject property between 1984 and 1986 (R-215); and finally,

8) The determination by SCHULTZ of the fair market value was not a reasonable estimate of fair market value for the subject property (R-216).

Testimony on behalf of SCHULTZ was presented primarily by MR. RICHARD BOVA, SCHULTZ'S deputy for appraisals. MR. BOVA testified that SCHULTZ had determined that the fair market value of the subject property was $4,247,840.00, adjusted to arrive at a just and assessed value of $3,981,400.00 (R-136). Although MR. BOVA testified that the Property Appraiser's Office "considered" the criteria contained in §193.011, Florida Statutes, and admitted he was dealing with semantics (R-181), and admitted during examination that no weight whatsoever was given to the market approach or income approach to valuation of the subject property (R-123). MR. BOVA conceded that cost

approach was the sole method used for determining the assessed value for the subject property and that although the existing long-term lease encumbering the property and income data for the subject property were submitted to SCHULTZ, and calculations made as to assessed value via the income approach, the same were given no weight in arriving at the assessed value of the property. In should be noted that, although the income approach was given no weight by SCHULTZ, SCHULTZ'S own calculations of value using the income approach and the income data submitted would have indicated an assessed value of either $2,875,480.00 (R-168 and PX-2) or $1,872,010.00 (R-181 and PX-3).

During the course of MR. BOVA'S examination, a MAFOL statement prepared by the office of SCHULTZ was admitted into evidence without objection as PX-1 (R-139). PX-1 contained an assessed valuation history indicating that the assessed value of the subject property had been as follows:

1983	$1,918,400.00
1984	$1,935,900.00
1985	$2,105,400.00
1986	$3,981,400.00

MR. BOVA conceded, during cross-examination, that he had no personal knowledge of the reasons for the 89.1% increase in just value between 1985 and 1986 (R-318 - 319) and which was reflected in PX-1. He also conceded that the

percentage increase in just value was inconsistent with the percentage increases in the data used by SCHULTZ in assessing the subject property via the cost approach, the only method used by SCHULTZ (R-319 - 321).

At the close of TAXPAYER'S case in chief (R-228 - 229) and at the conclusion of the presentation of testimony and evidence on December 10, 1987 (R-228 - 229), the TRIAL COURT expressed its concern over the lack of explanation or justification for the almost doubling of the just value for the subject property in 1986 and requested that SCHULTZ present testimony and evidence at a later hearing explaining the same. Although more than adequate opportunity was given to SCHULTZ to respond to the TRIAL COURT'S concerns, MR. BOVA presented a copy of the tax roll showing the progression of assessed value but candidly conceded that he did not "...have any information further than that." (R-79). SCHULTZ failed to present any further evidence in response to the TRIAL COURT'S concerns other than speculation of what might have been.

After entry of Final Judgment in favor of the TAX-PAYER, Petitioners appealed the Final Judgment to the DISTRICT COURT. The DISTRICT COURT in a written opinion, specially concurring opinion, and dissenting opinion, affirmed the judgment of the TRIAL COURT. Among the reasons given for the DISTRICT COURT'S opinion were the following:

1) The property appraiser's assessment was invalid because it exceeded the fair market value.

2) Under the "circumstances of this case" (emphasis supplied), use of the income factor produced, and was necessary to produce fair market value.

3) The property appraiser's assessment was outside the range of reasonable appraisals, shocked the conscience of the court, and was unconscionable.

4) Competent substantial evidence supported the TRIAL COURT'S conclusion, by virtue of the testimony of the TAXPAYER'S expert and the property appraiser's concession that the amount of his assessment exceeded present cash value, i.e. fair market value.

5) The case law relied upon by the property appraiser is materially distinguishable or is authority for affirmance.

In a specially concurring opinion, it was also held that competent substantial evidence supported the TRIAL COURT'S conclusion and that the property appraiser failed to accord meaningful consideration to each of the criteria enumerated in §193.011, Florida Statutes. The dissenting opinion specifically stated that previous holdings of "our" courts do not permit the majority to be joined.

It should be noted in the opinion of the Court that:

> "Contrary to the conclusion which the dissenting opinion attributes to this opinion, we are not at all declaring that, in the words of the dissenting opinion, 'a property appraiser must give at least some weight to each of the statutory criteria and build it into the final valuation of property. We are only

> ascribing error to the property appraiser's failure to use to any extent the income approach to the valuation of the property under the circumstances of this case."

In response to the DISTRICT COURT'S decision, Petitioners filed alternative Motions for Rehearing, Rehearing En Banc or for Certification. The DISTRICT COURT denied the Motions for Rehearing and Rehearing En Banc, but granted, in part, the Motion for Certification. See Schultz v. TM Florida-Ohio Ltd. Partnership, 553 So.2d 1203 (Fla. 2d DCA 1989). The DISTRICT COURT certified the following question to be of great public importance:

> "WHAT IS THE PROPER METHOD OF ASSESSING FOR AD VALOREM PURPOSES INCOME-PRODUCING PROPERTY WHICH IS ENCUMBERED BY A LONG-TERM LEASE WHICH DOES NOT RETURN TO THE OWNER RENT CONSISTENT WITH THE CURRENT RENTAL VALUE FOR SIMILAR PROPERTY?"

A specially concurring opinion was written On Motion for Rehearing, Rehearing En Banc and for Certification in which it was suggested that the certified question as phrased by the majority requested an advisory opinion as to how a case involving particular facts should be decided. It was suggested that a more meaningful question on the issues presented in the case will be as follows:

> "IN ASSESSING THE JUST VALUATION OF PROPERTY WHICH IS SUBJECT TO A LEASE WHICH HAS A LONG TERM REMAINING AFTER THE DATE OF THE ASSESSMENT AND WHICH PROVIDES FOR SUB-MARKET RENT, MAY A PROPERTY APPRAISER WHOLLY DISREGARD THE INCOME APPROACH TO THE VALUATION OF THE PROPERTY AND THEREBY ACCESS THE PROPERTY AT A FIGURE WHICH EXCEEDS ITS FAIR MARKET VALUE?"

This Court accepted jurisdiction.

SUMMARY OF ARGUMENT

Section 193.011 (formerly §193.021), Florida Statutes, in attempting to fulfill a mandate of Article VII, §4 of the Florida Constitution requires that the property appraiser take into consideration several enumerated factors, including, but not limited to, the income from the property being assessed. In the assessment of shopping center properties subject to a long-term lease entered into at arm's length, a property appraiser must, therefore, give meaningful consideration and, when appropriate, some weight to the income approach to value and actual income under the lease. Any less stringent requirement ignores the express language of the statute, leaving the taxpayer subject to the whim and caprice of the property appraiser with no protection against the arbitrary and oppressive exclusion of relevant factors set forth in §193.011, Florida Statutes.

The rule of law that all interests in property be appraised for ad valorem tax purposes does not require an appraisal of the property as being an unencumbered fee simple interest. Such a requirement directly contradicts the mandate to consider income from the property as set forth in §193.011, Florida Statutes, and fails to acknowledge Florida Statutes, the case law of other jurisdictions, and accepted appraisal methodology which allow the splitting of interests in order to appraise the entire bundle of property rights. Such methodology, which allows the splitting in valuation of the leased fee and leasehold interests, should be an accepted method for appraising shopping center and other commercial

property subject to a long-term lease. Acceptance of such methodology will allow appropriate consideration of "...the income from the property...", thereby doing justice to the explicit mandate of §193.011, Florida Statutes, recognition of the facts in a given case, and conformity to the requirements that all interests in property be included in the assessed value.

Regardless of the way in which the Court answers the certified question as it now stands or as it may be modified, the decision of the TRIAL COURT and the DISTRICT COURT should be sustained. Competent substantial evidence supports the TRIAL COURT'S conclusion.

ARGUMENT

I.

THE PROPER METHOD OF ASSESSING FOR AD VALOREM PURPOSES INCOME-PRODUCING PROPERTY WHICH IS ENCUMBERED BY A LONG-TERM LEASE WHICH HAS NOT RETURNED TO THE OWNER RENT CONSISTENT WITH THE CURRENT RENTAL VALUE FOR SIMILAR PROPERTY INCLUDES MEANINGFUL CONSIDERATION OF ACTUAL INCOME FROM THE PROPERTY.

Section 193.011 (formerly §193.021), Florida Statutes, in attempting to fulfill the mandate of Art. VII, §4 of the Florida Constitution, requires that "...the property appraiser shall take into consideration the following factors:

> (1) The present cash value of the property, which is the amount a willing purchaser would pay a willing seller, exclusive of reasonable fees and costs of purchase, in cash or the immediate equivalent thereof in a transaction at arm's length;
>
> (2) 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, taking into consideration any applicable local or state land use regulation and considering any moratorium imposed by executive order, law, ordinance, regulations, resolution, or proclamation adopted by any governmental body or agency or the Governor when the moratorium prohibits or restricts the development or improvement of property as otherwise authorized by applicable law;
>
> (3) The location of said property;
>
> (4) The quantity or size of said property;
>
> (5) The cost of said property and the present replacement value of any improvements thereon;

(6) The condition of said property;

(7) The income from said property; and (emphasis supplied)

(8) The net proceeds of the sale of the property, as received by the seller, after deduction of all of the usual and reasonable fees and costs of the sale, including the costs and expenses of financing, and allowance for unconventional or atypical terms of financing arrangements. When the net proceeds of the sale of any property are utilized, directly or indirectly, in the determination of just valuation of realty of the sold parcel or any other parcel under the provisions of this section, the property appraiser, for the purposes of such determination, shall exclude any portion of such net proceeds attributable to payments for household furnishings or other items of personal property."

A.

MEANINGFUL CONSIDERATION SHOULD BE GIVEN TO THE INCOME APPROACH AND ACTUAL INCOME FROM THE PROPERTY IN ASSESSING INCOME-PRODUCING PROPERTY ENCUMBERED BY A LONG-TERM LEASE ENTERED INTO AT ARM'S LENGTH.

While it is conceded that the actions of a property appraiser, as a constitutional officer, are clothed with the presumption of correctness, the court, in Walter v. Schuler, 176 So.2d 81 (Fla. 1965) confirmed that the intention of the statute was not, however, "...to give assessors an almost unbridled discretion in the performance of their duty to establish just valuation". The operative words of the above-referenced statute, to wit, "...shall take into consideration...", when given their common meaning, require that some meaningful effect be given to each of the factors set forth

in §193.011, Florida Statutes. In 1984, the court, in Blake v. Xerox Corp., 447 So.2d 1348 (Fla. 1984), appeared to obviate the effect of said statutory wording and the best intentions of the opinion rendered in Walter v. Schuler, supra, by holding that "all criteria set forth in §193.011, Florida Statutes, must be considered (but not necessarily 'utilized')". On the other hand, the court, in The Department of Revenue v. Morganwoods Greentree, Inc., 341 So.2d 756 (Fla. 1977) ("Morganwoods"), in determining what effect, if any, an encumbrance should have on determination of just value, held:

> "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. This 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." (Emphasis supplied.)

The confusion resulting from comparing the Blake v. Xerox Corp., supra, and Morganwoods, supra, cases has continued in later rulings of the districts courts of appeal of Florida and this Court. For instance, in Bystrom v. Valencia Center, Inc., 432 So.2d 108 (Fla. 3d DCA 1983) ("Valencia Center I"), the court ruled that the property to be assessed was the unencumbered fee simple and allowed the property appraiser's office to "consider" all, but use only some, of the factors set forth in §193.011, Florida Statutes.

The inherent conflict between the ruling in Valencia Center I, id., and Morganwoods, supra, is best reflected in the dissent in the case of Century Village v. Walker, 449 So.2d 378 (Fla. 4th DCA 1984), petition review denied 458 So.2d 271 (Fla. 1984), which may be found at page 382 as follows:

> "Under the Bystrom case, it appears that the assessment should be the value of the unencumbered fee simple while under the cited passage from Morganwoods Greentree, Inc., the encumbered interest is to be assessed."[1]

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[1]It is submitted that where the most learned members of our state's judiciary are unable to agree as to the meaning and effect of such words "...shall take into consideration...", persons of common understanding and intelligence must necessarily guess at their meaning and the challenged statute, without the interpretation and application urged by Respondent in this brief, may be determined to be unconstitutional, wreaking havoc upon the ad valorem tax system in the State of Florida. Assuming, arguendo, that the holding in Valencia Center I, supra, requires a property appraiser to consider, but not necessarily use or give effect of all of the factors set forth in §193.011, Florida Statutes, the property appraiser is given the unbridled discretion, contrary to the express provisions of the statute and the intent of Walter v. Schuler, supra, to arbitrarily reject one or more of the factors set forth in §193.011, Florida Statutes. It must be remembered that appraising is an art and, in light of the presumption of correctness with which the property appraiser's assessment of just value is clothed, there is no protection against the arbitrary and oppressive exclusion of factors set forth in §193.011, Florida Statutes, by the property appraiser of any county in the state of Florida. The property appraiser's expert in the case at bar admitted that the difference between considering the income and assigning it a given weight was a matter of semantics (R-181). By virtue of the language of §193.011, Florida Statutes, to wit, "...shall take into consideration...", and the interpretation given to such language in Valencia Center I, supra, it may be contended that the rights to due process of Respondent and others similarly situated have been and will continue to be violated unless real meaning and effect is given to the word "consideration". Additionally, because of the subjective nature of the art of appraisal, the presumption of correctness attaching to the property appraiser's assessment of just value and the ambiguous meaning of "consider", there is and will be virtually no check upon the potential for abuse by any given property appraiser of the

In cases following the Morganwoods, supra, case, the appellate courts of Florida have recognized the importance of income as a factor to be considered and used in the assessment of property subject to the encumbrance of a lease. In Bystrom v. Hotelarama Associates Limited, 431 So.2d 176 (Fla. 3d DCA 1983), the court held that when the property appraiser fails to obtain, and utilize, actual income data, although available, the presumption of correctness of the property appraiser's assessment is lost. This case follows the general law that the presumption of correctness afforded to the property appraiser is lost when the property appraiser fails to substantially comply with the statutory requirements governing valuation of property. See Bystrom v. Equitable Life Assurance Society of the United States, 416 So.2d 1133 (Fla. 3d DCA 1982). In Palm Corporation v. Homer, 261 So.2d 822 (Fla. 1972), the Court overturned the property appraiser's assessment stating at page 823:

> "The assessment here, however, was primarily on a replacement cost basis less the depreciation, with the land being based upon a square foot basis, according to the tax assessor. In the light of 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, and in fixing a proper assessment which included consideration of the omitted factor based upon evidence of it offered at trial."

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powers of his office. It is precisely the abuse by SCHULTZ of his discretion in arbitrarily excluding income from meaningful consideration in the case at bar that led to the TRIAL COURT'S findings and unusually lengthy opinion of the DISTRICT COURT.

It is undisputed that the property appraiser in the case at bar utilized only the replacement cost approach in assessing Respondent's property and totally ignored actual income from the property, use of the income approach, or use of the market comparison approach. The TRIAL COURT was, therefore, justified in overturning the property appraiser's assessment in the case at bar and in determining its just valuation based upon competent substantial evidence. See also Blake v. Farrand Corporation, Inc., 321 So.2d 118 (Fla. 3d DCA 1975).

B.

THE RULE OF LAW THAT ALL INTERESTS IN PROPERTY BE APPRAISED FOR AD VALOREM TAX PURPOSES DOES NOT REQUIRE AN APPRAISAL OF THE PROPERTY AS BEING AN UNENCUMBERED FEE SIMPLE INTEREST WHEN THE PROPERTY IS, IN FACT, ENCUMBERED BY A LONG-TERM LEASE ENTERED INTO AT ARM'S LENGTH.

It has been argued by Petitioner that the legal requirement that all rights in property be assessed necessarily precludes an assessment based upon the capitalization of actual sub-market rent. It is further argued that the use of such an approach allows the interest in the leasehold to escape taxation and that the only way to provide for the inclusion of all interests in the bundle of rights to property is to tax the property as though the landowner possessed the same in an unencumbered fee simple. Petitioner cites as authority for his reasoning, Morganwoods, supra, Valencia Center I, supra, Century Village, supra, and Valencia Center,

Inc. v. Bystrom, 543 So.2d 214 (Fla. 1989) ("Valencia Center III"). The court, in Valencia Center III, at page 217, cited Morganwoods, supra, and stated:

> "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. 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'."

and further held that failure to consider the transferred leasehold interest resulted in an assessment below market value.

A careful reading of Morganwoods, supra, and its progeny, Valencia Center I, supra, and Century Village, supra, reveals the assumption upon which the conclusion in Valencia Center III was based:

> "Secondly, if the lessor's interest in the property is reduced by virtue of a lease which is now disadvantageous to itself, it follows that the lessees' interests are all the more valuable. The present market would contemplate the totality of the interests and a willing buyer would offer a willing seller (or sellers) a figure based on the lowered value of the encumbered property to the lessor plus the increased value (a premium) for the interest of the lessees. Century Village, supra, at page 381 citing Valencia Center I at page 111.[2]

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[2]It is suggested that the conclusion in Century Village, supra, to wit: "...the property assessed is the unencumbered fee simple." is irreconcilable with its acknowledgment that "However, this does not mean that an assessment may be made without regard to the effect of an encumbrance on the value of the land.", at page 381, a conflict recognized by the

The reasoning expressed in Century Village, supra, may be expressed in other words: If the value of the landlord's interest goes down because of a below-market rate lease, the value of the tenant's interest must necessarily go up by the same amount. The sum of the parts, therefore, is always equal to the sum of the whole.[3]

Accepted appraisal theory acknowledges, however, that while generally the value of the sum of the split bundle of rights will equal the value of the bundle of rights as a whole, there are exceptions to the rule:

> "In the appraisal of split interests, it is found that as a general rule the value of the sum of the parts of a property equals the value of the property as a whole. There are exceptions to this rule and the appraiser must be alert to recognize conditions under which the value of the sum of the parts may be more or less than the value of the entire property--under free and clear ownership. The summation value of split interests is greater where the contract rent agreed upon by a financially strong tenant exceeds the economic rent which the property is estimated to produce at the time of appraisal. Such excessive income nevertheless must be separated and capitalized at higher risk rates of interest, for even financially strong tenants seek to correct inequities. Where lease terms are restrictive to the point that the tenant is unable to make

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dissent and resolved by the dissent in favor of a reduction in value by virtue of a genuinely disadvantageous encumbrance.

[3]In the case of a lease, the entire bundle of property rights, referred to as the sum of the whole, is split between the landlord and tenant, each of which may be referred to as the leased fee and leasehold interest, parts of the fee simple bundle of rights.

> effective use of the property, the reduced income flow would cause the value of the parts to be less than the value of the property as a whole." Alfred A. Ring, MAI, SRA, The Valuation of Real Estate, at 262 (1963).

Based upon the foregoing, the conclusions contained in Morganwoods, supra, Valencia Center I, supra, Century Village, supra, and Valencia Center III, supra, are based upon an invalid assumption. Although the total of the value of the leased fee interest and leasehold interest may be equal to the values of the unencumbered fee simple, it is not always so. The TRIAL COURT recognized the exception referred to in The Valuation of Real Estate, supra, in its findings in response to Petitioner's Motion to Strike the testimony of Respondent's expert at trial. The TRIAL COURT, in acknowledging the holding in Century Village, supra, and in reciting pertinent portions of its holding, found that:

> "'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.'
>
> 'An encumbrance or restriction such as an easement will not per se,' and I emphasize the phrase per se, 'reduce the assessment value of land simply because the owner has been divested of some proprietary interest.'
>
> 'However,' and I will again emphasize for the record, 'However, this does not mean 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 appraiser must,' and I emphasize the word must, 'consider in determining the just value of the property to be taxed.'

The court in this case goes on to give a rather ludicrous example; it says the error in only capitalizing the income from the lease to determine market value is apparent in a hypothetical situation where the lease is $1 per year for 99 years, thus implying the income approach evaluating real estate be used in solely a capitalization of income of that lease to determine the value of the property will tend to yield an unrealistic result as to true market value for all interest.

That isn't in line, however, with this witness' testimony.

As the court goes on to say:

'Secondly, if the lessor's interest in the property is reduced by virtue of a lease which is now disadvantageous to itself, it follows that the lessees' interests are all the more valuable.

'The present market would contemplate the totality of the interests and a willing buyer would offer a willing seller or sellers a figure based on the lowered value of the encumbered property to the lessor plus the increased value, a premium, for the interest of the lessees.'

The distinction that we have in this case, from the testimony of this witness, and he has been accepted as that of an expert, is that the lowered evaluation of the leasehold encumbrance on the property as regards the lessor's interest, is not tit for tat offset by an increased interest that the lessee might have.

This witness has testified as to the depreciating condition of the property; he's testified as to the immediate location of substantial competition across the street in the form of a Zayres; he

> testified to the continually diminishing business flow in the property; and he has testified, unlike the witnesses from the defense so far, that he has, in fact, visited the property and has firsthand knowledge of what the property even looks like.
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> So, here we have from the testimony of this witness, the lessor whose interest in the property is encumbered by a long term and not a short term of recent inception lease, and lessees whose interests have not, according to his testimony, been increasing throughout the term of the lease, because of the demography of the area and the competition and the condition and depreciation of the store. (emphasis supplied)
>
> This witness has given testimony of great materiality; it is admissible, and the objection is overruled. (R-225 - 227).[4]

The TRIAL COURT recognized that the assessment of the subject property as though unencumbered would fail to account for the very real loss in value suffered to the estates of both the landlord and the tenant as a result of functional and

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[4]The Petitioners' expert testified that no functional or economic obsolescence had been attributed to the property at the time of its assessment (R 136 - 138). Respondent's expert, on the other hand, testified in the TRIAL COURT that the property appraiser's failure to account for functional or economic obsolescence, referred to by the TRIAL COURT above, would result in an improper application of commonly accepted appraisal standards and that a proper application of obsolescence to the subject property would have reduced its value by $1.8 Million (R 214, 215 and 258), or an adjustment down from the unencumbered fee simple by $1.8 Million (R 260). No evidence was presented in the TRIAL COURT to rebut MR. PARHAM'S conclusion as to the necessity for such an adjustment or to the findings of the TRIAL COURT that such an adjustment resulted in the lowered evaluation of the leasehold interest of the lessee.

economic obsolescence.[5] The value of the total of each of the separate estates of ownership in a given property may, but will not always, therefore, necessarily equal the value of the unencumbered fee simple. An analysis of the above will reveal that the length of the lease, ability to assign or sublease, and restrictions on use, whether by virtue of obsolescence attributable to factors both within and outside the subject property or by restrictions imposed by the lease itself when negotiated at arm's length, may render the leasehold interest of little or no value beyond that provided by the terms of the lease itself.

The splitting of interests as an accepted methodology for the appraisal of property encumbered by a lease has been recognized by the laws of Florida, the case law of other jurisdictions, and Petitioners in their brief.

Section 196.001, Florida Statutes, specifically provides for the taxation of the leasehold interest and property whose fee interest is owned by a governmental agency.[6]

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[5]The subject lease provides, on page 2, that in addition to fixed rent, tenant will pay to landlord a percentage of gross sales. This provision was presumably inserted in order to provide for the possibility of increased revenues to the landlord and based upon the hope and expectation of greater sales revenues for the tenant. Unfortunately for both the landlord and the tenant, MR. PARHAM'S projections as to rent and sales revenues included no real expectations of significant jumps through the remaining twenty-six years of the lease (R-200).

[6]"196.001 Property subject to taxation.--Unless expressly exempted from taxation, the following property shall be subject to taxation in the manner provided by law:

In the case of Folsom v. County of Spokane, 759 P.2d 1196 (Wash. 1988), the Court adopted a methodology of valuing property subject to a long-term lease by capitalizing the value of contract rent and adding the present value of any leasehold bonus. The Court, in rejecting the argument that its methodology would allow the fragmenting of taxation among several taxpayers and that it would allow unscrupulous taxpayers to conspire with tenants to arbitrarily structure a tax-advantageous lease, held:

1. That the unit assessment rule prohibits multiple assessments on multiple taxpayers holding disparate interests in one piece of land. It is concerned, however, with only the final outcome of the assessor's task. The rule does not preclude the separate valuation of multiple interests in the course of producing a single assessed value; and

2. That if the now below market lease was not entered into originally in good faith and at arm's length, the assessor may ignore contract rent and base valuation solely on the market rent.[7]

...(2) All leasehold interests in property of the United States, of the state, or any political subdivision, municipality, agency, authority, or other public body corporate of the state."

[7]Although the court, in Folsom, supra, concluded in dicta that the sum of the parts cannot exceed or be less than the value of the whole and that the ultimate appraisal should attempt arrive at fair market value of the property as if it were unencumbered, no reference was made in the opinion to the exceptions to the general rule set forth above and it may be presumed that the same were either not applicable or were not argued.

It has been conceded by Petitioners on page 7 of the Initial Brief of Petitioners that the split interest method of valuation accounts for all of the interest in property:

> "Another way to value all the interests in the subject property through use of the income approach is to value the interest of the lessor by using the actual contract rent, and adding to that the value of the lessee's interest which is predicated on the capitalized value of the difference between market rent and contract rent."

By virtue of the foregoing, actual rent from a long-term lease entered into at arm's length should be given meaningful consideration. The same may be accomplished by an appraisal of the split interests in property. Such a methodology is consistent with the literal reading of §193.011(7), Florida Statutes, recognizes fact rather than speculation, and does no disservice to the requirement that all of the interests in property must be valued for ad valorem purposes.

II.

> REGARDLESS OF THIS COURT'S ANSWER TO THE CERTIFIED QUESTION AS STATED OR AS IT MAY BE MODIFIED BY THIS COURT, THE DECISION OF THE TRIAL COURT AND THE DISTRICT COURT SHOULD BE AFFIRMED.

Apart from the question certified to the Court, the sole function of the DISTRICT COURT is to evaluate whether competent substantial evidence supports the TRIAL COURT'S conclusion. See Blake v. Xerox Corp., supra. In the case at bar, the presumption of correctness of the property

appraiser's assessment was lost when he failed to comply with the statutory requirements of §193.011, Florida Statutes. See Bystrom v. Equitable Life Assurance of the United States, supra, and Bystrom v. Hotelarama Associates, Ltd., supra. It has also been held that where an assessment is made arbitrarily, the trial court may determine a property's just valuation if competent substantial evidence is introduced demonstrating that the tax assessor's assessment is erroneous. See Blake v. Ferrand Corporation, Inc., supra.

In the case at bar, competent substantial evidence was presented by the TAXPAYER'S expert when he testified that the fair market value of the subject property was $2,950,000.00 and that SCHULTZ'S assessment was erroneous for those reasons set forth in TAXPAYER'S Statement of the Case and Facts, which are repeated here for convenience:

1) The fair market value as determined by SCHULTZ was not within a reasonable range of values sustained by recognized appraisal methods (R-120);

2) Such valuation was grossly excessive and unreasonable (R-210);

3) SCHULTZ did not apply proper appraisal techniques and standards in determining the fair market value of the property when he gave no weight to either the income approach or the market data approach (R-211);

4) The capitalization rate used, or that was typically used in 1986 assessments by SCHULTZ for similar

properties, was outside the reasonable range of capitalization rates commonly accepted within the appraisal community (R-212);

5) Failure by SCHULTZ to give any weight to the income approach or market value approach would be arbitrary if done without a substantial basis (R-212);

6) Failure by SCHULTZ to reduce the value of the subject property due to functional or economic or external obsolescence resulted in an improper application of commonly accepted appraisal standards using the cost approach (R-215), and that the same, if done without a reason, was arbitrary and that reasons existed to apply functional economic and external obsolescence to the subject property (R-215);

7) There was essentially no increase in market value for properties comparable to the subject property between 1984 and 1986 (R-215); and finally,

8) The determination by SCHULTZ of the fair market value was not a reasonable estimate of fair market value for the subject property (R-216).

On the other hand, the primary expert witness presented by SCHULTZ in the form of MR. BOVA was unable to answer various questions propounded by the TRIAL COURT about evidence from SCHULTZ'S own records in the form of MAFOL Statement (PX-1), records which reflected a judicially unconscionable and unexplained increase of 89.1% in the 1986 assessed value, an increase that was inconsistent with the data applied by SCHULTZ to the only method used by SCHULTZ to determine the 1986 valuation of the subject property.

In Blake v. Farrand, supra, the power of the trial court to evaluate the weight of expert testimony and to determine an appropriate valuation was set forth as follows:

> "The determination of the weight to be accorded to the expert testimony of the real estate appraisers rested upon the trial judge, as trier of the facts, and if competent substantial evidence is introduced demonstrating that the tax assessor's assessment is erroneous, he may reduce said assessment."

See also Dade County v. Miami Herald Publishing Company, 285 So.2d 671 (Fla. 3d DCA 1973), and Simpson v. Merrill, 234 So.2d 350 (Fla. 1970). In the case at bar, competent substantial evidence was introduced by the TAXPAYER through the examination of its expert, L. JAMES PARHAM, a qualified MAI and SREA designated appraiser, and through its examination and cross-examination of RICHARD BOVA to support the TRIAL COURT'S findings and ruling. The TRIAL COURT, as trier of the facts, was in a unique position to evaluate all of the evidence and testimony submitted, including the credibility and quality of the expert testimony presented.

Although SCHULTZ and MILLER make much of the TRIAL COURT'S comments after its ruling, it should be remembered that:

> "The tendency of counsel to rely upon a judge's remarks made during court proceedings for some substantive weight bears out the biblical adage that an over-speaking judge is no well-tuned symbol. This leads us to observe that unnecessary critical or laudatory comments by judges should be avoided since they are often seized upon as

> having some judgmental impact. Generally speaking, such remarks do not constitute findings or holdings of the court and should be considered as such." See Estate of Senz, 417 So.325 (Fla. 4th DCA 1982).

The comments contained in the Initial Brief of Petitioner at page 29, et seq., pertaining to estoppel are irrelevant as no issue as to estoppel has been raised by TAXPAYER nor was the TRIAL COURT'S decision based upon such a theory. The remarks of the TRIAL COURT with regard to estoppel and to which the above-referenced portion of the Initial Brief of Petitioner has been directed have no judgmental effect and should not be considered as such.

CONCLUSION

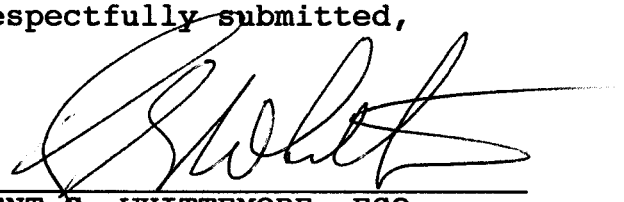
This Court should answer the certified question as stated or as it may be modified by the Court by requiring the property appraiser to give meaningful consideration to each of the factors set forth in §193.011, Florida Statutes, and to articulate any reasons for failing to give effect to, weigh or use any of the factors he rejects as being inapplicable. Whether or not "meaningful consideration" has been given to each of the statutory factors may be decided by the trier of fact. Failure to give meaningful consideration to each of said factors or to articulate his reasons for the rejection of the same should provide a basis for a determination that the property appraiser's assessment is erroneous. Such a holding will be consistent with the case law of Florida but will balance the rights of all concerned by providing a check on the unbridled discretion of a constitutional officer whose discretionary decisions are clothed with a presumption of correctness.

As the rule of law that requires property encumbered by a long-term lease to be taxed as though it is possessed in an unencumbered fee simple is based upon an invalid assumption, this Court should recede from prior decisions in which it was held that a landowner of property encumbered by a long-term lease must be taxed as though he possessed the property in an unencumbered fee simple. A methodology of assessment of such property should be approved by this Court wherein the interests of the landlord and

tenant be separately valued and added together to arrive at one assessed value using, among other appropriate factors, actual rent.

Regardless of how the Court may answer the certified question as stated or as it may be modified, the decision of the TRIAL COURT and DISTRICT COURT should be affirmed. Competent substantial evidence supports the TRIAL COURT'S conclusion and ruling. The opinion of the DISTRICT COURT is consistent with the decisional law of Florida in that the opinion ascribed error only to the property appraiser's failure to use the income approach to valuation under the circumstances of the case at bar.

Respectfully submitted,



KENT G. WHITTEMORE, ESQ.
Whittemore & Ramsberger, P.A.
One Beach Drive SE, Suite 205
St. Petersburg, Florida 33701
(813) 821-8752
Florida Bar No. 166049
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to those individuals listed on the attached Service List, this 30th day of April, 1990.

KENT G. WHITTEMORE, ESQ.

SERVICE LIST

Robert E. V. Kelley, Jr., Esq.
Rydberg, Goldstein & Bolves, P.A.
220 East Madison Street, Suite 724
Tampa, Florida 33602

Joseph C. Mellichamp, III
Senior Assistant Attorney General
Department of Legal Affairs
The Capitol, Room LL-04
Tallahassee, Florida 32399-1050

Susan H. Churuti, Esq.
Pinellas County Attorney
315 Court Street
Clearwater, Florida 34616

Willa A. Fearrington, Esq.
Fearrington & Hyman
105 South Narcissus Avenue
Suite 710
West Palm Beach, Florida 33401-5529

Gaylord A. Wood, Jr., Esq.
304 S.W. 12th Street
Fort Lauderdale, Florida 33315-1521

Robert A. Ginsberg, Esq.
Dade County Attorney
Craig H. Coller, Esq.
Assistant County Attorney
Daniel A. Weiss, Esq.
Assistant County Attorney
Metro-Dade Center, Suite 2810
111 N.W. 1st Street
Miami, Florida 33128-1993

Larry E. Levy, Esq.
Macfarlane, Ferguson, Allison
& Kelly
P.O. Box 82
Tallahassee, Florida 32302

John G. Fletcher, Esq.
7600 Red Road, Suite 304
South Miami, Florida 33143

Arthur J. England, Jr., Esq.
Eileen Ball Mehta, Esq.
Charles M. Auslander, Esq.
~~Barry F. Rose, Esq.~~
Fine Jacobson Schwartz Nash
Block & England
One CenTrust Financial Center
100 S.E. 2nd Street
Miami, Florida 33131