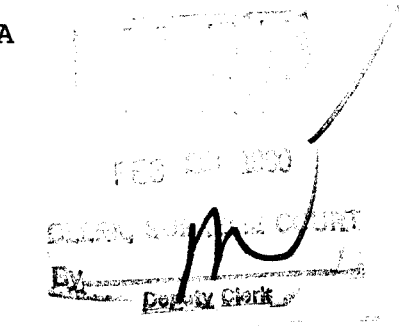
IN THE SUPREME COURT OF FLORIDA



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,

CASE NO. 75,322

vs .

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

Respondent.
_____/

INITIAL BRIEF OF PETITIONERS

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PRELIMINARY STATEMENT

In this initial brief, 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. 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". The trial court in this case 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 case was the Second District Court of Appeal, which Court will be referred to as the "DISTRICT COURT". The symbol (R-___), followed by a page number, will refer to the record on appeal. The symbol (A-____), followed by a number, denotes the appendix.

STATEMENT OF THE CASE

The TAXPAYER, Plaintiff below, is the owner of certain real property located in the City of Largo, Pinellas County, Florida. It filed an action in Circuit Court contesting the 1986 assessment of its property by SCHULTZ in the amount of $3,981,400.00 (R-1-6). Following a trial of the cause, the TRIAL COURT entered Final Judgment (R-70-71) overturning SCHULTZ's original assessed value and establishing a value of $2,950,000.00. In striking down SCHULTZ's assessment, the TRIAL COURT ruled that although SCHULTZ's actions were not unlawful or improper (R-81, 89), the percentage increase that the 1986 assessment exceeded the 1985 assessment for the property shocked the conscience of the court (R-80) and the taxing authorities were more or less estopped from utilizing an otherwise valid assessment methodology, which had been available for several years, without doing so in an incremental fashion. (R-84-85, 89). A Notice of Appeal of the Final Judgment was timely filed. (R-72).

The DISTRICT COURT affirmed the Judgment of the TRIAL COURT. 14 FLW 1727 (Fla. 2nd DCA July 28, 1989) (A-3-15). The DISTRICT COURT held that SCHULTZ'S failure to accord any weight to the actual sub-market rent from the property and his use of the cost approach to assess it, failed to comply with the requirements of §193.011, Fla. Stat. The DISTRICT COURT reasoned that a prospective purchaser of the property as encumbered by a long-term lease, would not ignore the actual contract rent in determining a sale price. In that respect, the DISTRICT COURT held that the

failure to base the assessment on the actual sub-market rent resulted in an assessment that exceeded the fair market value of the property. In reaching it's decision, the DISTRICT COURT questioned the applicability of the cases of Century Village v. Walker, 449 So.2d 378 (Fla. 4th DCA 1984), rev. denied, 458 So.2d 271 (Fla. 1984) and Bystrom v. Valencia Center, Inc., 432 So.2d 108 (Fla. 3rd DCA 1983), rev. denied, 444 So. 418 (Fla. 1984)("Valencia Center I"), by assuming they did not involve long-term leases. The DISTRICT COURT stated that Century Village "...[was] not shown to have involved a long-term lease and, for the reasons indicated above and further explained below, cannot have soundly reached the result it did unless it involved a short-term lease" 14 FLW at 1731, (A-7).

In response to the DISTRICT COURT'S decision, SCHULTZ and MILLER filed alternative motions for rehearing, rehearing en banc or for certification. (R-____). The DISTRICT COURT denied the motions for rehearing and rehearing en banc, but granted, in part, the motion for certification. 14 FLW 2902 (Fla. 2nd DCA Dec. 22, 1989)(A-1-2). 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-1)

A Notice to Invoke Discretionary Jurisdiction was timely filed by Petitioners. (R-___). This Court accepted jurisdiction of this

matter and established a briefing schedule in an order dated January 23, 1990.

STATEMENT OF THE FACTS

The subject property is an approximately 11-acre tract of land improved with a large department store-type building of approximately 116,800 square feet. The building is occupied by two tenants, a K-Mart department store and a waterbed store (R-154-155). The TAXPAYER's property is encumbered by a 22-year lease agreement with K-Mart Department Stores which commenced in 1970, the date the building was constructed. (R-35, 156-157). The lease also contains four 5-year options to renew, effectively extending its duration into the next century. (R-35, 195).

The TAXPAYER presented evidence of the subject property's value via the testimony of their expert, Mr. James Parham, an MAI-designated appraiser. (R-106,113). Mr. Parham unequivocally stated that he appraised the leased-fee interest in the real property as opposed to the unencumbered fee interest. (R-109,194). He only valued the lessor's interest based on the actual income received. (R-195,197). He explained that the lessor's interest was the right to receive income together with the present value of the reversion interest in the property at the expiration of the lease. (R-194). He stated that he gave considerable consideration to income (R-208) and that it, together with the property's cash value, constituted the two key elements of his valuation. (R-208). The methodology he used was in essence the income approach.

(R-197). His "consideration" of cash value is merely a redundancy of his income approach. (R-194, 197-198,212). He stated that he considered both the sales comparison and cost approaches, but did not use them in valuing the property. (R-204,206). In that respect, actual income was the only factor Mr. Parham used in arriving at a value of the lessor's interest in the subject property.

The TRIAL COURT admitted over objection, evidence which was offered by the TAXPAYER of the assessment of the subject property for the three preceding years (R-30, 140-142). The TRIAL COURT stated that although TAXPAYER's opinion of value was some 44% greater than the 1985 assessment on the property, the "stumbling block in [its] mind" was the apparent 89% increase represented by SCHULTZ's 1986 assessment. (R-77,87).

Testimony in defense of SCHULTZ's assessment was presented by Mr. Richard Bova, SCHULTZ's Deputy for Appraisals. He was similarly recognized by the Court as an expert witness. (R-144). Mr. Bova testified that the Property Appraiser's office considered the eight criteria contained in §193.011, Fla. Stat. (1985). (R-152-178) In particular, he testified that the Property Appraiser's office was aware of the lease which encumbered the property (R-156) and the income it generated (R-124,33). Mr. Bova testified that the Property Appraiser's office considered the income from the property by making calculations according to an accepted income approach formula (R-150-152). After considering the income from the property, Mr. Bova concluded that it was

"sub-market." Sub-market means that leases negotiated during 1986 for similar property would return a higher rental rate per square foot than that received for the subject property. (R-164, 170-171). Mr. Parham, the TAXPAYER's expert, agreed that the actual rent was sub-market. (R-233).

The cost approach was given the most weight by Mr. Bova and ultimately served as the basis for the assessment. (R-127-130, 30). He testified that he believed the law requires assessment of the unencumbered fee. (R-153). The values generated by the Property Appraiser's office for the replacement cost of the building as well as the value of the underlying land were not disputed by the TAXPAYER.

Depending upon what interest or interests in the property were to be valued, the range of value testified to by Mr. Parham and Mr. Bova, was as follows:

Income approach (actual income - Bova)	- $2,875,480.00	(R-168,34)
Income approach (actual income - Parham)	- **$2,950,000.00**	(R-197)
Income approach (market rent - Parham)	$4.5-4.8 million dollars	(R-255)
Income approach (market rent - Bova)	$5.6 million dollars	(R-178)
ASSESSED JUST VALUE	- $3,981,400.00	
TRIAL COURT'S Value	- **$2,950,000.00**	

Mr. Parham testified that in his opinion, SCHULTZ's assessment was grossly excessive and unreasonable (R-210). However, he also

testified that if the law required assessments to reflect the value of the unencumbered fee simple interest in the property, then SCHULTZ's assessment would not be excessive. (R-256).

SUMMARY OF THE ARGUMENT

The entire ad valorem taxation scheme is predicated on assessments which represent all the interests in the property, except when the legislature authorizes the assessment of separate interests. As it relates to this case, the legislature has not authorized the separate assessment of any interest in the property. Fair market value, which is synonymous with just value, refers to the value of the unencumbered fee simple interest in the property. Any attempt to value only a portion of the rights in a particular piece of property - such as an assessment based on the capitalization of actual sub-market rent - will fall short of the Constitutionally required standard of Just Value because the value of the non-assessed property rights will escape taxation. Since the duration of a given lease only affects the proportionate value of the lessor or lessees interest in the property, it is an immaterial and irrelevant factor and should not be considered in assessing the property.

The proper method of assessing the subject property is to value all the interests in the property. The income approach to value will value all the interests in the subject property provided market rent is used in place of the actual contract rent. Another way to value all the interests in the subject property through the

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.

A third way of valuing all the interests in the property is to use a method which inherently values the uncumbered fee simple interest. The cost approach is such a method. The cost approach focuses upon the replacement cost of the building and land and therefore is, by definition, unconcerned with partial interests. SCHULTZ used a cost approach and therefore valued all the interests in the property.

Although income is relevant in the valuation of rental property, the assessing statute merely requires its consideration, and courts of this state have never mandatorily required, to the exclusion of all other criteria, the actual use of income in the assessment process, especially when its use would arrive at a figure less then just value. SCHULTZ considered the income of the subject property, but did not use it because he felt it was not reflective of just value. The evidence adduced in the trial below as to the range of values for the unencumbered for the fee simple interest in the property, which could conceivably and legally be reached, demonstrates that SCHULTZ'S assessment should not have been overturned by the TRIAL COURT.

The proper standard for reviewing Ad Valorem assessments is to determine whether or not they exceed the just or fair market value of the property. The TRIAL COURT improperly struck down

SCHULTZ'S assessment based on its subjective determination that the amount the assessment exceeded that of the prior year's was unreasonable, without regard to whether or not the value assessed exceeded just value.

ARGUMENT

I. 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 IS ONE WHICH VALUES THE INTERESTS OF BOTH THE LESSOR AND LESSEE.

Florida Courts have never recognized an exception to the rule that an assessment for ad valorem tax purposes include all the interests in the property, except when the legislature authorizes the assessment of separate interests. In this instant case, the legislature has not authorized the assessment of separate interests in the property.

Florida's modern system of property taxation is founded upon two basic principles. The first principle is that property must be uniformally assessed at 100% of its fair market value. Walter v. Schuler, 176 So.2d 81 (Fla. 1965). The second principle is that with the exception of lawfully authorized exemptions and the special property classifications specified in the Florida Constitution, all real and personal property and property interests in Florida must be placed on the tax role. The fundamental policy is that of democratic equality - the policy "that every taxpayer be treated consistently, and that everyone contribute his fair share, no more and no less, to the tax revenues." ITT Community

Development Corporation v. Seay, 347 So.2d 1024, 1028 (Fla. 1977); Dade County Taxing Authorities v. Cedars of Lebanon Hospital Corp., 355 So.2d 1202, 1204 (Fla. 1978).

Section 4, Art. VII of the Florida Constitution mandates the "just valuation of all property for ad valorem taxation", provided that agricultural land and certain other specified classes of property be specially classified "and assessed solely on the basis of character or use." This Court has held that with the exception of those special classes of property specified in the Constitution, all property must be uniformly assessed at 100% of its fair market value and the legislature may not establish additional classes of property to be valued on a different basis. Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1974); ITT Community Development Corp. v. Seay, supra. Section 196.001, Fla. Stat., commands that "[a]ll real and personal property in this state" shall be subject to taxation in the manner provided by law unless expressly exempted from taxation and §192.011 (2) defines "assessed value" to mean "the annual determination of the just or fair market value of an item or property" except for special classes of property specified in Article VII, §4, Fla. Const.

Florida law does not authorize a special assessment classification for leased property. The entire property must be assessed at 100% of its fair market value, the same as other property. To value only the landlord's reversion and omit the value of the leasehold would result in an illegal underassessment as a matter of law. Similarly, to base the assessment on contract

rent instead of market rent and the actual fair market value of the property, would create an illegal special classification of leased property.

An ad valorem tax is against the law itself, not against the owner. Lee v. Carpenter, 132 So.2d 433 (Fla. 2nd DCA 1961). It is well-established in Florida - and an essential requirement of uniformity in property taxation - that assessments must include all interests in the property. The property assessed is the unencumbered fee simple ownership - the entire "bundle of rights" in the property. Century Village v. Walker, 449 So.2d 378, 381 (Fla. 4th DCA 1984). The assessment is of the realty itself, at its full cash value, regardless of estates in it. Bancroft Inv. Corp. v. City of Jacksonville, 27 So.2d 162 (Fla. 1946); Wolfson v. Heins, 6 So.2d 858 (Fla. 1942). It is elementary that the assessment must include all interests in the land. Homer v. Dadeland Shopping Center, Inc., 229 So.2d 834 (Fla. 1970); McNayr v. Claughton, 198 So.2d 366 (Fla. 3rd DCA 1967).

In McNayr v. Claughton, supra, the Third District reversed the trial court which directed that property encumbered by a 99 year lease be valued according to the actual rent being paid to the fee owner. The Court held:

> "...[T]he law requires an assessment of the value of not one interest in the land, but of the land; that is, the assessed value of the land must represent all interests in the land". 198 So.2d at 368.

In Homer v. Dadeland Shopping Center, Inc., supra, the taxpayer owned a shopping center impressed with restrictive covenants. The District Court held the existence of such covenants

detracted from the value of the property, and directed that an assessment be made on the value of the property less the value of the restrictions, e.g., only the owner's interest. This court quashed the decision of the District Court, holding:

> It is elementary that the tax assessment valuation must include all interests in the property, except when the Legislature authorizes the assessment of separate interests. See Dickinson v. Davis, 224 So.2d (Fla. 1969)". 229 So.2d at 837.

When real estate is leased, the "bundle of rights" in the property is separated. Landlord and tenant each obtain separate and distinct interests in the property. Those separate interests, taken together, constitute the fee simple title or ownership. According to the American Institute of Real Estate Appraisers,

> The divided interests resulting from a lease represent two distinct, but related, estates of property - the leased fee estate and the leasehold estate.
>
> * *
>
> The leased fee estate is the lessor's or landlord's estate. A leased fee estate is an ownership interest held by a landlord with the right of use and occupancy conveyed by lease to others. ...Although the specific details of leases vary, a leased fee generally provides the lessor with rent to be paid by the lessee under stipulated terms; [and] the right of repossession at the termination of the lease...
>
> * *
>
> The leasehold estate is the lessee's or tenant's estate. A leasehold estate is the right to use and occupy real estate for a stated term and under certain conditions as conveyed by the lease. Lease terms shape the quantity and quality of future benefits likely to flow to the interests created by the contract. Thus, the agreement provides that

> the lessor will receive specified rent or services during the term of the lease and a reversion of the tenant's rights of use in occupancy when the lease expires.
>
> * *
>
> Leased terms sometimes create advantages for the leasehold position to the detriment of the leased fee position. If the lessee has a rent advantage, this is assured by the leasehold interest, which often has a value in the market.
>
> American Institute of Real Estate Appraisers, The Appraisal of Real Estate, Ninth Edition, 111, 114 and 115 (1987).

The fair market or just value of property for ad valorem purposes necessarily must reflect all ownership interests. This Court interpreted and defined the terms "just value" and "fair market value" in Walter v. Schuler, supra. That case involved the assessment of single-family homes which necessarily represents the unencumbered fee simple interest. Therefore, when this Court stated that the term "just value" is synonymous with "fair market value", it was conditioned on the assumption that one was dealing with the fair market value of the unencumbered fee simple interest, not just the lessor's interest.

In Overstreet v. Brickell Lum Corporation, 262 So.2d 707 (Fla. 3rd DCA 1972), the Third District, having recently had a decision quashed by this court in Homer, supra, reversed a trial court judgment in favor of a taxpayer. The taxing authority had assessed the property at $157,460.00 for the year in question, but the trial court enjoined the tax collector from collecting taxes on that part of the assessment which exceeded $38,801.20. Overstreet concerned

the same strip of property which was involved in McNayr v. Claughton, supra; the property was encumbered by a 99 year lease which did not return to the owner current market rent. The Court found error in basing the assessment on the actual income derived from a lease because that method did not value all the interests in the property. The Court held that:

> ...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 yield an unrealistic result as to true market value for all the interests." 262 So.2d at 709 (emphasis supplied).

It should be remembered that the TAXPAYER'S expert in the instant case testified that SCHULTZ'S assessment would not be excessive if the law required assessments to reflect the value of the unencumbered fee interest (R-256). The law does require such assessments. Indeed, any other rule would permit the acts of private citizens to control tax assessment functions. For example, the owners of similar properties could enter into long-term lease agreements with each other at rates far below market and thereby receive favorable assessments as compared with their competitors. The TRIAL COURT and DISTRICT COURT ignored this requirement in order to reach the result they wanted which was an assessment at less than just value. The DISTRICT COURT'S decision in the case at bar is in direct conflict with an innumerable list of cases including this Court's decisions in Homer, supra and Walter v. Schuler, supra.

In Department of Revenue v. Morganwoods Greentree, Inc., 341 So.2d 756 (Fla. 1976), this Court distinguished mortgages, leases and subleases on the one hand and an encumbrance or easement on the other. The DISTRICT COURT interprets Morganwoods to require encumbrances to be taken into account in the assessment process. The DISTRICT COURT'S reading overlooks or misapprehends the holding that all the interests in the common area ultimately found their way onto the tax roll. In Morganwoods, the property appraiser had increased the value of the 200 units to reflect the right to use the common area; he also valued and assessed the owner of the common area - the developer - as if the unit owners had no easement rights whatsoever. The property appraiser was wrong because he attempted to include easement rights in the value of the 200 units, when the easement rights were in the common areas. The common areas were owned by the developer. The common areas were one parcel; the 200 units were separate parcels.

Since in Florida all interests must be assessed to the owner of the property, the developer, as such owner, would bear the tax burden. Since none of the unit owners owned the common area, and there is no separate statutory authority for taxing the easements, the unit owners would bear no tax burden for their right to use the common areas. This Court held that this was incorrect and stated that if the value of the units were increased to reflect the easement rights in the common area, there should be a corresponding decrease in the value of the common area as assessed to the developer. Any other way would result in double taxation.

In Florida, a lessee of private property pays no ad valorem real property tax on the value of his leasehold. See §196.199, Fla. Stat. Thus, if a lessee pays $1,000,000 for the right to occupy property worth $5,000,000, no ad valorem tax is paid on the value of $4,000,000 - the difference between the true worth of the occupancy right and the amount paid. According to the DISTRICT COURT, the value of $4,000,000 cannot be assessed against the lessor (property owner), hence no tax is paid thereon. If $5,000,000 is the true worth, why shouldn't that figure be reflected in the true value?

Since the TRIAL COURT accepted the value of the TAXPAYER'S expert in the instant case, who valued the property based on the actual rent being paid, the true worth of the property to the lessor, reflected in the windfall received by the lessee, goes untaxed and that interest in the property receives a special exemption not authorized anyplace in law. (R-109,194-195,197). The effect of the DISTRICT COURT'S affirmance of the TRIAL COURT is to unconstitutionally exempt the value of the leasehold interest and sanction a value for ad valorem tax purposes of less than just value, in contravention of Art. VII, §4, Fla. Const. See Archer v. Marshall, 355 So.2d 781 (Fla. 1978).

The existence of a lease does not alter or affect the value of property. Since the Property Appraiser values property as though unencumbered, and does not adjust or divide the value of property based on the interests of the lessor and the lessee, there is no justification for adjusting the value of property based on

the length of the lease. Thus, the creation by the DISTRICT COURT of a long-term/short-term lease dichotomy as a basis for reviewing assessments, is invalid. Since such a dichotomy is not a basis for a review of an assessment, the Fourth District Court of Appeal did not mention the remaining term of the lease in its decision in Century Village v. Walker, supra, however, it was a long term lease, similar to the lease in the instant case. (A-15,22)[1]. Moreover, contrary to the DISTRICT COURT'S assumption in this case, the lease involved in Valencia Center I also was a long-term lease because it had a remaining term of 21 years as of January 1, 1980, which was the tax year in question. See,Valencia Center, Inc. v. Publix Supermarkets, Inc., 464 So.2d 1267 (Fla. 3rd DCA 1985), rev. denied, 475 So.2d 696 (Fla. 1985) (lease began in 1963, and with options, does not expire until 2001). In Valencia Center I, the Third District reversed a trial court decision with instructions to reinstate the original assessment. In that case, there was no dispute that the actual use of the property, as a one-story supermarket shopping center, constituted a underutilization when compared with its highest and best use - a site for high-rise office development. The Third District in Valencia Center I rejected the taxpayer's contention that §193.011(2), Fla. Stat. (1979), required an assessment based on the underutilization of the property, and that highest and best use should be determined in

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[1]. See Mitchell v. Gillespie, 161 So.2d 842 (Fla. 1st DCA 1964) (Appellate Courts may examine the records and files of cases decided by other appellate courts in order to gain a proper understanding and interpretation of the published opinion as well as to determine its applicability to the facts of a given case.)

conformity with the terms of the long-term lease which encumbered the property. The TAXPAYER in this case makes the same contention. The Court in Valencia Center I approved an assessment of the property as though unencumbered, holding:

> If the property appraiser must not only consider, but also use the current use of the property as the highest and best use, there is an inevitable conflict with "fair market value" on all properties on which there is an underimprovement.
>
> What a property is currently used "as" is often not the highest and best use. In the case sub judice, valuing the subject as a shopping center leads to a value less than fair market value, a fact which was agreed to even by Valencia's sole appraiser...432 So.2d at 110 (Emphasis in the original)

The "inevitable conflict" with fair market in the case of underutilization also occurs under circumstances where contract rent is sub-market.

Assuming there were two owners of identical apartment buildings including land location, each with a value of $1,000,000 and not mortgaged, then obviously, both owners would expect to be assessed the same and pay the same taxes. Assume further, that one of the owners obtains a mortgage for $900,000. Should he expect the value of his apartment building to change to $100,000 because that is the value of his equity in the building? Obviously not because this would discriminate against the other apartment building owner. It is not the value of the owner's interest (equity) which is assessed, it is the value of the property. Otherwise, the second owner could borrow $1,000,000 and mortgage

the apartment building for that amount, thereby removing all of his tax liability.

The same is true if a lease existed. If only the value of the lessor interests is assessed, three things inherently occur which are:

1. A legislative (statutory) criterion for considering bad management is created;

2. A new statute is created assessing the value of the lessor's interest, and;

3. Other owners of similar properties not tainted with bad management or bad leases are discriminated against.

For instance, if one apartment building is worth $1,000,000 for ad valorem tax valuation without a lease, another identical building must also be worth $1,000,000. Otherwise, discrimination exists assuming the two are identical in all respects, including land location. Thus, if the second apartment building is leased in a financially poor way, the value of the apartment building could not change, because if it did the owner of the first building would be discriminated against. Poor management is not a valid basis or criterion for assessing property; if it were, a violation of equal protection of the law would occur because discrimination would be inherent.

The DISTRICT COURT'S attempt to distinguish Century Village, supra, is invalid. The similarity of Century Village to the case at bar with the exception of the result, is illustrated by the following comparison:

Facts - TM Florida - the property is encumbered by long-term lease, with 26 years left to run from the date of the assessment, in favor of K Mart Corporation. The lease provides for rent in the amount of $1.84 per square foot before overage adjustments; market rent for similar properties ranges from $4.50-$6.00 per square foot. Income was considered but given no weight; final value based on cost approach.

Facts - Century Village - property improved with a shopping center, including a K Mart Store, and was encumbered by a long-term lease that still had a term of 20 years left to run as of the date of the assessment. Contract rent is $1.20 per year, and the market rent was $5.00 per square foot as of the assessment date. The actual income from the property was considered, but the final assessment was based on the "market/cost" system. See (A-15-46) (Final Judgment and Appraiser's Affidavit).

TM FLORIDA-OHIO:
Issue Presented - whether an assessment based on the use of actual sub-market income from a long-term lease constitutes the just value of the property for taxation purposes.

CENTURY VILLAGE:
Issue Presented - the proper method of assessing a shopping center for ad valorem taxation when the property is encumbered by Leases that do not return to the owner rent consistent with the current rental value for similar property.

TM's Contention - the market value of the property is determined by an income approach using the actual rent received by the owner.

Century's Contention - the term "income" means the actual income that the owner-lessor receives. The value of the interest of an owner/lessor, as indicated by actual income received, corresponds to the fair market value or just valuation.

Schultz's Contention - the actual income was sub-market and therefore not entitled to any weight in the assessment because it only reflects the value of the owner-lessor. The cost approach should be given weight in this case because it necessarily values all the interests in the property.	Walker's Contention - all the interests in the property, including the interest of the owner-lessor, and the interests of the fortunate lessees whose rental obligations are less than current market value for leased commercial space, must be included in the assessment. This can be done by determining the value of the owner-landlord's interest and the interest of the fortunate tenant and combining the two, or by using the economic rent approach, which automatically values both interests. Utilization of actual income would result in an assessment of only part of the interest in the property.
Appellate Decision - TM Florida - sub-market rental income from long-term lease on real property must be used in assessment process; appraisal based on actual income meets just value requirement since a willing buyer would not ignore contract rent in offering to buy the property.	Appellate Decision - Century Village - an appraisal based on contract rent which is sub-market, only values the interest of the lessor. To arrive at a property's just value, the assessment must include not just the value of the lessor, but also the value of the lessee's interest.

Valencia Center I is also indistinguishable from the case at bar. Again, the following comparison does not disclose any reasonable basis for distinguishing Valencia Center I.

TM FL. - OHIO:	VALENCIA CENTER:
Facts - property encumbered by a long-term lease with 26 years left to run from the date of assessment. Actual rent is sub-market. Income was considered but given no weight; final value based on cost approach.	Facts - property encumbered by a long-term, sub-market lease which had 21 years left to run from the date of assessment. Income was considered but was determined to be inappropriate for assessment purposes. Assessment was based on vacant land sales (cost approach, assuming value for improvements were included in final assessment).
TM'S Contention - assessment should be based on actual rent received from lease.	Valencia's Contention - property should be valued based on the terms of the actual lease.
Schultz's Contention - actual income sub-market and not entitled to any weight, because it would only value the lessor's interest in the property.	Bystrom's Contention - the income approach was inappropriate. The existence of a lease is irrelevant to a valuation of the unencumbered fee simple, which is what the law requires.
Appellate Decision - TM - Property Appraiser is wrong. Since owner can only sell his property as encumbered, assessment should be restricted to value of leased fee. Assessment must reflect the existence of the lease.	Appellate Decision - Valencia - Property Appraiser correct. Property must be assessed as unencumbered fee simple, notwithstanding a lease on the property. Assessment must include the interest of all lessees.

In Valencia Center v. Bystrom, 543 So.2d 214 (Fla. 1989) (Valencia III), this Court affirmed a decision of the Third District Court, which in turn affirmed the decision of the lower court, that a statute which required the assessment of property in accordance with the highest and best use permitted under certain long-term leases was unconstitutional because it conflicted with the just value standard. Once again, this Court held that the fair market value standard, which is based on the willing buyer/willing seller concept, refers to the unencumbered fee

simple, which includes both the value of the lessor's and the lessee's interest. In other words, the fair market or just value can only be obtained by adding together those interests. SCHULTZ'S actions in this case, of considering but not using the actual sub-market rent in assessing the property, are no different than those of Bystrom when he considered but gave little weight to the actual present underutilization of the property.

The District Court in the instant case has created a statutory criterion for bad management. What is the result if we apply this criterion to other situations?

Assume an owner of an apartment had made a bad management decision and leased the building for a ten year period with a net rental income of $1,000,000. Assume that the market rent for that building is $5,000,000. The DISTRICT COURT would have the value of the building based on the net rental income of $1,000,000, the actual rent being paid by the lessee.

Assume further that beginning in the eleventh year, the owner finds a stupid lessee who signs a new lease agreeing to pay a rent which would leave a net rental income of $10,000,000 for the next ten years, even though the fair market rent would still be only $5,000,000. The question arises now, should the value be based on $10,000,000? The underlying principle of the DISTRICT COURT is that it should, based upon nothing more than a bad management decision on the part of the lessee. Neither of the bad management decisions of the lessor or lessee should control the value of the property.

Again, assume that during the same time period an identical

building next to the prior example had been leased for a rent which would result in a net rental income of $5,000,000, which is the market rent for such building. The DISTRICT COURT says that this building should be valued based on $5,000,000. The result of applying the DISTRICT COURT'S principle is to discriminate between identical properties. Under either of the prior examples there is inherent discrimination. This is true because of a new judicially created statutory criterion for valuing property that has been created by the DISTRICT COURT. The result is that throughout the state of Florida, owners of properties which are tainted with bad management will demand favorable tax treatment, rewarding such bad management.

Finally, applying the DISTRICT COURT'S principle that only the owner's equity is subject to valuation, and thus taxation, the taxable values on the ad valorem tax rolls would be reduced to a nominal level, since virtually all residential and most commercial properties are mortgaged. Since a leasehold only has value when the contract rent is less than the current market rate, it is without question that the use of market rent in the income approach formula will produce a value indication that represents all the interests in the property. Alternatively, the income approach can be used to separately estimate the value of the leased fee and leasehold, by reference to current market rent, which can then be added together in order to produce an assessment. Similarly, the just value of the unencumbered fee can be determined via both the cost and market approaches to value, assuming there is sufficient market data available. In the case at bar, SCHULTZ valued the property using the cost approach and in so doing, proceeded

lawfully and produced an assessment within the range of reasonable appraisals. This was acknowledged by both the TRIAL COURT and TAXPAYER'S expert.[2] (R-89,256)

II. PROPERTY APPRAISERS ARE REQUIRED TO CONSIDER THE FACTORS CONTAINED IN SECTION 193.011, FLA. STAT., IN VALUING PROPERTY, HOWEVER, THERE IS NO MANDATORY REQUIRED USE OF ANY PARTICULAR FACTOR IN ARRIVING AT JUST VALUE.

In the case sub judice, the DISTRICT COURT held that SCHULTZ'S failure to use in any way the income factor constituted a failure to comply with the requirements of §193.011, Fla. Stat. 14 FLW at 1729. (A-5) The DISTRICT COURT also went on to opine that "...the income approach to the valuation of property like that involved here could not be disregarded without also disregarding the fair market value requirement". Id, (A-5).

Section 193.011, Fla. Stat. is entitled "Factors to consider in deriving just valuation" and states, in pertinent part, that:

> "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:" (emphasis supplied)

It goes on to list eight criteria which must be considered, among which are (2) the highest and best use to which the property can be expected to be put; (5) the cost of the property and present replacement value of the improvements; and (7) the income from the property.

In interpreting the requirements of §193.011, Fla. Stat., this Court has always recognized the distinction between the consideration

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[2]. The cases cited by the DISTRICT COURT from other jurisdictions have contrary positions to the decisions reached by this court, and are thus not applicable to the issues in this case.

of a factor on one hand, and its use or weight on the other. Straughn v. Tuck, 354 So.2d, 368 (Fla. 1977). In Daniel v. Canterbury Towers, Inc., 462 So.2d 497 (Fla. 2d DCA 1984), the DISTRICT COURT followed the Straughn decision by holding that a property appraiser is free to assign whatever weight to each factor he deems appropriate and that the selection of one factor over another as a basis for an assessment does not render it invalid. 462 So.2d 502. In the case at bar, SCHULTZ'S assessment is overturned not because he failed to consider each of the factors, but because the DISTRICT COURT disagreed with the weight that was assigned to each one. In this regard, the DISTRICT COURT has ignored its earlier decision in Daniel and abandoned this Court's decision in Straughn and others.

In relying on this Court's decision in Palm Corporation v. Homer, 261 So.2d 822 (Fla. 1972) for the foregoing proposition, the DISTRICT COURT misapprehended and overlooked the facts of that case. In Palm Corporation, the property appraiser did not even possess income information, contrary to the facts of this case (R-124, 33, 150-152). The lack of information and corresponding failure to use available market data to perform an income approach led to this Court's decision that Homer failed to consider income. While it may appear that this Court's opinion in Palm Corporation is internally inconsistent to some degree with respect to the terms "use" and "consider", any such inconsistency was resolved in the later decision of this court in the Straughn v. Tuck case. For instance, in support of its ruling that income must be used in assessing shopping centers, the DISTRICT COURT relied on the following portion of this Court's decision:

> "[Income] is a factor which is particularly applicable to business properties such as shopping centers; yet this important consideration was admittedly not used by the assessor in this instance. The reason given for not doing so was that the property owner refused voluntarily to submit its income from the shopping center to the assessor for his consideration." 261 So.2d 823 (emphasis added).

The DISTRICT COURT also overlooked the fact that Palm Corporation never addressed the issue of a property appraiser's discretion to variously weight or emphasize one criterion over another in assessing property. The DISTRICT COURT also relied on Schultz v. Lurie, 512 So.2d 1003 (Fla. 2d DCA 1987); Bystrom v. Hotelarama Associates, Ltd., 431 So.2d 176 (Fla. 3rd DCA 1983) and Exchange Realty Corporation v. Hillsborough County, 272 So.2d 534 (Fla. 2d DCA 1972), however, those cases are factually distinguishable because they do not involve situations such as this case where the property appraiser had considered the income, but had not assigned any weight to it. They involved situations where the property did not consider income, much less use it in making his assessment.

While SCHULTZ was in possession of the income and expense information from the TAXPAYER'S property and gave consideration to it by making standard calculations, under the circumstances of this case he was justified in not assigning any weight to it. This is because an assessment based on sub-market rent omits the value of the leasehold interest. In determining that the fair market or just value can only be achieved through the actual income, the DISTRICT COURT has mistakenly limited application of that standard to the landlord's interest, as opposed to all the interests in the property.

III. THE DISTRICT COURT AND TRIAL COURT USED AN ERRONEOUS STANDARD OF REVIEW IN STRIKING DOWN THE ASSESSMENT.

This court has consistently held over the years that the actions of a Property Appraiser, as a constitutional officer, are clothed with the presumption of correctness. The taxpayer has the burden of overcoming this presumption of correctness by sufficient allegations and proof excluding every reasonable hypothesis of a legal assessment. Bystrom v. Whitman, 488 So.2d 520 (Fla. 1986); Blake v. Xerox Corporation, 447 So.2d 1348 (Fla. 1984); Powell v. Kelly 223 So.2d 305 (Fla. 1969). In Blake v. Xerox, this court stated as follows:

> Section 193.011, Florida Statutes (1977), provides a list of factors which a property appraiser is to consider when determining the 'just valuation' of property. The trial court's determination that the appraiser properly considered the statutory factors as mandated was supported by competent, substantial evidence. Thus the only remaining question was whether the appraiser, following the law, could conceivably and reasonably have arrived at the appraisal value being challenged... [r]egardless of which [appraisal] method was theoretically superior, the trial court was bound to uphold the appraiser's determination if it was lawfully arrived at and within the range of reasonable appraisals, that is, if it was supported by any reasonable hypothesis of legality. 447 So.2d at 1350.

This then is the standard of review which the TRIAL COURT should have used in the case at bar in determining whether or not grant the TAXPAYER relief. At the conclusion of testimony, and after giving consideration to all the evidence presented, including the various opinions of value testified to by the expert witnesses, the TRIAL COURT bottomed its judgment not upon the aforementioned standard of review, but instead upon its subjective view of the "reasonableness" of the amount that the 1986 assessment exceeded that of the prior year.

The following excerpts from the record are illustrative of the TRIAL COURT's findings in the matter, as well as its reasons for overturning the assessments:

> "The taxing authority did not do anything unlawful. It did not use a method which was illegal. It used a method which it could, literally for years in the past and for whatever reasons, chose not to use." (R-89).
>
> "And in all fairness to the taxing authority, the County, I find no problem in the methodology by which they appraised the property in 1986. I'm not saying it is erroneous or improper. That methodology, however, was available to the taxing authority for many years." (R-86).
>
> "The increase increment in a one-year period of time of 89.1% is equitably unconscionable..." (R-88-89).
>
> "The property owner was coaxed and lulled into the position of non-anticipation by his reasonable reliance upon proper valuations. It is almost a situation of estoppel."[3] (R-89).
>
> "If the County had been appraising the property by a method less beneficial in the past, and the County has the legal authority to appraise it in a method more beneficial, it would seem that the greater equity would require that this be done incrementally, not in one lump-sum. (R-84-85).

Despite SCHULTZ'S assessment having successfully withstood the scrutiny of the Blake v. Xerox, supra, standard, the TRIAL COURT nonetheless overturned the assessment based on its unwarranted standard. In Schleman v. Connecticut General Life Ins. Co., 9 So.2d 197 (Fla. 1942), Cosen Inv. Co., Inc. v. Overstreet, 17 So.2d 788 (Fla. 1944), and Walter v. Schuler, supra, this court embraced full cash value as the legal standard for assessment, thereby requiring a taxpayer to prove

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[3]. The instances are rare indeed when the doctrine of equitable estopple can effectively be applied against government actions. See, Korash v. Mills, 263 So.2d 579 (Fla. 1972); and First National Bank of Birmingham v. Department of Revenue, 364 So.2d 38 (Fla. 1st DCA 1978).

that the assessment under challenge exceeds the just or fair market value in order to obtain relief. Forsaking the recognized test of determining whether or not SCHULTZ's assessment exceeded 100% of just value, the TRIAL COURT chose to base its decision upon the novel theory of whether or not the assessment exceeded the prior year's and by how much.

This approach runs afoul of another time-honored maxim of Florida ad valorem Law - the principal that each year's tax assessment must be based on its own validity and not on the assessment of any prior or subsequent year. Overstreet v. Brickell Lum Corporation, supra; Container Corp. v. Long, 274 So.2d 571 (Fla. 1st DCA 1973); Homer v. Hialeah Race Course, Inc., 249 So.2d 491 (Fla. 3rd DCA 1970); and Keith Investments, Inc. v. James, 220 So.2d 695 (Fla. 4th DCA 1969).

Since the time of Schleman, supra, and most notably in Walter v. Schuler, supra, this court's overriding concern with respect to ad valorem tax assessments has been that they be made at the level of 100% cash value and, most importantly, that they be made without any element of arbitrariness. Being satisfied that there was nothing illegal about SCHULTZ's assessment for 1986, and that it reflected 100% of just value, the TRIAL COURT nevertheless advocated that any increase be made in an incremental manner. This type of reasoning, by definition, is arbitrary and is exactly the type of conduct that was admonished by this court in Walter v. Schuler, supra.

By choosing to focus on the increase of the assessment from the prior year as opposed to its legality and relationship with 100% of just value, the TRIAL COURT was, in essence, stepping into the shoes of the

Property Appraiser by attempting to substitute its judgment for that of SCHULTZ'S and found a value less than just value.

In Florida East Coast Railway v. Green, 178 So.2d 355 (Fla. 1st DCA 1965), the First District Court of Appeal analyzed the proper function of the trial judge in relation to tax assessments. It commented as follows:

> It is also appropriate to observe that, in cases of this sort, the judicial inquiry is limited to an ascertainment of the legal validity of the actions of other public officials. Judges are not selected because of their abilities as appraisers of property or their capacity to predict the economic future of business ventures based upon past experience and an evaluation of present conditions. Judges may not, therefore, substitute their judgment for that of taxing officials charged with the responsibility to ascertain the value of property for purposes of taxation. 178 So.2d at 360.

See also, Haines v. Leonard L. Farber Co., 199 So.2d 311 (Fla. 2d DCA 1967), cert. denied 210 So.2d 218 (Fla. 1968); Overstreet v. Dean, 219 So.2d 752 (Fla. 3d DCA 1969); and Dade Co. v. Deauville Operating Corp., 156 So.2d 31 (Fla. 3d DCA 1963). Having satisfied itself that Schultz proceeded lawfully, the TRIAL COURT should have resisted the temptation to second guess his actions and simply upheld the assessment.

CONCLUSION

There is no evidence in the record that SCHULTZ'S assessment exceeded the fair market value for all the interest in the property. The TRIAL COURT committed reversible error below in striking down SCHULTZ'S assessment after comparing it with that of the prior year instead of the fair market value for the unencumbered fee simple

interest in the property as of January 1, 1986. The DISTRICT COURT has rendered a decision which is in conflict not only with other district courts in the state, but also with the long standing precedent established by this court, most recently, Valencia Center III. Accordingly, the petitioners request this court to quash the decision of the DISTRICT COURT and direct the DISTRICT COURT to remand the case to the TRIAL COURT with instructions to enter Final Judgment in favor of SCHULTZ and MILLER, upholding the assessment on the subject property for the year 1986.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing initial brief of Petitioners has been furnished by U.S. Mail to **KENT G. WHITTEMORE, ESQUIRE**, Counsel for Respondent, Whittemore and Ramsberger, P.A., One Beach Drive SE, Suite 205, St. Petersburg, Florida 33701; **GAYLORD A. WOOD, JR., ESQUIRE**, 304 Southwest 12th Street, Ft. Lauderdale, Florida 33315-1521 and **WILLA FEARRINGTON, ESQUIRE**, 105 South Narcissus Avenue, Suite 710, West Palm Beach, Florida 33401-5529, Counsel for Amicus Curiae, REBECCA E. WALKER, Palm Beach County Property Appraiser; **ROBERT A. GINSBERG, ESQUIRE**, Dade County Attorney, **DANIEL A. WEISS, ESQUIRE**, Assistant County Attorney and **CRAIG H. COLLER, ESQUIRE**, Assistant County Attorney, Metro-Dade Center, Suite 2810, 111 Northwest First Street, Miami, Florida 33128, Counsel for Amicus Curiae, JOEL W. ROBBINS, Duly appointed Property Appraiser of Dade County, Florida; and **JOHN G. FLETCHER, ESQUIRE**, Suite 304, 7600 Red Road, South Miami, Florida, 33143, Counsel for Amicus Curiae, Valencia Center, Inc., this 19th day of February, 1990.

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