

IN THE SUPREME COURT
STATE OF FLORIDA

LAWRENCE FUCHS, as the
Executive Director
of the Department of Revenue,
State of Florida, and
THE MIAMI BEACH OCEAN
RESORT, INC.,

Consolidated Case Nos.
96,182 and 96,183

Appellants,

vs.

JOEL W. ROBBINS, Property
Appraiser, Dade County,
Florida

Third District Court
of Appeal Consolidated
Case Nos. 98-275 and 98-274

Appellee.

11th Judicial Circuit
Case No. 93-21009

AMENDED BRIEF* OF *AMICUS CURIAE*
QWEST COMMUNICATIONS CORPORATION
IN SUPPORT OF APPELLANTS
LAWRENCE FUCHS AND MIAMI BEACH
OCEAN RESORTS, INC.

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Introduction

This brief is submitted on behalf of Amicus Curiae Qwest Communications Corporation ("Qwest"). Qwest is a communications company, whose facilities consist of nearly 19,000 miles of high capacity fiber optic cable that currently connects 150 American cities, and is engaged in developing the "backbone" for the next generation Internet. Some 1,390 route miles of Qwest's fiber optic cable are located throughout Florida. Qwest provides advanced Internet communications as well as more traditional telecommunications services. Its customers are residential consumers and businesses.

Section 192.042(2), Florida Statutes provides a treatment for incomplete tangible personal property (construction work in progress, or "CWIP") which is analogous to the treatment of incomplete realty improvements in section 192.042(1), that is, no value is to be assigned to such property until it is substantially completed. As of January 1, 1999, Qwest owned construction work in progress located in Florida, and several property appraisers assessed it for taxation despite section 192.042(2). Qwest also anticipates a continuing presence of CWIP in this State. If the theoretical basis upon which the District Court held subsection (1) of the statute unconstitutional is applied also to subsection (2), Qwest's costs will increase significantly, reducing the resources it has available to provide

service and to stay competitive. Qwest is therefore vitally interested in the issues before this Court.

The statutes at issue in this action have not changed materially since the case was filed. Citations are to the 1999 Florida Statutes unless otherwise indicated.

Statement of the Case and the Facts

Qwest adopts the Statements of the Case and the Facts of the Appellants.

Summary of Argument

The property appraiser is a county officer whose duties are prescribed by law. Art. II, §5(c), Fla. Const. In addition, Article VII, Section 1(a), Florida Constitution provides that "No tax shall be levied except in pursuance of law." The property appraiser cannot disregard a statute prescribing his duties without violating Article II, Section 5(c), and he cannot assess property which the Legislature has forbidden him to assess without violating Article VII, Section 1(a). His responsibility is the timely preparation of the tax rolls, not the adjudication of statutes.

Section 192.042(1), which instructs against taxation of partially completely improvements, is constitutional. Such property cannot be taxed in the absence of statutory authority, Article VII, Section 1(a). This Court's prior precedents do not deny the Legislature a voice in the administration of ad valorem taxes, and Article VII, Section 4 is an affirmative direction to the Legislature to prescribe regulations on the subject of value. Section 192.042(1) reflects the legislative determination that a regime for the assessment of partially completed improvements is not practical. The Court should not substitute its judgment for that determination.

I.
**The Property Appraiser Lacks Standing
to Disregard and then Contest the Constitutionality
of a Statute Prescribing his Duties**

Qwest concurs with the standing analysis set forth in the brief of *amicus curiae* Florida Power & Light Company, with the additional comments set forth below.

As a preliminary matter, there is a need for the Court's guidance in this area. Property appraisers throughout the State are now refusing to apply statutes governing their duties on constitutional grounds, and arguing that they have standing because of the "defensive" and "public funds" exceptions to the general rule that public officers lack standing to challenge such statutes. The contentions, as reflected in the concurring decision below, result in the exceptions essentially swallowing the rule.

The property appraiser is a county officer. Art. VIII, § 1(d), Fla. Const. Therefore, Article II, Section 5(c), Florida Constitution is relevant here:

The powers, *duties*, compensation, and method of payment of state and county officers shall be fixed by law.

(Emphasis added). The word "law" as used in the Constitution means a statute adopted by both Houses of the Legislature.

Advisory Opinion to the Governor, 156 Fla. 48, 22 So.2d 398

(Fla. 1945). The Constitution contains no exception or qualification from Article II, Section 5(c) for laws the property

appraiser deems to be unconstitutional, and makes no mention of standing to challenge them. None of the property appraiser's duties are prescribed in the Constitution. The framers of the Constitution and the people of Florida have not conferred upon the property appraiser the option to disregard a statutorily prescribed duty because he believes it violates a constitutional provision.

Another important provision is Article VII, Section 1(a), Florida Constitution, which commands: "No tax shall be levied except in pursuance of law." This language has been a feature of Florida's organic charter since 1868.¹ It means there must be an affirmative grant of legislative authority for all taxation. As this Court observed in *State ex. rel. Seaboard Airline Railway Co. v. Gay*, 160 Fla. 445, 35 So.2d 403, 430 (1948):

[T]he obligation of a citizen to pay taxes being purely of statutory creation, taxes can be lawfully levied, assessed, and collected only in the express method pointed out by statute.

See also *Hausman v. VTSI, Inc.*, 482 So.2d 428, 430 (Fla. 5th DCA 1985) *review denied*, 492 So. 2d 1331 (Fla. 1986) ("An assessment not authorized by statute is void"). In the present case, the Legislature has specifically provided that partially completed improvements are *not* to be taxed. By disregarding the statute and

¹See, Article XII, Section 3, Florida Constitution (1868); Article IX, Section 3, Florida Constitution (1885).

assessing them anyway, the property appraiser has violated Article VII, Section 1(a) as well as Article II, Section 5(c).

It is not for the local taxing authorities to decide whether the system prescribed by the legislature is unfair, or to complain in a judicial forum about lost revenue or shifted tax burdens, or to spend public funds attacking statutes prescribing their duties. Such is simply not their role or function under Florida's system of government. That they are "constitutional officers" is beside the point. So are the members of the Legislature, who take the same oath as the property appraisers, but who, unlike the property appraisers, have the constitutional authority to pass laws. It is illogical for these local officers, who have no duties except those provided by law, to maintain that they are at liberty to disregard or challenge those laws at will. When they do so, they violate not only the statute in question, but two constitutional provisions.

This does not mean that every statute affecting the property appraiser's duties will always be constitutional; it means that he must comply with the statutes irrespective of his own constitutional views. It means that the presumption in favor of the constitutionality of legislative acts is not merely an abstraction, but a rule which governs the conduct of the property appraiser in preparing the tax roll. In short, it means the

people of Florida have not ordained the property appraisers as the guardians of their constitutional interests.

Nor has the Legislature done so. There is no statute authorizing or directing the property appraiser to pass judgment on or challenge the constitutionality of duly enacted statutes. To the contrary, the statutory provision authorizing him to contest a Value Adjustment Board decision on constitutional grounds specifically provides that it does *not* authorize him "to institute suit to challenge ... any duly enacted legislative act of this state." § 194.036(1)(a), Fla. Stat. There is thus no basis for concluding that either the Constitution or the statutes confer standing on the property appraiser to disregard or challenge legislative acts.

These considerations specific to county officers and taxation issues buttress the standing analysis offered by Florida Power & Light Company. A property appraiser's refusal to comply with a statute on the ground that it is unconstitutional is effectively an adjudication, as if he were a member of the judiciary. That the taxpayer can seek review of the property appraiser's adjudication does not change its character. In such a regime, the burden of overturning the property appraiser's adjudication and defending the statute falls on the taxpayer. Article VII, Section 1(a), Florida Constitution makes this especially anomalous, in that the taxpayer would be required to

defend the constitutionality of the absence of legislative authority to tax. These strange results will not obtain if the Court makes clear that the property appraiser is required to presume the constitutionality of the laws prescribing his duties.

Qwest concludes this portion of its brief with the following observations:

Notwithstanding the assumption of the property appraiser below, there is no imperative to confer standing on him to ensure that the statute can be challenged. This is not his function. One does not find the Department of Revenue, which is headed by the Governor and Cabinet (constitutional officers), and which administers many taxes, challenging the constitutionality of statutes prescribing its duties. Whether another litigant has standing to challenge section 192.042(1) can be determined in a proper case, when that litigant is before the Court.

The property appraiser's effort to establish standing by characterizing his action as "defensive" is sophistry. The property appraiser *provoked* the constitutional dispute by disobeying and then attacking a law prescribing his duties. *Turner v. Hillsborough County Aviation Authority*, 24 Fla. L. Weekly D2034 (Fla. 2d DCA 1999) analyzed the issue correctly.

The administration of section 192.042(1) does not involve the property appraiser in either the disbursement or collection of public funds, and the concurring opinion of Judge Sorondo is

incorrect in suggesting the contrary. The property appraiser's job is to prepare the tax roll in accordance with the statutes, including section 192.042(1). The Tax Collector collects the taxes. The only relevant "disbursement" is the public expense of the property appraiser's constitutional litigation.

With 67 county property appraisers in Florida, the prospect of each of them having the independent right to disregard and contest the statute of his choosing is sobering. Nothing in this Court's precedents requires or permits such a result. The Court should confirm that the property appraiser lacked standing to challenge section 192.042(1), and reverse the decision below. This will obviate the necessity to consider the constitutionality of section 192.042(1).

II.

Section 192.042(1) is Constitutional

The issue is essentially whether, as a result of *Interlachen Lakes Estates, Inc. v. Snyder*, 304 So. 2d 993 (Fla. 1973) and its progeny, the Legislature is completely without a voice on the subject of value in general, or on the treatment of partially completed realty improvements in particular. If so, it would be an odd result, given that Article VII, Section 4, Florida Constitution is an affirmative direction to the Legislature to prescribe regulations on the subject of value.

Also implicated is Article VII, Section 1(a), Florida Constitution, which provides "No tax shall be levied except in pursuance of law," and which the 1968 Constitution elevated to the first sentence in the finance and taxation article. Qwest submits that this provision cannot be ignored in the analysis. It reinforces the point made by other *amici* that Article VII, Section 4 is not self-executing. Further, it leaves the property appraiser with a logical conundrum: there is no statutory authority to tax partially completed improvements, and they cannot constitutionally be taxed without such authority. To hold that they are taxable, when the Legislature has said they are not, cannot be reconciled with Article VII, Section 1(a).

However, the literal text of *Interlachen* also creates a conundrum, for it is now the springboard for constitutional litigation brought by property appraisers throughout the state. The problem is not with the general principle that fair market value is the constitutional standard in Florida; it is with the idea that as of January 1 of each year this standard must apply in all circumstances, no matter how extreme or impractical. The syllogism is simple: just valuation means fair market value, *Walter v. Schuler*, 176 So. 2d 81 (Fla. 1965), and Article VII, Section 4 refers to the just valuation of *all* property. Therefore, the argument proceeds, any other treatment is a prohibited "classification."

This approach, which is by nature purely academic, is suitable to prevent discrimination on the basis of ownership, as in *Interlachen*, or to expose the flaws in a mechanism for establishing value, as in *ITT Community Development Corp. v. Seay*, 347 So. 2d 1024 (Fla. 1977), or to assure that the full "bundle of rights" in leased property is valued, as in *Valencia Center, Inc. v. Bystrom*, 543 So. 2d 214 (Fla. 1989). However, there is a practical dimension to the ad valorem tax system, which should be considered in deciding issues such as the constitutionality of section 192.042(1).

If the property appraiser were required to determine the "fair market value" of every partially completed improvement each year, the process would involve two essential steps. First, he would be required to ascertain the precise stage of completion of every project under construction as of January 1. This is necessary because a project closer to completion would theoretically command more in a sale. How he proposes to do this is not explained. He performs no comparable function currently. As *amicus* The St. Joe Company points out, he must also decide, in a fashion which is consistent from one site to the next, which items at the site have become "improvements" and which have not. It is not sufficient that he do this over the several months after January 1, as occurs with completed improvements whose condition changes very little in that time period. A construction

project is dynamic, so the property appraiser's staff must spend New Year's Day visiting all the sites in the County.

The second step is determining the fair market value for all these partially completed improvements as of January 1. Perhaps, in some rarified circumstances, the property appraiser will find that there has been an arm's length sale of a comparable property at the same stage of completion. It is more likely that he will be unable to use the comparable sales approach. He will also have no basis for hypothesizing income (assuming the property is intended for income production). This leaves the cost approach, the results of which will not be susceptible to validation by another approach. What will he use? The actual costs incurred at each project? The construction draws? Will costs that are not yet reflected in the improvements be included? How would they be excluded? Will every owner, developer, and contractor now be required to quantify the costs they have incurred which had actually become part of the realty as of January 1?

These problems do not mean that assessment of a *single* partially completed property is impossible, as in the eminent domain cases cited by the Third District. Nor is it relevant that the taxpayer's improvement in this case "had an *uncontested* fair market value of \$3,790,227," *Fuchs v. Robbins*, 24 Fla. L. Weekly D1529 (Fla. 3rd DCA 1999) (emphasis the court's). Economics play a role in what taxpayers decide to contest. But even if a single

partially improved property can be appraised with some degree of credibility, this does not mean that the regime sought by the property appraiser can be administered throughout the state, or with any consistency within or between counties.

The property appraisers could undoubtedly find a way to place *some* sort of value on every partially completed improvement in every county every January 1. However, as Professor Richardson points out, simply assigning values should not be the objective. David M. Richardson, "Just Value" or Just a Value - Florida's Imperial Property Appraiser, 48 Fla. L. Rev. 723 (1996). The question is whether the assessments in the system the property appraiser seeks would bear any relation to the fair market value standard which, ironically, is the claimed motivation for his initiation of this litigation. If not, a decision striking down section 192.042(1) would not vindicate the just valuation clause, but would frustrate it.

The Legislature decided, before and after the adoption of the 1968 Constitution, to avoid these difficulties by deferring taxation until substantial completion of the improvements. This was a practical determination affecting the timing of taxation, *Culbertson v. Seacoast Towers East*, 212 So. 2d 646 (Fla. 1968), and should not be disturbed by the property appraisers or the judiciary. As this Court has observed:

Constitutional provisions are designed to
effectuate practical government regulated by law;

and they should be so interpreted as to accomplish, and not to defeat, their purposes or to lessen their efficiency.

Neisel v. Moran, 80 Fla. 98, 85 So. 346, 351 (Fla. 1919). The Legislature was entitled to conclude that the annual assessment of partially completed improvements is not reasonably administrable. If the Court entertains any residual doubt on that score, it should not decide that section 192.042(1) is unconstitutional without the benefit of an evidentiary record which fully explores the consequences of such a determination.

The statute is constitutional. The decision below should be reversed.

Conclusion

In Florida's system of government, property appraisers are subject to the laws prescribed by the Legislature. They do not have standing to challenge those laws, or to assess property that the statutes say is not to be assessed.

Section 192.042(1) is a reasonable regulation within the ambit of Article VII, Section 4, Florida Constitution. It is doubtful that fair market value assessments could be achieved if partially completed improvements were subject to assessment statewide. There would be more value on the tax rolls, but not fair market value.

The decision below should be reversed.

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CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that the text and all footnotes of this Amended Brief of Qwest Communications Corporation were typed using 12 point Courier New font, which is not proportionately spaced. A three-and-a-half inch disk containing the Amended Brief of Amicus Curiae Qwest Communications Corporation has been furnished to the Supreme Court of Florida.

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CERTIFICATE OF SERVICE

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