8-24

IN THE SUPREME COURT OF FLORIDA

TIMOTHY "PETE" SMITH, Okaloosa County Property Appraiser; and State of Florida, DEPARTMENT OF REVENUE,

Appellants,

vs.

DONALD D. WELTON, and ANNE WELTON,

Appellees.

Case No.: 92,930

First District Court of Appeal Case No. 96-0377

First Judicial Circuit Case No. 95-3894

APPELLEES' ANSWER BRIEF

MARK WELTON
WELTON & WILLIAMSON, P.A.
1078 South Ferdon Blvd.,
Crestview, Florida 32536
(850) 682-2120

TABLE OF CONTENTS

TABLE OF CITATIONS

Additional Authority:

Constitution **Page**

PREFACE

The parties will be referred to as the Appellant and Appellee. The following symbols will be used:

(R-__)	Record on Appeal.
SOHA	Save our Homes Amendment - Article VII, Section 4(c)
CPI	Consumer Price Index as reference by formula in the SOHA Subsection (c)(1)B.
DOR	Department of Revenue of the State of Florida

POINT ON APPEAL

* * * * * *

Whether §193.155(8) Fla. Stat. (Supp. 1994) is unconstitutional on its face, coming in direct violation of Article VII, Sec. 4(c), Fla. Const.
and its clear language requiring that Homestead property be assessed as of January 1st, and that "assessment shall only change as provided herein."

STATEMENT OF THE CASE AND FACTS

This case is an appeal from a summary judgment entered where both parties moved for summary judgment, based on the depositions, affidavits, documents, and pleadings. By appellants filing for summary judgment appellants thereby asserted that there was no dispute of material fact based on the evidence. The

deposition testimony, documents attached thereto, and affidavits show that despite the Appellants' assertions in their brief to this court to the contrary, none of the property escaped taxation, and the Defendant/Appellant assessed the subject property in 1994, having been elected in 1992. Appellants have tried to avoid the fact that none of the subject property escaped taxation and that the Defendant/Appellant Timothy "Pete" Smith assessed the property at its "just value" and has never attempted to correct the 1994 assessment that he now claims either "escaped taxation" or was not at "just value". The evidence was thus undisputed that this is not a case where any property has escaped taxation as appellants attempt to suggest. Property which has escaped taxation must be back-assessed pursuant to §193.092, Fla. Stat. (1993). Nor is it a case where a property appraiser is correcting a ministerial or administrative error of omission or commission within §197.122 Fla. Stat. (1993) "For every change made to an assessment roll subsequent to certification of that roll to the tax collector pursuant to section 193.122, Florida Statutes, the property appraiser shall complete a Form DR-409, Certificate of Correction of the Tax Roll." See Fla. Admin. Code R. 12D-8.021. No form DR-409 or any other has ever been filed.

The disputed property was assessed on a lump-sum basis

because it had no utility and could not be used for anything except bare storage because of code restrictions. (Vol. II R - 215, Vol. I R 62-63). It actually was more of a burden to the remainder of the structure which had been renovated and converted for use as appellees' residence.

It is therefore imperative that the errors contained in the Appellants' brief be corrected.

This is not a standard "ad valorem property assessment challenge case" as indicated by the appellants. This was a declaratory action, upon which the lower court found that §193.155(8), Fla. Stat. (Supp. 1994), is facially unconstitutional. The SOHA was only recently passed, becoming a part of Florida's Constitution in 1993. Accordingly, the first year of application of the limitations contained in the SOHA did not go into effect until the 1995 assessments. There is therefore, no case or precedent dealing with a challenge to the actions of a Property Appraiser for violating the SOHA in the assessment of a subject Homestead property, however Section 194.171 Florida Statutes placed the matter in the jurisdiction of the Circuit Court.

The undisputed facts clearly show that in 1972, the Appellees purchased the subject property, an abandoned, U.S.

Government project community center-school, from the Okaloosa County School Board. The appellees paid $16,395 on a closed bid auction for 43 acres of land and an old school building of approximately 19,000 square feet. (Vol. I, R-93) In 1977, the Property Appraiser's records indicate that the property being assessed was completely measured and a drawing of the building was placed into the Property Appraiser's records. The assessment of the subject property was increased by Howard Hilburn, the former Okaloosa County Property Appraiser, after the Appellee, Mr. Welton completed his renovations of a small section of the building to use as his home. Mr. Welton then went to Mr. Hilburn's office to discuss the other end of the building, and the increase in assessment that Howard Hilburn had placed on that section. As a result of that meeting, Howard Hilburn decreased the assessment on the south end of the building containing 15,000 square feet, more or less, to $2,000, placing it in the "added features" section on the property record card. (Vol. II, R- 227-231 Property Record Card dated "4-13-77") According to this card, attached to the deposition of Howard Hilburn, and the affidavit of the Appellee, Donald Welton, the Okaloosa County Property Appraiser has continued to assess this section of the building as an "added feature" since at least 1977. Howard

Hilburn, acting as the Okaloosa County Property Appraiser, physically viewed the property and stated the he found the property to have "no utility" and assessed the property using the "lump sum" evaluation method. (Vol. II, R- 215) In spite of the claim by the Appellant, Timothy "Pete" Smith that this part of the property has escaped taxation, there is no record of any attempt by the Appellant to effectuate any back assessment on the subject property pursuant to §193.092 Fla. Stat. (1993), during his three years in office preceding the commencement of this action, nor has the appellant taken any steps to correct a material mistake under the "errors of omission or commission" under §197.122, Fla. Stat. (1993).

Thus, neither §193.092, Fla. Stat.(1993) nor §197.122(1), Fla. Stat. (1993) are before the court because the appellants relied on §193.155(8), Fla. Stat. (Supp. 1994). It seems apparent that the Defendant, Smith used §193.155, Fla. Stat. (Supp. 1994) because neither §193.092 Fla. Stat. (1993) nor §197.122(1), Fla. Stat. (1993) authorize him to change his judgment on the assessment of a given property when the tax rolls have been certified and the taxes paid.

The appellants attempt to somewhat suggest otherwise but admit that the property appraiser did not back-assess the

property. (Appellant's 1st DCA Brief page 3) In fact, during the deposition of Charles Patrick Castille, the Deponent stated that, as residential supervisor, he has never seen a back assessment done by this Okaloosa County Property Appraiser's Office. (Vol. I, R-106) Had back-assessment been involved in this case, §193.155(8), Fla. Stat. (Supp. 1994), could not have been used by the appellant, property appraiser.

The Defendant, Smith did not go back and change the base year assessment as required under §193.155(8)(a), Fla. Stat. (Supp. 1994)[1] the ONLY assessment which has been changed by the action of the Appellants is the 1995 assessment which is more that a 130% increase from the 1994, base year assessment, and all subsequent assessments therefore are also incorrect. (Vol. I, R-1-12, 106) The facts of this case are clear and undisputed that the Appellees have been taxed on the entire property at issue in this case since 1976. For more than twenty years, the back portion of this old school building has been taxed as an added feature, at the lump sum valuation of $2,000. **To argue that 15,000 square feet of this building, escaped taxation, is not**

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[1]If errors are made in arriving at any annual assessment under this section due to a material mistake of fact concerning an essential characteristic of the property, the assessment must be recalculated for every such year.

only preposterous, but irrelevant to this appeal.

SUMMARY OF ARGUMENT

This case clearly involves a situation of a property appraiser attempting to change his judgment as to the value of a parcel of property, using a statute which violate the SOHA. None of the property escaped taxation as the depositions, affidavits, and records of the property appraiser's office clearly show.

The issue of this case is simply whether §193.155(8), Fla. Stat. (Supp. 1994) is facially unconstitutional? The question is also simply answered by looking at this court's opinions over the past three decades dealing with ad valorem taxation and the presumption of correctness given to the judgment of a property appraiser's assessment once the tax roll has been certified and the taxes paid.

The property appraiser is attempting to change his judgment as to the proper just value and method of valuation after having assessed the property, certified the tax roll and the Appellants paid the taxes, for each of the years preceding this assessment. The property appraiser attempted to disguise his change of judgment by stating that the property was "undervalued" in prior years or that the property has escaped taxation. There are well

settled laws and cases to allow a property appraiser to back assess or to correct an error of omission or commission.

Thus an appraiser could not change his judgment before the SOHA and, certainly, the SOHA did not create a new or expanded authority to change his judgment on homestead property. In spite of this, Appellants argue that the SOHA somehow created a new or expanded authority for homestead property only. Furthermore, Florida courts have always held that once an appraiser has assessed property in a given year he cannot change it thereafter except for ministerial or administrative changes.[2]

The SOHA clearly requires that the given homestead be assessed at "just value" as of January 1, 1994, or January 1st of the year following the property becoming homestead property. This just valuation is necessary to establish the base year assessment, and despite the argument of the Appellant, whether the 1994, base year assessment was at "just value" is not an issue to be determined by this court. The only issue, is simply whether §193.155(8), Fla. Stat. (Supp. 1994) is in violation of the SOHA and therefore unconstitutional.

The SOHA is a valid amendment to the Florida Constitution

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[2] Korash v. Mills, 263 So.2d 579 (Fla. 1972); Allen v Dickinson, 223 So. 2d 310 (Fla. 1969)

containing certain very limiting parameters to changing the assessment of homestead property after the base year assessment has been made, the tax roll certified and the taxes paid. The parameters have been enlarged and expanded by §193.155(8), Fla. Stat. (Supp. 1994), clearly allowing a property appraisers to circumvent the clear wording of the SOHA based on "a material mistake of fact" which is not defined in the statute, but left to the unbridled discretion of the property appraiser or the DOR. The statute's subsections clearly do not apply to the "just value" assessment. "Homestead property shall be assessed at just value as of January 1, 1994. . . . **Thereafter**, determination of the assessed value of the property is subject to the following provisions: . . . (8) Erroneous assessments of homestead property assessed under this section may be corrected in the following manner[:]."[3] In addition, there is no limitation on how far back the property appraiser can go to correct his "material mistakes of fact", which conflicts with earlier Florida law that limits back assessment to three years under §193.092, Fla. Stat. (1993) It is Appellees' position that section 193.092, Florida Statutes is good law and not an issue in this case. If a given property

[3]§193.155(8) (Emphasis added)

has escaped taxation, the only means to back assess the property under Florida law is with §193.092, Fla. Stat. (1993), which allows back assessments limited by a three year statute of limitation.

Because §193.155(8), Fla. Stat. (Supp. 1994) enlarges and expands the limitations set forth in the SOHA with only the unbridled discretion of the property appraiser to protect the property owner, this court should affirm the decision of the District Court of Appeals, that §193.155(8), Fla. Stat. (Supp. 1994) is clearly in direct violation of the Florida Constitution, and therefore unconstitutional.

ARGUMENT

The Florida Constitution clearly requires "a just valuation of all property for ad valorem taxation, *provided:*" The Florida Constitution does require a just valuation but gives three provisos, agricultural land, tangible personal property and homestead. The very heart of just value is the application of Section 193.011, Florida Statutes, by a constitutional officer who, by law, is given the responsibility and presumption of correctness, to assess property at "just value." His "judgment" is given this presumption of correctness because "just value" is

a subjective "judgment" for which he must draw on his experience, judgment, and expertise. This court has repeated over the past three decades, that a tax assessor being a constitutional officer is clothed with the presumption of correctness and his judgment is not to be overturned except by proof that every reasonable hypothesis has been excluded which would support the tax assessor. Powell v. Kelly, 223 So.2d 305 (Fla. 1969), Straughn v. Tuck, 354 So.2d 368 (Fla. 1977), District School Board of Lee County v. Askew, 278 So.2d 272 (Fla. 1973), ITT Community Development Corp. v. Seay, 347 So.2d 1024 (Fla. 1977). As I am sure the court is aware, these are only but a few of those cases.

The Appellants, in their brief, would have you believe that the property was never assessed at "just value" as of January 1, 1994 and that based on this proposed failure of the Appellant, Smith, they must be allowed to change future assessments to correct the alleged mistake. The Appellants further argue that a windfall would occur should this court find that the statute is unconstitutional, and that such a decision would allow the property to go on unassessed. This of course is incorrect since the legislature has dealt with the issue by long ago enacting Section 193.092, Florida Statutes. If any part of the subject property has escaped taxation, the property appraiser has, not

the option, but the obligation to back-assess the property.[4] The statute in question, §193.155(8), Fla. Stat. (Supp. 1994), only applies after homestead property has been assessed at "just value" which is contrary to the basis of their argument.

Appellants are attempting to argue that as a result of the SOHA, a property appraiser may now do something which the law and the court have never previously allowed, change his judgment when he believes he has made a mistake and to revisit each homestead property each year and adjust the value from January 1, 1995, forward, ad infinitum. One must gather from the property appraiser's argument, that the SOHA created a new, enlarged and expanded authority of property appraisers for homestead assessments only.

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[4] "When it shall appear that any ad valorem tax might have been lawfully assessed or collected upon any property in the state, but that such tax was not lawfully assessed or levied, and has not been collected for any year with any period of 3 years next preceding the year in which is ascertained that such tax has not been assessed, or levied, or collected, then the officers authorized **shall** make the assessment of taxes upon such property in addition to the assessment of such property for the current year, and shall assess the same separately for such property as may have escaped taxation at and upon the basis of valuation applied to such property for the year or years in which it escaped taxation, noting distinctly the year when such property escaped taxation and such assessment shall have the same force in effect as it would have had if it had been made in the year in which the property shall have escaped taxation[,]." §193.092 Fla. Stat. (1995) (emphasis added)

As to the first argument, the constitution has always required that property be assessed at just value and the date for assessment has always been January 1.[5] All that the SOHA did was fix the January 1 date as a base year assessment and place limitations on the increases of that assessment. To argue that SOHA created a new duty and changed 100 years of law so that property appraisers can now, on homestead property alone, each year revisit the value of each homestead as of January 1, is ludicrous. Korash v. Mills, 263 So. 2d 579 (Fla. 1972) stated the principles as follows:

> It is the judgment of the assessor that is involved: if he seeks to change his judgment on a valuation which properly includes all of the "real property" as defined in the statute section 192.001(12), after certification of the tax roll, a change "reevaluating" the amount will not be allowed, in accordance with our previous holdings.[6]
>
> We adhere to the decisions in those situations because of the inherent evils which would allow belated adjustments upward and downward, creating instability and causing inequitable future variances between buyers and sellers regarding tax proportions and obligations.[7]

§193.155(8), Fla. Stat. (Supp. 1994) provides:

> Homestead property shall be **assessed at just value**

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[5] See § 193.042, Fla. Stat. (1993)

[6] Korash, 363 So. 2d at 581.

[7] Id. at 582.

> **as of January 1, 1994.** Property receiving the homestead exemption after January 1, 1994, shall be assessed at just value as of January 1 of the year in which the property receives the exemption. ***Thereafter, determination of the assessed value of the property is subject to the following provisions:***
>
> [sections 1-7 omitted]
>
> (8) Erroneous assessments of homestead property assessed under this section may be corrected in the following manner:
>
> (a) If errors are made in arriving at **any annual** assessment **under this section** due to a material mistake of fact concerning an essential characteristic of the property, the assessment must be recalculated for every such year.
>
> (b) If changes, additions, or improvements are not assessed at just value as of the first January 1 after they were substantially completed, the property appraiser shall determine the just value for such changes, additions, or improvements for the year they were substantially completed. Assessments for subsequent years shall be corrected, applying this section if applicable.
>
> If back taxes are due pursuant to Sec. 193.092, the corrections made pursuant to this subsection shall be used to calculate such back taxes.[8]

Clearly, if as the Appellants argue, the property had not been assessed at "just value" based on 15,000 square feet of the building having escaped taxation, the Property Appraiser should not have even looked to Section 193.155,Florida Statutes, but is

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[8]§193.155(8), Fla. Stat. (Supp. 1994) (Emphasis added).

required to back-assess according to §193.092, Fla. Stat. (1993). The subject statute §193.155, Fla. Stat. (Supp. 1994), states clearly that the provisions contained therein only are to be applied **after** the property has been assessed at "just value."

"Thereafter" in the opening paragraph is defined in Black's Law Dictionary as "After the time last mentioned; after that; after that time; afterward; subsequently; thenceforth."[9] I had a professor in law school tell me, "When you are trying to understand a passage, look for the words such as, 'therefore,' 'wherefore,' 'shall,' 'may,' 'should,' 'thereafter,' [etc.]" He was trying to teach me the importance of words in understanding the law, and the way that one word can change the entire meaning of a statute. An ideal case to explain this just happens to be related to the Save Our Homes Amendment, ("SOHA"). In Florida League of Cities v Smith, 607 So. 2d 397, (Fla. 1992), the Supreme Court heard a mandamus action seeking the removal of the SOHA from the November 1992 ballot. The League of Cities argued that the SOHA would trigger Art. VII, §6(d), Fla. Const.: "This subsection shall stand repealed on the effective date of any amendment to section 4 [Florida Constitution] which provides for

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[9]Black's Law Dictionary, 1325 (5th ed. 1979).

the assessment of homestead at a specified percentage of its just value." The Petitioners wanted the SOHA pulled off the ballot because the initiative petition summary failed to disclose that the SOHA would effectively repeal the $20,000 exemption contained in Section 6(d)of the Florida Constitution. The court however, did not see the SOHA as triggering the repeal wording of Section 6(d)of the Florida Constitution. The court keyed in on one word, "specified." In fact the court went on to state the definition of the word from both Black's Law Dictionary, 1399 (6th ed. 1991) and Webster's Third New International Dictionary, 1412 (1981). The court concluded the paragraph stating, "Thus, a 'specified percentage' is one that is both stated and precise."[10] The court went on to state the well settled law in Florida as to constitutional interpretation, "In any event, the law is settled that when constitutional language is precise, its **exact letter must be enforced** and extrinsic guides to construction are not allowed to defeat the plain language."[11] The SOHA, Art. VII, §4(c), Fla. Const. is precise and unambiguous in that it places

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[10]Florida League of Cities v. Smith, 607 So. 2d 397, 399 (Fla. 1992).

[11]Id. at 400, citing, State ex rel. West v Gray, 74 So. 2d 114 (Fla. 1954); City of Jacksonville v Continental Can Co., 113 Fla. 168, 151 So. 488 (1933). (Emphasis added)

an affirmative duty to make a base assessment of "just value" at a given time and then limits the changes to **that assessment** as outlined in the amendment. The plain wording of §193.155, Fla. Stat., (Supp. 1994) clearly states that subsections 1-8 apply only after the "just value" assessment is completed.

By reading the entire Art. VII, § 4, Fla. Const. it is obvious that the language is clear and precise.

> § 4. Taxation; assessments
>
> By general law regulations shall be prescribed which shall secure a just valuation of all property for ad valorem taxation, **provided**:
>
> (a) Agricultural land, land producing high water recharge to Florida's aquifers or land used exclusively for non-commercial recreational purposes may be classified by general law and assessed solely on the basis of character or use.
>
> (b) Pursuant to general law tangible personal property held for sale as stock in trade and livestock may be valued for taxation at a specified percentage of its value, may be classified for tax purposes, or may be exempted from taxation.
>
> (c) All persons entitled to a homestead exemption under Section 6 of this Article shall have their homestead assessed at just value as of January 1 of the year following the effective date of this amendment. **This assessment shall change only as provided herein.**
>
> 1. Assessments subject to this provision

shall be changed annually on January 1st of each year; but those changes in assessments shall not exceed the lower of the following:

(A) three percent (3%) of the assessment for the prior year.

(B) the percent change in the Consumer Price Index for all urban consumers, U.S. City Average, all items 1967=100, or successor reports for the preceding calendar year as initially reported by the United States Department of Labor, Bureau of Labor Statistics.

2. No assessment shall exceed just value.

3. After any change of ownership, as provided by general law, homestead property shall be assessed at just value as of January 1 of the following year. Thereafter, the homestead shall be assessed as provided herein.

4. New homestead property shall be assessed at just value as of January 1st of the year following the establishment of the homestead. That assessment shall only change as provided herein.

5. Changes, additions, reductions or improvements to homestead property shall be assessed as provided for by general law; provided, however, after the adjustment for any change, addition, reduction or improvement, the property shall be assessed as provided herein.

6. In the event of a termination of homestead status, the property shall be assessed as provided by general law.

7. The provisions of this amendment are

> severable. If any of the provisions of this amendment shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any remaining provisions of this amendment.

Art. VII, § 4 Fla. Const. (Emphasis Added)

It is clear from years of Florida case law that all property is to be assessed each year at "just value."[12] However the opening paragraph of Art. VII, §4, Fla. Const. does not stop at the "just value" requirement. The paragraph adds an additional thought with the word "provided[:]". Black's Law Dictionary, defines "provided" as a "word used in introducing a proviso *(q.v.)*. Ordinarily it signifies or expresses a condition; but this is no invariable, for, according to the context, it may import a covenant, or a limitation or qualification, or a restraint, modification, or **exception to something which precedes.**"[13] It would appear both from the clear wording and from surrounding case law, that the "provided" means that the three classifications of property in Florida Constitution, Sections 4(a), 4(b), and 4(c) are exceptions to the "just value"

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[12]See, Escambia County Chemical Corp. v. Fisher, 277 So. 2d 307 (Fla. 1st DCA 1973).

[13]Black's Law Dictionary 1102 (5th ed. 1979) (Emphasis added)

requirement. Art. VII, § 4(a), Fla. Const. deals with the assessment of agricultural property which is assessed at a percentage of "just value", and Section 4(b) is tangible property, also assessed at a percentage of its value, and Section 4(c) requires that an assessment be made at "just value" on January 1st of the year following the effective date of the amendment, which the Florida Supreme court has previously determined to be January 1, 1994.[14] The Fuchs case was brought by the Lee County Property Appraiser, who also happened to be the drafter of the SOHA. He brought a declaratory action, arguing that the effective date of the amendment was to be the date it was passed by the voters of the State of Florida. This would have been true had the amendment stated this date as the effective date. However, because the amendment did not state an effective date, this triggered a constitutional provision making the first Tuesday after the first Monday in January following the passage of the amendment, the effective date.[15] This court determined this to be January 5, 1993, "[thus, 1994 becomes [sic] the base year upon which the assessed 'just value' of the

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[14]Fuchs v. Wilkinson, 630 So. 2d 1044, (Fla. 1994)

[15]Art. XI, §5(c), Fla. Const.

homestead property is determined, and January 1, 1995, becomes [sic] the first tax year in which the limitations in Amendment 10 are used to calculate the 'tax value' of homestead property."[16] This court went on to state the requirements of the Amendment:

> Consequently, from the plain reading of the amendment, January 1, 1994 (the year following the effective date of the amendment), is the date homestead property is to be 'assessed at just value.' **Thereafter, any increase in the assessed value of homestead property may be accomplished only as provided in the amendment**; i.e., each January 1 any increase in assessed value may not exceed 3% of the assessment for the prior year or the percent of change in the Consumer Price Index, whichever is lower.[17] (Emphasis added)

It is clear from this very case that this Court is not only aware of the amendment, but has already given its opinion that the base assessment in the first paragraph of Section 4(c), Florida Constitution can only change as provided in that section of the amendment. In Sparkman v State ex rel. Scott, 58 So. 2d 431 (Fla. 1952), this court was faced with a somewhat similar situation. Mr. Scott was a relator challenging the validity of a statute providing that in order for a person to apply for homestead exemption, he must have been a legal citizen in the

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[16]Fuch at 1046.

[17]Fuch (Emphasis added)

State of Florida for at least one year. Mr. Scott successfully argued in the Circuit Court, that this one year requirement was in violation of Art. X, §7, Fla. Const. The Tax Assessor, William Sparkman appealed. The issue on appeal was:

> [W]hether the fixing in the statute of the residential requirement of one year as a condition precedent to the right of an owner to claim homestead exemption is within the authority granted to the Legislature by the last sentence of Section 7, Article X of the Constitution; i.e. to 'prescribe appropriate and reasonable laws regulating the manner of establishing the right to said exemption'; or is an unlawful attempt by the Legislature to alter, contract, or enlarge Section 7, Article X, by legislative enactment, contrary to the express pronouncements of this court that '**Express or implied provisions of the Constitution cannot be altered, contracted or enlarged by legislative enactments.**'[18]

Chief Justice Sebring reasoned that Section 7 of the Florida Constitution created a class of people who were entitled to homestead exemption using the words, "Every person who has legal . . .", whereas the challenged statute had a class of people limited to only those people who had been residents for one year or more. This court concluded, "We think it plain that the statute involved falls into the latter category[,]" an unlawful attempt by the Legislature to alter, contract, or enlarge the

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[18] Sparkman at 432, Quoting State ex rel. West v. Butler, 70 Fla. 102, 69 So. 771, 777 (1915), and Amos v. Mathews, 99 Fla. 1, 126 So. 208 (1930).

constitution.[19] The challenged statute before this court is very similar to the statute in Sparkman in that it adds additional ways to change the assessment of homestead property after the base assessment of "just value", which are not included in the SOHA. The practical operation of §193.155, Fla. Stat. (Supp.1994) is a clear violation of the "only as provided herein" wording found in the SOHA.

An understanding of the assessment process for ad valorem taxation of non-homestead real property is required in order to understand why the subject statute violates the SOHA. In order to appraise a parcel of non-homestead real property, the property appraiser's office analyzes data on sales of comparable property and considers the eight factors set forth in §193.011, Fla. Stat. (1993). The appraiser then arrives at a figure that he believes in his judgment, to be just value after considering all the requirements and factors set forth under Florida law. This value he places on the property is a subjective figure which is within his discretion and expertise, within the confines of the requirements of state law and Department of Revenue regulations. The law requires that the property appraiser go through this

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[19]Id. (Emphasis/restatement of the issue added)

process every year for every piece of non-homestead property in the county. (See, Escambia County Chemical Corp. v. Fisher, 277 So. 2d 307, 308 (Fla. 1st DCA 1973).) After the property appraiser has arrived at a figure for just value for every parcel of non-homestead property in the state, TRIM[20] notices are sent out, and the process for appealing to either the Property Appraiser or the value adjustment board is carried out. After completion of the value adjustment board hearings, the board will certify the tax roll. The Property Appraiser must then approve and certify the roll to the tax collector, and the tax notices go out and are paid by the owner of the particular parcel of land. The value placed on that property by the property appraiser is now presumptively at just value for that given year[21] and can only be changed if some property "escaped taxation" or there are ministerial errors of omission or commission.[22]

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[20]TRIM (Truth in Millage)

[21]See, Bystrom v. Whitman, 488 So. 2d 520 (Fla. 1986), Blake v. Xerox Corp., 447 So. 2d 1348 (Fla. 1984), Scripps Howard Cable Co. v. Havill, 665 So. 2d 1071 (Fla. 5th DCA 1995),Upheld by this court in Havill v. Scripps Howard Cable Co.,23 Fla. L. Weekly S234, and Op. Att'y. Gen. Fla. 91-95 (1991).

[22]Countryside Country Club, Inc. v Smith, 573 So. 2d 14, (2nd DCA 1990), Markham v Friedland, 245 So. 2d 645 (4th DCA 1971), District School Bd. Of Lee County v. Askew, 278 So. 2d 272 (Fla. 1973).

In the case of Countryside Country Club, Inc. v Smith, 573 So. 2d 14, a corporation owned a golf course and country club for which the assessments of the property for the years 1985-1987 were in dispute. The court found in favor of the Pinellas County Appraiser, but in so doing, the court also opined: "Although a Property Appraiser is allowed to correct clerical errors[23] and to assess back taxes on property that has previously escaped taxation,[24] **he is not allowed to reassess property after the tax roll has been certified for a certain year and the tax levied thereon paid, even though he mistakenly, inadvertently or negligently assessed the property."**[25]

The ruling of the Countryside court and the very essence of §193.122, Fla. Stat. (1993) is for the Property Appraiser to certify the tax roll to the tax collector only after "satisfying himself that all property is properly taxed[.]"[26] This means that if, at a later date, the appraiser decides that he made a mistake and undervalued the property in a previous appraisal, the

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[23]Id. at 16. Citing §197.142, Fla. Stat. (1987).

[24]Id. Citing §193.092, Fla. Stat. (1987)

[25]Id. Quoting Markham v Friedland, 245 So. 2d 645 (4th DCA 1971).

[26]§193.122(2), Fla. Stat. (1993).

appraiser cannot change that previous appraisal.

This matter is also outlined in the opinion of Attorney General Butterworth, in his response to a question from the Department of Revenue concerning refunds pursuant to section 197.182, Florida Statutes (1993). In that opinion the Attorney General Butterworth stated,

> "Upon completion . . . the property appraiser is required to certify the tax rolls. This act has historically been viewed as signifying the termination of the primary jurisdiction of the property appraiser. It is presumed that the property appraiser has performed his duties properly and the assessments are proper. Once the property appraiser has certified the tax rolls to the tax collector for collection, no subsequent changes may be made by the property appraiser to the tax rolls which result from a change in judgment. **While the property appraiser and the tax collector each have authority to correct errors of omission or commission at any time, this authority is limited to the correction of clerical or administrative errors."**[27]

In the case of non-homestead property, if the appraiser feels there is a problem with his previous judgment, he can simply change the value for the property on the next year's assessment, based on his new judgment that the property is worth more than what he appraised it for during the previous appraisal

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[27]Op. Att'y. Gen. Fla. 91-95 (1991). Citing State v Thursby, 104 Fla. 103, 139 So. 372, 376 (Fla. 1932), Powell v Kelly, 223 So. 2d 305 (Fla. 1969) Korash v. Mills, 263 So. 2d 579 (Fla.1972) and Markham. (Emphasis added.)

year.

Keeping the procedure for non-homestead real property assessment in mind, now consider the SOHA, Art. VII, §4(c), Fla. Const. The words of limitation, "this assessment shall change only as provided herein" clearly states that all assessments of homestead property after the base year assessment can only change as provided in that section of Article VII of the Florida Constitution. This means that homestead property is no longer assessed every year like non-homestead property is assessed. The amendment contemplates and assumes that after the base year assessment, homestead property will NOT be assessed each year at its "just value". In the well reasoned opinion of the District Court, Judge Booth acknowledges the fact that the very language of the SOHA "mandates the special or "inequitable" taxation." Smith v. Welton, 710 So.2d 135, 137 (1st DCA 1998)

The amendment requires that the property owner "shall have their homestead assessed at just value as of January 1 of the year following the effective date of this amendment." "Just value" no longer becomes the standard for the assessment of homestead property, but each year's increase must be based on either 3% or the change in the CPI, whichever is lower, capped only by "just value". Unlike the position taken by Judge Van

Nortwick in his dissent on this matter: "Rather than violating the constitutional mandate, by section 193.155(8)(a), Florida Statutes, the Legislature is attempting to insurer that all Florida Homestead's would be assessed at just value as required by the Constitution." the constitution requires "just value" on all property "provided" homestead property is treated differently.

What the Defendants/Appellants now argue, is that a Property Appraiser "may rely on the 'material mistake of fact' provision of section 193.155 (8)(a), Florida Statutes to remedy an error in a homestead assessment so that the assessment will correctly reflect just value." The SOHA amendment does not require that each years assessment reflect just value, only that after the property has been assessed in 1994 at just value, that the assessment shall only change as provided within the SOHA. The Defendants/Appellants go on to argue that,

> "The First District aired when it found that section 193.155(8), Florida statutes was unconstitutional and could not be relied upon to remedy an error in an incorrect assessment which was due to a material mistake of fact, as opposed to a change in judgment on the part of the Property Appraiser. Appellants' position throughout this litigation has consistently been that the 1994 value never constituted 'just value' because it was based upon incorrect data. As a result a portion of appellees' property escape taxation for 1994 which, intern, resulted in a 'base year' assessment below 'just value'." (P. 6 Appellants' Joint Initial Brief)

If in fact the plaintiffs property had escape taxation in 1994, the property appraiser is clearly and legally required to assess such property under §193.092, Fla. Stat. (1993) and under that same section, is required to back assess such property for every such year that the property has escaped taxation, up to three years back. The appellants also argue that if §193.155(8), Fla. Stat. (Supp. 1994) cannot be used to correct this error, and place the property back on the rolls, then the Plaintiff will receive a "windfall." This of course is not only false, but irrelevant and factually incorrect. Florida law is well settled, that §197.122, Fla. Stat.(1993), establishes a tax lien that attaches to all property that is not exempt as of January 1 of each year, and the only way to satisfy the lien is to pay it. Florida law has well established statutes and case law concerning what to do when property has actually escaped taxation,[28] but this is not an issue before the court either, although it does provide the proper foundation for the issue at hand. If a given homestead property had been assessed, and part of the property had escaped taxation, then only the part of the property assessed, will be subject to the limitations of the SOHA. When

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[28]§193.092, Fla. Stat. (1993) and Markham.

the missed property is discovered the law requires that the property appraiser "shall make the assessment of taxes upon such property . . . and shall assess the same separately for such property as may have escaped taxation . . .."[29] Utilization of the back assessment statute not only takes care of the assessment but relates the assessment back to the date required under the amendment as long as it does not exceed the three year limitation.

The clear wording of the SOHA limits any change to the base assessment to that which is provided within Section 4(c), Florida Constitution. However, an assessment made in 1994, on a parcel, part of which has escaped taxation, is only partly limited by the amendment. The portion of the property that was assessed "shall change only as provided herein" while the part of the property that escaped taxation must still be assessed as of January 1, 1994, or January 1, of the year after which the property receives homestead exemption, not to exceed 3 years back.

If the Appellant, Mr. Smith believed that the 1994 assessment appellees' property was not at "just value" because part of the property escaped taxation, he was required to change

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[29]§193.092, Fla. Stat. (1993).

the 1994 assessment by the established state law in place to change such an assessment.[30] Nothing in Section 4(c), Florida Constitution requires that any other year other than the 1994 assessment, of the subject property, be at just value. The only way Mr. Smith can change the January 1, 1994 assessment is, if in fact, part of the property escaped taxation and he uses §193.092, Fla. Stat. (1993) to back assess the property. The greatest problem for the Appellant is that no part of Mr. Welton's property ever escaped taxation. Even if it had, the proper remedy for the Appellant would not have been §193.155, Fla. Stat. (Supp. 1994) but §193.092, Fla. Stat. (1993).

An assessment that is made, placed on the tax rolls, certified, not objected to by the DOR or the taxpayer, and the tax paid, is presumptively at "just value" based on numerous decisions by this court and the DCAs in the state of Florida.[31] Since just value is a judgment call on the part of the property appraiser, there has to be a time when that judgment is locked into place and that has historically been after certification of

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[30]Id. and §193.122 Fla. Stat. (1993)

[31]See, Bystrom v. Whitman, 488 So. 2d 520 (Fla. 1986), Blake v. Xerox Corp., 447 So. 2d 1348 (Fla. 1984), Scripps Howard Cable Co. v. Havill, 665 So. 2d 1071 (Fla. 5th DCA 1995), and Op. Att'y. Gen. Fla. 91-95 (1991).

the tax roll to the tax collector.[32] If Mr. Welton's property was undervalued in the opinion of Mr. Smith, it is Mr. Smith who must answer to the taxpayers of Okaloosa county, for the only "errors capable of correction under statute are oversights of clerical or ministerial variety, not willful deception or errors in judgment."[33]

§193.155(8), Fla. Stat. (Supp. 1994) can not be interpreted in a way to be consistent with Art. VII, §4(c), Fla. Const. nor does a finding that it is unconstitutional create a windfall to some property owners. There is only one way to read the subject statute and that is the way it is written, with introduction and all.

Finding that §193.155(8), Fla. Stat. (Supp. 1994) to be constitutional, would clearly be allowing an alteration or enlargement by legislative action[34] of the limitations contained in Art. VII, §4(c), Fla. Const.. The wording of §193.155(8), Fla. Stat. (Supp. 1994) clearly says that "[i]f errors are made

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[32]See, Footnotes 21 and 22, supra

[33]Footnote 27, Op. Att'y. Gen. Fla. 91-95 (1991).

[34]Fuch at 432, Quoting State ex rel. West v. Butler, 70 Fla. 102, 69 So. 771, 777 (1915), and Amos v. Mathews, 99 Fla. 1, 126 So. 208 (1930).

in arriving at any annual assessment . . ." thereby giving an open door to any property appraisers in this state to change a homestead assessment for mistakes of judgment, changes in evaluation, or any manner within the broad definition of "material mistake" for **ANY** year. That means that if my property is assessed in 1994, without any part of it having escaped taxation, and in the year 2020 it is discovered that my house is not wood but brick, the property appraiser may change the assessments for all twenty six years. This statute contains no limitation on time span, nor does it comply with the mandates of Florida Statutes sections 193.092, 197.122 or 193.122.

To illustrate the arguments above, consider the following example. I own a house and an acre of land close to an interstate highway. The government decides that they are going to put an interstate exit, accessing the road on which my house is located. The market value of my property has easily just doubled. If that is my homestead property and has been since January 1, 1994, that additional value cannot be placed on the tax rolls according to Article VII, section 4(c) of the Florida Constitution, except at an incremental rate of the lesser of three percent or the Consumer Price Index, per year. There has been a mistake of fact as to the value of the property as a

relates to the interstate on ramp, but no property has escaped taxation, yet my homestead will not be assessed at just value, it was already assessed at "just value" as of January 1, 1994. This can be the only interpretation of Art. VII, §4(c), Fla. Const. According to Appellants' argument, the property appraiser could use §193.155(8), Fla. Stat. (Supp. 1994) and claim that the material mistake of fact exists which allows him to increase the assessment of my property this year with total disregard for the restrictions and limitations required in the Florida Constitution under Art. VII, §4(c), Fla. Const. The property appraiser would declare that the mistake was not considering an interstate exit on the same road as my house which materially affects the value of my property. This use of §193.155(8), Fla. Stat. (Supp. 1994) clearly destroys the intent behind the SOHA which is to protect those on fixed incomes from increases in their homestead property values due to circumstances beyond their control.

CONCLUSION

The question before this court is whether §193.155(8), Fla. Stat. (Supp. 1994) is unconstitutional on its face, coming in direct violation of Art. VII, §4(c), Fla. Const. and its clear language requiring that Homestead property be assessed as of January 1st, and that, that "assessment shall only change as

provided herein[?]"

This question should be answered with a resounding yes. The well reasoned opinion written by Judge Booth clearly outlines the reasoning this court should adopt in finding that the section in dispute clearly violates the limitations of, and expands the parameters of the SOHA.

Given the status of the law, the fact scenarios are not important to resolve the one issue before this court, only helpful. The SOHA, a valid amendment to the Florida Constitution contains certain, very important, limiting parameters to the assessment of homestead property after the base year assessment. These limitations have been altered and enlarged by the legislative enactment, §193.155(8), Fla. Stat. (Supp. 1994) making that section of the Florida Statutes facially unconstitutional. For this reason alone, the court must affirm the District Court's decision that §193.155(8), Fla. Stat. (Supp. 1994) is unconstitutional on its face.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to **JOHN C. DENT, JR., DENT & COOK,**

330 South Orange Avenue, Sarasota, FL 34236 and Joseph C. Mellichamp, III, Attorney General's Office, Tax Section, Capitol Building, Tallahassee, FL 32399-2142 via regular U.S. Mail on this 27th day of July, 1998.

MARK H. WELTON
WELTON & WILLIAMSON, P.A.
Attorney for Appellees
1078 S. Ferdon Blvd., Suite B
Crestview, Florida 32536
(850) 682-2120
Florida Bar No. 999202