IN THE SUPREME COURT OF FLORIDA

LAWRENCE FUCHS, et al.,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 96,182
	)	
JOEL W. ROBBINS, et al.,	)	
	)	
Respondent.	)	
	)	
THE MIAMI BEACH OCEAN RESORT, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 96,183
	)	
JOEL W. ROBBINS, et al.,	)	
	)	
Respondent.	)	

BRIEF OF AMICUS CURIAE THE ST. JOE COMPANY
IN SUPPORT OF THE PETITIONERS

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Statement of the Facts and of the Case

Amicus Curiae The St. Joe Company ("St. Joe") adopts the Statement of the Facts and of the Case as presented by the Petitioners.

Statement of Interest

St. Joe is a publicly held Florida corporation and, with ownership of more than 1 million acres of real property in 29 counties, St. Joe is Florida's largest private landowner. St. Joe is actively engaged in the business of making improvements to real property. Included among its business activities are development of master-planned communities and residential subdivisions, commercial and industrial facilities, and resorts throughout the state. For these reasons, St. Joe is substantially affected by constitutional and legislative policy decisions regarding ad valorem taxation.

In light of its experience as a landowner and developer in many counties, St. Joe offers this Court a unique perspective on the certainty and predictability which section 192.042(1), Florida Statutes, provides to every taxpayer who constructs an improvement to real property. Additionally, St. Joe identifies for the Court the practical ramifications that would result if the statute were held unconstitutional. Finally, because St. Joe has been involved in various policymaking initiatives related to section 192.042(1) in recent years, it offers this Court an informed perspective on the public policy rationale underlying that statute, as well as the alternatives to that statute which have been considered and rejected.

Summary of the Argument

The process by which real property is appraised for ad valorem tax purposes is an art, not a science. It is inherently inexact. Pursuant to the mandate in Article VII, section 4 of the Florida Constitution, the Legislature over many years has established a system which attempts to further a variety of competing values in a balanced and reasonable manner. Section 192.042(1), Florida Statutes, is a component of that system and prescribes guidelines for valuation of incomplete improvements for property tax purposes in an effort to infuse uniformity, predictability and certainty into ad valorem taxation notwithstanding the inherent imprecision of the appraisal process.

The statute's bright-line rule provides predictability and certainty to every taxpayer who constructs an improvement to real property. It also provides predictability and certainty in the assessment rolls which serve as the basis for revenue projections in the local government budget-making process. The Legislature's policy decision in section 192.042(1) is based upon the consideration and rejection of alternatives, such as partial-year taxation, which impose greater administrative burdens on local governments and provide less predictability and certainty for everyone.

Given the inherent inexactitude of the property appraisal process and the need to balance many competing concerns, section 192.042(1) represents a rational policy

choice by the Legislature. In its en banc decision, the Third District Court of Appeal has in effect second-guessed this legislative policy choice. This Court should reverse the Third District because its decision is inconsistent with the long-standing policy of judicial deference to legislative enactments dealing with ad valorem taxation. This Court should leave this ad valorem tax policy issue to the Legislature.

Argument

I. SECTION 192.042(1), FLORIDA STATUTES, INFUSES UNIFORMITY, PREDICTABILITY AND CERTAINTY INTO THE AD VALOREM TAX SCHEME ESTABLISHED BY THE LEGISLATURE PURSUANT TO ARTICLE VII, SECTION 4 OF THE FLORIDA CONSTITUTION.

The appraisal process by which just valuation of property is secured for ad valorem tax purposes is an art, not a science. Contrary to the description of the appraisal process by the Third District, Fuchs v. Robbins, 24 Fla. L. Weekly D1529, D1530 (Fla. 3rd DCA June 30, 1999) (en banc), the process of placing a value on real property for ad valorem tax purposes is inherently inexact. In discussing the appraisal process, one expert explained:

> An appraisal is an economic analysis under uncertain conditions and thus can be expressed only in the terms of probability. No appraiser is capable of giving a precise figure in his prediction of probable selling price. At best, he can define a range of prices within which the selling price would probably fall, and in some cases, he may have sufficient information to be able to express his judgment on the probability of falling at various points within the range.

Richard Radcliff, Readings in Market Value, American Institute of Real Estate Appraisers (1981). In a similar vein, U.S. District Judge Jenkins wrote:

> . . . Absent a miracle of time, place and circumstance – willing buyer, willing seller, high noon, January 1, 1984 for example – true market value for purposes of ad valorem taxation is always an estimate, always an expression of judgment, always a result built on a foundation of suppositions about knowledgeable and willing buyers and sellers, endowed with money and desire, whose desires are said to converge in a dollar description of the asset. **All of this is simply a sophisticated**

> **effort at "let's pretend" or "modeling" in modern jargon, and all of it involves judgment. Not natural law, not science – judgment.**

Union Pacific R.R. Co. v. State Tax Comm'n of Utah, 716 F.Supp. 543, 554 (D. Utah 1988) (emphasis added). Accord Powell v. Kelly, 223 So.2d 305, 309 (Fla. 1969).

Pursuant to the mandate in Article VII, section 4 of the Florida Constitution, the Legislature has enacted a statutory scheme designed to infuse uniformity, predictability and certainty into the inherently inexact appraisal process. A significant element of that uniformity, predictability and certainty will be lost if this Court affirms the decision of the court below and invalidates section 192.042(1), Florida Statutes.[1] If section 192.042(1) is invalidated, property appraisers will have no guidance as to the proper standards to apply when valuing incomplete improvements to real

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[1] Of course, this Court need not reach the constitutional question if it determines that the court below erred when it held that the property appraiser had standing to challenge the constitutionality of section 192.042(1). See Fuchs, 24 Fla. L. Weekly at D1532 (Sorondo, J., concurring). St. Joe will not reiterate the arguments on this point made by the Petitioners and amici, but refers the Court to Turner v. Hillsborough County Aviation Authority, 24 Fla. L. Weekly D2034 (Fla. 2nd DCA Sept. 3, 1999), in which the Second District Court of Appeal held that the property appraiser did not have standing to challenge the constitutionality of an ad valorem tax exemption statute, section 196.012(6), Florida Statutes (1997). If this Court chooses to address the standing issue which was summarily addressed in the Third District's en banc opinion, St. Joe encourages the Court to adopt the Second District's reasoning that a property appraiser may not circumvent settled rules which prohibit an appraiser from challenging the constitutionality of a tax statute "by denying the exemption based on his belief that it is unconstitutional and then be allowed to ask the court to approve his disobedience by upholding his denial." Id. at D2036.

property.[2] Taxpayers who own and develop property in more than one county, such as St. Joe, will face the prospect of property appraisers throughout the state applying differing standards – or applying similar standards differently – when appraising incomplete improvements for ad valorem tax purposes.

In adopting the bright-line rule of section 192.042(1), the Legislature has struck a balance, among a variety of concerns, that provides uniformity, predictability and certainty for everyone. And in striking the appropriate balance, the Legislature has not embraced an all-or-nothing taxation scheme. Rather, section 192.042(1) represents a common sense, rational legislative decision that the value of an incomplete improvement on January 1 is zero if it cannot be used "for the purpose for which it was constructed."

In light of the problems associated with the potential alternatives to section 192.042(1), it is apparent that the Third District's decision, if upheld, would create

[2] For ease of reference, St. Joe will use the phrase "incomplete improvement" when referring to an improvement to real property which is not "substantially complete" as that phrase is defined in section 192.042(1).

more problems than it solves.[3] The decision to retain or eliminate the bright-line rule of section 192.042(1) is vested in the Legislature because, unlike the judicial branch, it has been given the constitutional charge to address the myriad of administrative issues – such as the "timing" for putting property improvements on the tax rolls, Collier County v. Florida, 733 So.2d 1012, 1019 (Fla. 1999) – that must be decided when establishing the ad valorem tax system for this large and diverse state.

The legislative rationale underlying section 192.042(1) becomes more apparent when the standard appraisal methodologies are applied to incomplete improvements. See Fuchs, 24 Fla. L. Weekly at D1530 (discussing the three standard appraisal methodologies: "comparable sales approach"; "cost approach"; and "income approach"). Those methodologies were developed to ameliorate the inherent imprecision in the appraisal process in an effort to better determine just valuation. They are not as easily applied to incomplete improvements as the Third District suggests.

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[3] If the current ad valorem tax system creates a windfall for some taxpayers because incomplete improvements are not taxed, Fuchs, 24 Fla. L. Weekly at D1530, D1533 n. 4-5, it also creates a windfall for local governments because improvements destroyed or substantially damaged (i.e., damaged to the extent that they cannot be used for the purpose for which they were constructed) after January 1 are still taxed at their January 1 assessed value. No adjustment to the tax rolls is made to account for the reduction in value due to such damage. Judicial invalidation of the bright-line rule of section 192.042(1) would not impose a more balanced or equitable system; it would judicially alter the balance set by the Legislature.

First, the "comparable sales approach" allows the property appraiser to value the property based upon the price at which similar properties have been bought and sold. See 12 Thompson on Real Property § 97.07(f)(1) (David A. Thomas ed. 1994). In determining whether a sale is "comparable," the appraiser must evaluate the physical characteristics of the properties, the location of the properties, as well as other factors and market conditions. Because the sale of incomplete improvements to real property is a rare exception rather than the norm, it is unlikely that a "comparable sale" would exist. Moreover, the difficulty in using the comparable sales approach to value incomplete improvements would be exacerbated by comparisons of properties in various stages of completion. The potential for variables in the stage of completion – e.g, differing components completed, different development sequences – makes it difficult to imagine that a true "comparable sale" could be found or that the comparable sales approach could be used with anything approaching exactitude to appraise incomplete improvements.

Next, the "cost approach," which allows the appraiser to value the property based upon its replacement cost, Thompson on Real Property, supra, is mentioned by the court below as a viable alternative appraisal methodology for incomplete improvements, Fuchs, 24 Fla. L. Weekly at D1530. The cost approach, however, has its own practical difficulties and unresolved issues when applied in the context of

incomplete improvements. For example, are pre-assembled building materials (such as roof trusses) stored on-site but not yet affixed to a partially-complete structure part of its replacement cost? How are labor costs (including any changes to those costs since commencement of construction) taken into account? How will the property appraiser determine material costs which may vary based upon factors such as the developer's relationship with the supplier? The uncertainties raised by questions such as these support the legislative policy decision embodied in section 192.042(1) to establish a bright-line rule for valuing incomplete improvements. These questions also highlight the fundamental difficulty and inequity in using the cost approach to value something that is incomplete since the value of its parts may have little or no relationship to its value or worth as a completed whole.

Finally, the "income approach," which values the property based upon the income that it produces, Thompson on Real Property, supra, is difficult to apply in the context of incomplete improvements, especially improvements intended for commercial use. If the improvement cannot be used for the purpose for which it was constructed, it is unlikely to be capable of producing income. Therefore, its value would be zero.[4] That logic alone provides ample support for the legislative decision

[4] The court below identified the "income approach" but did not discuss its impact on the value of the improvement at issue in this case. See Fuchs, 24 Fla. L. Weekly at D1531.

embodied in section 192.042(1) that an improvement which cannot be used for "the purpose for which it was constructed" has a value of zero for ad valorem tax purposes prior to its completion.

Because of the difficulties of valuing incomplete improvements, the legislative scheme embodied in section 192.042(1) leads to a more reliable and predictable result. It also results in fewer appeals of the assessment to the local Value Adjustment Board ("VAB") and to circuit court than would likely occur if the property appraiser were required to ascribe a value to the incomplete improvements. By fostering litigation,[5] eliminating the bright-line rule of section 192.042(1) would increase administrative costs and burdens to local governments and the court system. Conversely, the bright-line rule of section 192.042(1) serves the valid public policy of minimizing litigation and providing uniformity, certainty and predictability when valuing real property. Cf. Whitten v. Progressive Casualty Ins. Co., 410 So.2d 501, 505 (Fla. 1982) (affirming the Legislature's "salutary purpose" of reducing frivolous litigation through its adoption of section 57.105, Florida Statutes).

The predictability and certainty provided by the bright-line rule of section 192.042(1) is especially important to those such as St. Joe who make improvements

[5] The likelihood of additional litigation over the valuation of incomplete improvements is enhanced by a statute enacted in 1997 that reduces the burden on taxpayers when challenging the assessment. See FLA. STAT. § 194.301 (1997).

to real property. When a taxpayer decides to make an improvement to real property, the decision is based on predicted costs, including tax liabilities. Those predicted costs are used in planning, budgeting and financing improvements. Without the certainty provided by the bright-line rule of section 192.042(1), all taxpayers will be less able to predict accurately their ad valorem tax liabilities. Accordingly, their business decisions will be subject to greater uncertainty and instability, thereby impeding commerce.

Likewise, local governments make decisions regarding a broad range of governmental activities based on revenue projections. Those projections are based upon the preliminary assessment rolls prepared by the property appraiser. See generally FLA. STAT. § 200.065 (1998 Supp.) (prescribing the procedure by which local governments fix their millage rates and adopt budgets based upon the taxable value of property within the jurisdiction as determined by the property appraiser pursuant to chapter 193, Florida Statutes); see also FLA. STAT. § 193.122 (1997) (establishing the procedure for revision and extension of the assessment rolls by the property appraiser to reflect changes to the taxable value made by the VAB). The preliminary assessment rolls likely will be less reliable without the bright-line rule of section 192.042(1) due to the need for property appraisers to estimate the value of incomplete improvements. Moreover, without section 192.042(1), more assessments

are likely to be appealed to the VABs and circuit courts. Therefore, the taxable value on the final (i.e., extended) assessment roll may be significantly less than that on the preliminary assessment roll which, in turn, will require additional action on behalf of the local government to fix the millage rate. See FLA. STAT. § 200.065(5) (1998 Supp.). As a result of these and other sources of uncertainty, the local government's revenue-estimating system will be less reliable for purposes of fixing its millage rate and adopting its budget if section 192.042(1) is invalidated.

II. THE LEGISLATURE HAS CONSIDERED ALTERNATIVES TO SECTION 192.042(1), FLORIDA STATUTES, BUT HAS NOT IDENTIFIED AN ALTERNATIVE WHICH PROVIDES THE SAME LEVEL OF UNIFORMITY, CERTAINTY AND PREDICTABILITY.

Due to the inherently inexact nature of the appraisal process and other factors, the ad valorem tax scheme established by the Legislature, including section 192.042(1), is imperfect. In an effort to respond to the desire of local governments for additional ad valorem tax revenues, there has been frequent consideration – by the Legislature, the executive branch, the 1998 Constitution Revision Commission and local governments – of alternatives to the bright-line rule of section 192.042(1). These efforts have not produced a viable alternative to section 192.042(1) due to the legal and practical difficulties associated with the apparent alternatives.

A joint legislative committee, the Advisory Council on Intergovernmental Relations (now named the Legislative Committee on Intergovernmental Relations), studied section 192.042(1) in 1995 and explored alternatives, but no revisions were enacted by the Legislature as a result of that policy review. See Jt. Advis. Council on Intergovt. Rel., Ad Valorem Partial Year Assessments: Relevant Issues and Information, at 19-21, 27-35 (Jan. 1995) [hereinafter referred to as "ACIR Report"] (discussing the legal and administrative issues implicated by a potential repeal of section 192.042(1)). On its own, the Legislature has considered the issue when bills have been introduced by members in recent sessions, but it has not altered the current policy.[6]

Further, in 1996, Governor Chiles established the Florida Ad Valorem Task Force to consider changes to the ad valorem property taxation system. See Fla. Exec. Order 96-192 (May 31, 1996). Among the issues the Task Force confronted in its eight months of study and deliberation was whether to advocate repeal of section 192.042(1). The Task Force debated that issue at several meetings and evaluated the

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[6] Joint resolutions which proposed amendments to the Florida Constitution to authorize assessment of ad valorem taxes on a partial-year basis have been filed and debated in the past several legislative sessions. See, e.g., Fla. SJR 738 (1998), Fla. HJR 3545 (1998), Fla. SJR 1236 (1997), Fla. HJR 2697 (1997), Fla. SJR 1098 (1996), Fla. HJR 2741 (1996). Legislation which would revise the ad valorem tax scheme to implement such a constitutional amendment has also been filed and debated. See, e.g., Fla. SB 740 (1998), Fla. HB 4425 (1998).

alternatives to section 192.042(1), see Fla. Ad Valorem Tax Task Force, Report to the Governor and Legislature, at 22, 24 (Mar. 1997) [hereinafter referred to as Task Force Report] (minutes of November and December meetings where partial-year taxation and other alternatives to section 192.042(1) were discussed), but ultimately it did not reach a consensus on the issue. Id. at 3.

Most recently, the Constitution Revision Commission reviewed an assortment of issues associated with the ad valorem tax system and considered a proposed constitutional amendment to authorize the imposition of ad valorem taxes on a partial year basis. See Fla. Const. Revis. Comm'n Proposal No. 51. (1998). That proposal was the subject of considerable debate but ultimately was rejected by a vote of 13 to 15. See Fla. Const. Revis. Comm'n Journal at 143 (Jan. 14, 1998). The narrow vote by the Constitution Revision Commission further underscores the difficulties of striking a balance between the competing concerns implicated by this policy issue.

In fulling its constitutional responsibility to enact regulations to administer the ad valorem tax system, and consistent with a desire to balance the desire for equity, uniformity, predictability and certainty of this system, the Legislature has considered various alternatives to section 192.042(1). As discussed below, each of the primary

alternatives considered – partial-year taxation,[7] interim service fees and repeal of section 192.042(1) – has its own legal and practical infirmities. Consequently, the Legislature has chosen not to disturb the current balance of competing policies achieved by the bright-line rule of section 192.042(1).

Partial-year taxation has been considered by the Legislature on numerous occasions, but it has been consistently rejected. Aside from constitutional concerns implicated by assessing property on a date other than January 1, see FLA. CONST. art. VII, § 4(c), the primary reason that the partial-year taxation concept has been rejected is the increased administrative burden which it would impose on property appraisers and local governments. See ACIR Report at 40-43. Because of these increased burdens, this option traditionally has been opposed by property appraisers.

Additionally, the effort by local governments to increase their revenues has included their consideration of an interim service fee to make up for potential tax

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[7] Although it has evolved over time, the concept of partial-year taxation generally requires improvements which are not "substantially complete" on January 1, but which are completed before the following January 1, to be placed on the tax rolls in the year completed. The improvements would then be assessed a prorated share of the ad valorem taxes due for that year. For example, an improvement that was not "substantially complete" on January 1, 1999, but was completed on June 30, 1999, will pay 6/12 of the ad valorem tax due for 1999 based upon its assessed value on June 30. Pursuant to section 192.042(1), the improvement would currently not be subject to ad valorem taxation in 1999 since it was not "substantially complete" on January 1.

revenues that are unrealized as a result of the current statutory system. Legislation filed in the 1999 Regular Session but not adopted would have authorized imposition of such a fee. See Fla. HB 739 (1999); Fla. SB for CS 320 (1999). In Collier County, 733 So.2d at 1019, this Court invalidated an interim service fee as an unauthorized tax.

Finally, the repeal of section 192.042(1) has been considered and rejected. That alternative implicates constitutional concerns regarding the assessment of the partial value of an improvement to real property. See ACIR Report at 20-21. That alternative would also have higher annual recurring administrative costs than other alternatives. See Task Force Report at 24 (referencing a report presented to the Task Force at its December meeting in which the Department of Revenue indicated that the repeal of section 192.042(1) would have "higher" annual recurring administrative costs and "poor" equity as compared to other potential alternatives.). Consideration of administrative costs is a reasonable and legitimate legislative rationale for retaining section 192.042(1). See Colding v. Herzog, 467 So.2d 980, 983 (Fla. 1985) (upholding the Legislature's decision to exempt certain property from ad valorem taxation based upon administrative costs in excess of the revenue generated). A repeal of section 192.042(1) also would have a disproportionate impact on multi-year construction projects, since the incomplete improvement would be taxed each year

even though the improvement may not be useable for the purpose for which it is being constructed for several years.

III. THE FLORIDA CONSTITUTION DIRECTS THE LEGISLATURE TO ESTABLISH THE AD VALOREM TAX SYSTEM AND THE COURT SHOULD ABSTAIN FROM UPSETTING THE BALANCE STRUCK BY THE LEGISLATURE IN SECTION 192.042(1), FLORIDA STATUTES.

This Court has long recognized the discretion that is inherent in the constitutional mandate that the Legislature establish regulations to secure a just valuation of property for purposes of ad valorem taxation. See L. Maxcy, Inc. v. Federal Land Bank of Columbia, 150 So. 248, 249 (Fla. 1933), aff'd on reh'g, 151 So. 276 (Fla. 1933). Justice Pariente reiterated this policy of judicial deference for the unanimous Court in Collier County when she admonished that "[i]f there is any windfall created by the current scheme, as the County claims, the County's redress lies with the Legislature." Collier County, 733 So.2d at 1019 (emphasis added). In this case, the need for judicial deference to the Legislature is highlighted once again by the difficult balancing which the Legislature has performed by enacting and retaining the bright-line rule of section 192.042(1). The Legislature, not the courts, is the appropriate body to decide how best to balance those competing concerns.

The Third District's en banc decision is contrary to the policy of judicial deference reiterated in Collier County and usurps the power delegated to the

Legislature by Article VII, section 4 of the Florida Constitution. Accordingly, it should be reversed insofar as it invalidates section 192.042(1), Florida Statutes.

Conclusion

For the foregoing reasons of law and policy, St. Joe respectfully requests that this Court reverse the en banc decision of the Third District Court of Appeal and expressly hold that section 192.042(1), Florida Statutes, is constitutional.

Respectfully submitted this **20th** day of September, 1999.

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Certificate of Service

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