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,

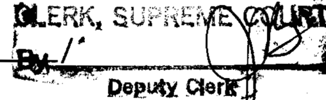
Petitioners,

CASE NO. 75,322

vs.

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

Respondent.



PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

In this reply brief, Amicus International Council of Shopping Centers will be referred to as the "COUNCIL". All other references will be consistent with those used in the initial brief.

SUMMARY OF THE ARGUMENT

The Appellate Courts of Florida are often called upon to interpret and give effect to the various statutes enacted by the legislature relative to the assessment of property for purposes of ad valorem taxation. In order to ensure that assessments are lawfully made, a property appraiser must be cognizant of these decisions as well as amendments to the Florida Statutes and rules and regulations of the Department of Revenue. The practice of modifying certain valuation procedures within a property appraiser's office in response to appellate decisions does not constitute arbitrary action sufficient to invalidate an assessment. On the contrary, the failure to do so would itself be unlawful.

The enactment of §193.011, Fla. Stat. was intended to prevent arbitrary and inequitable conduct by property appraisers. On the other hand, in order to accurately and consistently determine the just value of property, a property appraiser must be afforded sufficient discretion to use those factors which are not only emphasized in the marketplace, but lead to an assessment that otherwise meets the requirements of the law. The requirement that assessments not exceed full market value provides protection to taxpayers against unbridled discretion on the part of property

appraisers since any assessment which is outside the range of reasonable appraisals will be judicially set aside. What the TAXPAYER really argues for in this case is the mandatory use of sub-market income in the assessment of properties subject to a long-term lease. A requirement to always use income to assess rental property is impractical due to the frequent occurrence of situations where the income is unsuitable as a basis for an assessment.

Due to the dual requirement that an assessment be made in conformance with the assessing statute and that it reflect the value of all interests in the property, the TAXPAYER'S evidence below is insufficient and inherently unreliable as a matter of law. It's expert failed to give consideration to the cost and market approaches. Also, the discounted cash flow analysis which was actually used by the TAXPAYER produces a speculative value which Florida Courts have consistently rejected.

ARGUMENT

I. THE DECISION TO REJECT THE ACTUAL INCOME FROM THE PROPERTY IN THE VALUATION PROCESS WAS NEITHER ARBITRARY, NOR UNLAWFUL.

The TAXPAYER explicitly acknowledged that the DISTRICT COURT'S opinion, in the instant case, is in conflict with the opinions of this Court and other District Courts on the main issue involved. The TAXPAYER admits on page 29 of its brief that the rule of law in the State of Florida requires property encumbered by a long term lease to be taxed as though it is possessed in an unencumbered fee simple. The TAXPAYER asks this Court to recede from these prior decisions. However, the TAXPAYER has given no justification for

such a change. There has been no changes in the constitution or statutes that would dictate that this Court should recede from prior decisions in which it was held that a landowner of property encumbered by a long-term lease be taxed as though he possessed the property in an unencumbered fee simple. The TAXPAYER'S only justification for this change is its desire to pay less taxes. The TAXPAYER'S and COUNCIL'S position is that actual income must be used even if the actual income is sub-market.

The statement at page 4 of the COUNCIL'S brief that the property appraiser "disregarded" the income factor is not correct. He used the income factor but found that the actual income being sub-market did not value all of the interests in the property, and hence, could not establish just value.

The property appraiser considered actual income, but rejected it because it was sub-market and used the cost approach to value the property. The TAXPAYER refused to use the cost at all.

In short, the TAXPAYER contends that actual rent is the sole legal basis to value income producing property. This means that if the rent had been \$20.00 per month, although the income capability was \$20,000 per month, according to the COUNCIL and the TAXPAYER, the value must be based on the \$20.00 figure. This ignores the cost and market approach, both of which are valid methods of arriving at just value.

SCHULTZ performed a perfectly proper appraisal in this case. Having determined that actual rent was sub-market and being commanded by law to assess at just value, he considered both the market and costs approaches. He found no comparable sales which could be used to establish market value through comparisons, so he

then turned to the cost approach to establish value.

SCHULTZ'S office valued the subject property for 1986 as if it were unencumbered by the lease to K-Mart. According to Mr. Bova, SCHULTZ'S office believed it was following the requirements of the law by rejecting a valuation based solely on actual sub-market rent (R-173). In announcing its final decision on February 19, 1988 (R-83-91)[1], the TRIAL COURT stated:

> "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 am not saying it is erroneous or improper. That methodology, however, was available to the taxing authority for many years" (R-86).
>
> "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 choose not to use". (R-89)

During the course of the proceedings on December 10, 1987, Mr. Bova was questioned by both counsel for the TAXPAYER as well as the TRIAL COURT, as to why the assessment had increased from the previous year as well as how the previous year's assessment was derived. At that time, it was Mr. Bova's suspicion that the previous year's assessment had been based on an income approach using actual sub-market rent (R-311) (A-1). Mr. Bova further explained that following the Century Village decision[2], SCHULTZ'S office was attempting to identify all the commercial income-producing properties in the county which were encumbered by leases

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1 The TRIAL COURT'S remarks following the close of evidence on December 10, 1987 (R-59-69), contrary to the TAXPAYER'S assertion as well as the record on appeal, do not constitute its final ruling, but rather serve as observations of what the evidence had shown thus far and a directive to the attorneys as to specific areas where more evidence was required before a final decision could be made.

2 Century Village v. Walker, 449 So.2d 378 (Fla. 4th DCA 1984), rev. denied, 458 So.2d 271 (Fla. 1984).

returning sub-market rent in order to revise the assessments to reflect the value of the unencumbered fee simple interest in the property (R-312-314) (A-1). Bova further explained that due to the large number of parcels with those characteristics, it is possible that not all were changed in the course of the first year following the decision. At the final hearing held on February 19, 1988, having confirmed his suspicions in the interim, Mr. Bova stated that the previous year's assessment had indeed been based upon an income approach using actual sub-market rent and that the decision in 1986 to reject that approach was based upon an implementation of the Century Village, supra, decision (R-82-83). (A-2). Therefore, it is highly misleading for the TAXPAYER to suggest[3] that Bova had no personal knowledge of the reasons for the increase in assessed value. Rather, SCHULTZ'S decision not to give weight to the actual income from the property was the result of a carefully considered, county-wide policy for which a substantial basis existed.

Both parties acknowledged drastically different "market" values for the subject property. As was indicated in the initial brief, the values were:

Unencumbered:	\$4,500,000 - Parham	(R-255)
	\$3,981,400 - Assessment	
Leased fee:	\$2,950,000 - Parham	(R-197)
	\$2,875,480 - Bova	(R-168,34)

The previous year's assessment reflected the leased fee value of the property. Neither party employed the market approach to value.

[3] See page 5 of TAXPAYER'S answer brief.

The TAXPAYER misrepresents the factual record of this case again by asserting that SCHULTZ totally ignored the use of the market comparison approach.[4] In fact, Mr. Bova testified that from a search of the records of the property appraiser's office, no comparable sales could be found which could be used in a market comparison approach. Again, SCHULTZ considered the sales factor, but chose not to use it due to the lack of comparable sales. (R-157) (A-3). The TAXPAYER did not dispute this point. While the TAXPAYER contends that SCHULTZ'S rejection of the income was an arbitrary act, the truly arbitrary act was Parham's decision to value the leased fee, which doesn't value all of the interests in property, as opposed to the fee simple.

The cost approach, comparable sale approach and income approach (market rent) are used to value the unencumbered fee simple interest in property. Alternatively, sub-market rent will only value the leased-fee interest in property since a leasehold only exists where contract rent is less than market rent. The choice of the particular interest to be appraised necessarily determines the appropriate methodology to be employed. Since the TAXPAYER has finally conceded[5] that the assessment must reflect the value of all interests in the property, it follows that Parham's valuation of the leased fee is legally deficient. When the three approaches to value are used with respect to the identical interest in the property, the resulting value indications should be relatively close. For example, the value indication for the leased

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4 See page 16 of TAXPAYER'S answer brief.

5 See page 9 of TAXPAYER'S answer brief.

fee interest in the subject property as estimated by both the TAXPAYER and SCHULTZ differ by only 2.6%! On the other hand, the difference between Parham's leased fee value and his unencumbered fee value is between 35% and 39%. Had Parham actually generated value indications for the cost and market approach[6], in the course of making his appraisal of the subject property, the reconciliation process would have required him to re-examine exactly what interest in the property was being appraised. Therefore, by failing to appreciate the distinction between the leased fee interest and the unencumbered fee interest, the TRIAL COURT understandably became confused when presented with Parham's testimony as to "market value" and SCHULTZ'S assessment of market value.

Both the TAXPAYER and COUNCIL contend that the assessing statute, §193.011, Fla. Stat., requires mandatory use of the income from the property. Additionally, they argue that SCHULTZ failed to accord consideration to the actual income and as a result, his assessment is unlawful. The DISTRICT COURT below reached the same conclusion.[7] The law in Florida concerning the requirement to consider each factor as well as the property appraiser's discretion as to the ultimate weight he gives each one, has heretofore been consistent in terms of upholding the distinction between the two terms.[8] For this Court to adopt mandatory use as the legal standard in Florida would not only repudiate earlier decisions, but would create an absurdity in the law which would frustrate all

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6 See (R-204, 206).

7 553 So.2d 1203, 1205 (Fla. 2d DCA 1989).

8 See pages 25-28 of SCHULTZ'S initial brief.

property appraisers in performing their constitutional duties.

Notwithstanding the DISTRICT COURT'S pronouncement, there is not one scintilla of evidence in the record below that SCHULTZ failed to meaningfully consider the income from the property. None of the cases[9] cited by the TAXPAYER and COUNCIL, as authority for their contention that SCHULTZ acted unlawfully, involved factual situations where a property appraiser had income information and considered it, but chose ultimately to base the assessment on a different appraisal methodology. Furthermore, none of those cases involved long-term leases at sub-market rents.

Income that is less than current market rates for similar property, or that is otherwise distorted, provides a misleading indication of value. The potential pitfalls resulting from a rigid use of actual income had previously been recognized by the DISTRICT COURT in Daniel v. Canterbury Towers, Inc., 462 So.2d 497 (Fla. 2d DCA 1984). In Canterbury Towers, the DISTRICT COURT reversed the trial judge and reinstated the property appraiser's assessment. The property at issue was a 15-story condominium-type building containing 125 residential apartment-type living units. It was operated as an adult congregate living facility whereby the owner contracted to care for the residents for the rest of their natural lives in consideration for an initial, non-refundable entrance fee paid upon admission. The entrance fees, sometimes referred to as entrance endowments, varied depending upon the size of the particular living unit. For the particular years in question, the

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[9] Bystrom v. Hotelarama Associates Limited, 431 So.2d 176 (Fla. 3d DCA 1983), Petition rev. denied 441 So.2d 631; Bystrom v. Equitable Life Assurance Society of the United States, 416 So.2d 1133 (Fla. 3d DCA 1982); Palm Corporation v. Homer, 261 So.2d 822 (Fla. 1972); and Homer v. Dadeland Shopping Center, Inc., 229 So.2d 834 (Fla. 1970).

entrance fees ranged from between $22,000 to $64,000 per unit. In addition to the entrance fee, residents paid a corresponding monthly service fee between $295 to $764. In return, the residents received meals, utilities, housecleaning, laundry service and other recreational activities. The property appraiser based his assessment on the cost approach. Although he never had the actual income and expense in connection with the property, he did possess the general scheme and concluded that an income approach would be too complicated based on the instability of income and the imbalance caused by the entrance fees. He concluded that the cost approach would be more realistic for valuation purposes.

The trial judge overturned the assessments based on a failure to properly consider and utilize the income approach. The DISTRICT COURT reversed finding that there was ample evidence that the property appraiser had in fact considered all the factors in the assessment statute. It held:

> "In any assessment situation, some of the particular factors of the statute will, if relied upon, 'primarily' or 'exclusively' produce a different valuation than will others. In the case at bar, Appellee's <u>peculiar and unique income flow</u>, if used as an 'income approach' for the purpose of fixing valuation, will produce a lower value than if either the 'cost approach' or the <u>real rental value</u> is utilized. That alone is no basis for invalidating the property appraiser's decision". 462 So.2d at 501-502 (emphasis supplied).

The income approach was legally insufficient because it is incapable of reflecting the value of the entrance fees previously paid and therefore fails to value all the interests in the property.

This Court should reject the interpretation of the assessing statute as advanced by the TAXPAYER and COUNCIL because it would

create arbitrary results. By requiring a mandatory use of income in this case, the DISTRICT COURT has judicially rewritten the statute for the sole purpose of justifying a result that is itself illegal - the assessment of a partial interest in property. Art. VII, §4, Fla. Const. requires "...a just valuation of all property...". This means all interests in the property. The DISTRICT COURT, prior to its decision in the case at bar, had construed the term "property" to mean the unencumbered value.

As pointed out in SCHULTZ'S initial brief and the brief of the Property Appraiser's Association of Florida, to assess only the landlord's interest exempts part of the value of the property, where sub-market rent exists. The TAXPAYER and the COUNCIL are asking this Court to create an exemption not permitted by Art. VII, §3, or elsewhere in the Florida Constitution.

They also ask this Court to rewrite Florida Statutes to insert a qualification to the term "property" and "real property" by providing that where property is subject to a lease only the landlords interest be assessed.

Judge Lehan, who authored the instant opinion, expressed a different view in the case of Palm Pavilion of Clearwater, Inc. v. Thompson, 458 So.2d 893 (Fla. 2d DCA 1984). In that case, which involved a lease with an option to purchase, the question presented was what was intended by the term "property" included in the lease. Judge Lehan pointed out that the term was not qualified by language suggesting that only the landlord's interests in the property was intended and concluded that the purchase price to be paid by the lessee upon exercising the option must be based on the value of the property as if unencumbered by the lease and not based only on the

value of the lessor's interest. Similarly, Florida law requires that the property be assessed and no provision exists for assessing only the landlord's interest.

Section 192.001(2), Fla. Stat., provides:

> (2) "Assessed value of property" means an annual determination of the just or fair market value of an item or property or, if a property is assessed solely on the basis of character or use or at a specified percentage of its value, pursuant to s.4(b), Art. VII of the State Constitution, its classified use value or fractional value.

Section 192.001(12), Fla. Stat., provides:

> (12) "Real property" means land, buildings, fixtures, and all other improvements to land. The terms "land," "real estate," "realty," and "real property" may be used interchangeably.

Section 192.011, Fla. Stat., provides in pertinent part:

> The property appraiser shall assess all property located within his county, except inventory, whether such property is taxable, wholly or partially exempt, or subject to classification reflecting a value less than its just value at its present highest and best use.

There is nothing contained in Section 193.011 or any other statutes that authorizes the property appraiser to assess only the landlord's interest. See also, Simpson v. Fillichio, et al., 15 F.L.W. D1119 (Fla. 4th D.C.A. April 25, 1990).

In the case at bar, adequate information existed for only two of the three appraisal methods designed to value all the interests in the property - cost and income. The most convenient method of employing the income approach is to substitute market rent in the equation. In fact, this method has been judicially approved in Walker v. Smathers, 507 So.2d 1207 (Fla. 4th DCA 1987). COUNCIL suggests that market income cannot be reliably determined in the

appraisal process.[10] However, SCHULTZ and the TAXPAYER apparently had no trouble determining what market rent should be for the subject property. Bova testified that market rent for the subject was between $4.50 and $6.00 per sq. ft. (R-170); Parham stated that market rent ranged up to $4.25 per sq. ft. (R-233). Bova's income approach using a market rent of $4.50 per sq. ft. indicated a valuation of $5,600,000 (R-178), yet the actual assessment was $3,981,400, the most appropriate value for the subject property.[11]

Valuing property as though unencumbered is perfectly acceptable because the general rule states that the sum of the values of the parts equals the value of the whole. Although two exceptions to this rule do exist,[12] none were shown to be applicable in the case at bar. Specifically, there was no proof below that the lease terms restricted the tenant, K-Mart, from making an effective use of the property. K-Mart is in the business of retail sales and that is exactly how it used the subject property. It is misleading for the TAXPAYER to suggest that the TRIAL COURT found otherwise. Although Parham testified that the decreased value of the landlord's interest was not offset by a corresponding increase to the tenant, his opinion was based on the property's depreciated condition, the presence of competition across the street as well as a general diminishing business flow.

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10 See Page 13 of COUNCIL'S amicus brief.

11 Contrary to the assertion made on page 8 of COUNCIL'S amicus brief, this Court held in Palm Corporation v. Homer, supra, that the property appraiser could use hypothetical market rent in assessing a property under the income approach.

12 See page 18 of TAXPAYER'S answer brief.

None of these factors are related to the terms of the lease and therefore Parham's testimony violates the very principle which the TAXPAYER cites as authority. More importantly, however, the remarks of the TRIAL COURT upon which the TAXPAYER relies[13] were uttered prior to hearing, upon cross examination, Parham's admission that his opinion on these points were based on sheer speculation and therefore were of little evidentiary value. (R-238-242)[14]

It is interesting to note that Parham's opinion of the property's unencumbered value exceeded SCHULTZ'S assessment by at least 13% even though it would still "suffer" from the same poor visibility, physical condition and proximity to competition. In its argument[15] the TAXPAYER misunderstands this aspect of appraisal theory by contending that an allowance for obsolescence should be deducted from Parham's opinion of $4.5 - 4.8 million. To do so would be improper because a calculation of market rent for the subject property would take into account its location and condition. Thus, the resulting indication of market rent would reflect all internal as well as external characteristics of the property including obsolescence and nearby retail competition. If, as TAXPAYER suggests[16] SCHULTZ'S assessment was faulty in this regard, why was Parham's opinion of market value greater?

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13 See page 19 of TAXPAYER'S answer brief.

14 Parham conceded that he had no empirical data supporting his opinion that potential customers had trouble seeing the K-Mart store from the adjacent roadway and that his opinion as to competition was based solely on his observation of the immediate neighborhood. He had no access to the financial records of the competitors that he identified nor did he speak with or interview any of the managers concerning their gross sales or rental rates. He did not undertake any studies to determine whether or not K-Mart was achieving an appropriate share of the consumer marketplace at that specific location.

15 See pages 21-22 of TAXPAYER'S answer brief.

16 See page 26 of TAXPAYER'S answer brief.

II. THE FINAL JUDGMENT MUST BE OVERTURNED BECAUSE IT IS CONSTITUTIONALLY IMPERMISSIBLE TO BASE AN ASSESSMENT SOLELY ON SUB-MARKET RENT.

Despite the TAXPAYER'S assertion to the contrary, Parham's testimony was neither competent, nor substantial. Since the TRIAL COURT found that SCHULTZ had assessed the property lawfully, it could only have properly reduced the assessed value based on proof by the TAXPAYER that the assessment could not be supported by any reasonable hypothesis of legality; in other words, that it was outside the range of reasonable appraisals. Blake v. Xerox Corporation, 447 So.2d 1348 (Fla. 1984). This means that in addition to Parham's income approach, the TAXPAYER also had to offer evidence of value under the market and cost approaches and demonstrate that SCHULTZ'S assessment exceeded the value indications of all three.

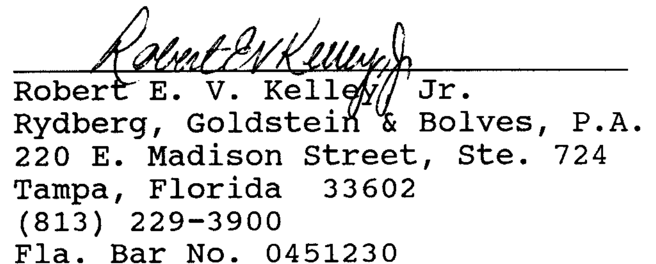
Parham's valuation of the lessor's interest in the property only took into account one of the eight factors - actual income. Any testimony that Parham considered the cost approach was nothing more than a thinly veiled attempt to clothe his opinion in legal competency. Parham's method was a discounted cash flow analysis. (R-197). The cost approach is used to value the property at the expiration of the lease, which was not to occur for another 26 years. This reversion value, which is then added to the discounted value of the lessor's right to receive contract rent over the remaining lease term, becomes so speculative as to be incompetent and not worthy of any evidentiary weight. See e.g. Muckenfuss v. Miller, 421 So.2d 170 (Fla. 5th DCA 1982); St. Joe Paper Company v. Adkinson, 400 So.2d 983 (Fla. 1st DCA 1981).

Even if Parham's testimony had included a value for the lessee's interest in the property, it still was insufficient as a matter of law upon which to base the TRIAL COURT'S judgment because it failed to consider all eight criteria and did not establish that SCHULTZ'S assessment exceeded a reasonable cost approach or market approach to value.

CONCLUSION

For the reasons expressed both herein and previously in Petitioner's initial brief, the decision of the DISTRICT COURT should be quashed, the judgment of the TRIAL COURT reversed and the case remanded with instructions to reinstate SCHULTZ's 1986 assessment of the property.

Respectfully submitted,



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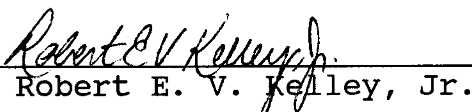
I HEREBY CERTIFY that a true of the foregoing has been furnished by U.S. Mail to those individuals listed on the attached service list, this 25th day of May, 1990.



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