SUPREME COURT
STATE OF FLORIDA

Consolidated Case Nos. **96,182** & **96,183**

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

Appellants,

vs.

JOEL ROBBINS, Property Appraiser, Dade County, Florida,

Appellee.
_____/

BRIEF OF AMICUS CURIAE PROPERTY APPRAISERS' ASSOCIATION OF FLORIDA, INC.

Larry E. Levy
Fla Bar No. 047019
Loren E. Levy
Fla Bar No. 0814441
The Levy Law Firm
1828 Riggins Road
Tallahassee, Florida 32308
850/219-0220

TABLE OF CONTENTS

Page

Table of Citations ii

Statement of Type Size and Style vi

Preliminary Statement vii

Statement of the Case and of the Facts 1

Summary of Argument 1

Argument 6

I. SECTION 192.042, THE SUBSTANTIALLY COMPLETE STATUTE, IS UNCONSTITUTIONAL, IN CONFLICT WITH THE 1968 CONSTITUTION IN THAT IT CONSTITUTES AN IMPERMISSIBLE CLASSIFICATION OF REAL PROPERTY NOT PERMITTED THEREBY AND OPERATES TO UNLAWFULLY EXEMPT PROPERTY NOT EXEMPT UNDER THE 1968 CONSTITUTION.

II. PROPERTY APPRAISERS HAVE STANDING TO CHALLENGE THE CONSTITUTIONALITY OF A STATUTE WHICH DIRECTLY AFFECTS THEIR DUTIES IN ASSESSING PROPERTY FOR COLLECTION PURPOSES.

Conclusion 31

Certificate of Service 32

TABLE OF CITATIONS

Page

Am Fi Investment Corp. v. Kinney,
360 So.2d 415 (Fla. 1978) 16,24

Archer v. Marshall,
355 So.2d 781 (Fla. 1978) 9,10,16,23,24

Barr v. Watts,
70 So.2d 342 (Fla. 1953) 3,18

Board of Public Instr. for Santa Rosa Co. v. Croom,
48 So. 641 (Fla. 1908) 22,23

Canaveral Port Auth. v. Department of Revenue,
690 So.2d 1226 (Fla. 1996) 1

Capital City Country Club v. Tucker,
613 So.2d 448 (Fla. 1993) 10,23,25,26

City of Tampa v. Birdsong Motors, Inc,
261 So.2d 1 (Fla. 1972) 6

Collier County v. State of Florida,
733 So.2d 1012 (Fla. 1999) 10

Culbertson v. Seacoast Towers East, Inc.,
212 So.2d 646 (Fla. 1968) 1,6

Department of Admin. v. Horne,
269 So.2d 659 (Fla. 1972) 4,5

Department of Educ. v. Lewis,
416 So.2d 455 (Fla. 1982) 17,18

Department of Revenue v. Florida Boaters Ass'n, Inc.,

409 So.2d 17 (Fla. 1989) 12,26

Franks v. Davis,
145 So.2d 228 (Fla. 1962) 12

Fuchs v. Robbins,
738 So.2d 338 (Fla. 3d DCA 1999) ..... passim

Interlachen Lakes Estates, Inc. v. Snyder,
304 So.2d 433 (Fla. 1973) ..... passim

ITT Community Dev. Corp v. Seay,
347 So.2d 1024 (Fla. 1977) 2,9,16,23

Lykes Bros. v. City of Plant City,
354 So.2d 878 (Fla. 1978) 13,24,26

Markham v. Yankee Clipper Hotel, Inc.,
427 So.2d 383 (Fla. 4th DCA),
review denied, 434 So.2d 888 (Fla. 1983) 6,7

Maxey, Inc. v. Federal Land Bank of Columbia,
150 So. 248 (Fla. 1933) 8

Palethorpe v. Hillsborough Co. Aviation Auth.,
171 So.2d 526 (Fla. 1968) 11,12

Presbyterian Homes of Synod of Florida v. Wood,
297 So.2d 556 (Fla. 1974) 1,12

Sebring Airport Auth. v. McIntyre,
642 So.2d 1072 (Fla. 1994) 9

Sebring Airport Auth. v. McIntyre,
718 So.2d 296 (Fla. 2d DCA 1998) 1,2,9

State ex rel. Burbridge v. St. John,

197 So. 131 (Fla. 1940) 5,13

State ex rel. Miller v. Doss,
2 So.2d 303 (Fla. 1941) 5,8,9,12

State ex rel. Florida Portland Cement Co. v. Hale,
176 So. 577 (Fla. 1937) 21,22,23

Turner v. Hillsborough Co. Aviation Auth.,
739 So.2d 175 (Fla. 2d DCA 1999) 14,15,27

Valencia Center, Inc. v. Bystrom,
543 So.2d 214 (Fla. 1989) ..... passim

William v. Jones,
325 So.2d 426 (Fla. 1976) 10,24

Florida Constitution:

1885 Florida Constitution 1,13

1968 Florida Constitution 1,2,6

Art. VII, sect. 3, Fla. Const. (1968) 20

Art. VII, sect. 4, Fla. Const. (1968) 11,20

Art. VII, sect. 9, Fla. Const. (1968) 11

Florida Statutes:

§ 192.042, Fla. Stat. (1997) ..... passim

§ 192.042(1), Fla. Stat. (1991) ..... passim

§ 194.036, Fla. Stat. (1997) 14

§ 194.036(1)(a), Fla. Stat. (1997) 27

§ 194.181(6), Fla. Stat. (1997) 28,29

Ch. 196, Fla. Stat. (1991) 10

§ 197.122(3), Fla. Stat. (1997) 30,31

§ 197.182, Fla. Stat. (1997) 30

Laws of Florida:

Ch. 61-240, Laws of Florida 3

Ch. 80-368, Laws of Florida 10

STATEMENT OF TYPE SIZE AND STYLE

The undersigned counsel certifies that the font size and style used in the brief of amicus curiae, Property Appraisers' Association of Florida, Inc., is 14 Times New Roman.

PRELIMINARY STATEMENT

Appellant, Lawrence Fuchs, as the Executive Director of the Department of Revenue, State of Florida, will be referred to herein as the "department." Appellant, The Miami Beach Ocean Resort, Inc., will be referred to herein as the "resort." Appellee, Joel Robbins, Dade County Property Appraiser, will be referred to herein as the "appraiser."

The amicus curiae, the Property Appraisers' Association of Florida, Inc., will be referred to herein as the "PAAF." The PAAF is an association whose membership consists of county elected property appraiser in the State of Florida. The other amicus who have filed briefs in this case will be referred to herein by their respective names.

References to the resort's initial brief will be delineated as (RB-page 3). References to the department's brief will be delineated as (DB-page #).

STATEMENT OF THE CASE AND OF THE FACTS

The PAAF adopts, as if fully set forth herein, the statement of the case and of the facts as set forth in the appraiser's answer brief.

SUMMARY OF ARGUMENT

The PAAF submits that the en banc decision of the Third District Court of Appeal holding section 192.042(1), Florida Statutes (1991), commonly referred to as the "substantially complete" statute, unconstitutional is eminently correct and should be affirmed by this Court. The PAAF also submits that the district court was correct in holding that the appraiser had standing to challenge the statute's constitutionality and properly did so. The PAAF further submits that this Court's decision in Culbertson v. Seacoast Towers East, Inc., 212 So.2d 646 (Fla. 1968), which this Court decided under the 1885 Florida Constitution, is no longer efficacious under the 1968 Florida Constitution. As recognized by this Court in Canaveral Port Auth. v. Department of Revenue, 690 So.2d 1226 (Fla. 1996), Valencia Center, Inc. v. Bystrom, 543 So.2d 214 (Fla. 1989), Interlachen Lakes v. Snyder, 304 So.2d 433 (Fla. 1983), Presbyterian Homes of Synod of Florida v. Wood, 297 So.2d 556 (Fla. 1974), and the more recent decision of the Second District Court of Appeal in Sebring Airport Auth. v. McIntyre, 718 So.2d 296 (Fla.

2d DCA 1998)(Sebring III), now pending on appeal in this Court, Nos. 94,105 & 94,118, assessment and exemption from taxation is controlled by the 1968 Constitution.

The sum and substance of these various cases is that under the 1968 constitution the legislature lacks the authority to classify or define property in such a fashion or way so that such property is undervalued or receives an exemption, partial or otherwise, through any form including under-valuation, and that all statutes, whether of a genesis prior to or after the 1968 constitution, are controlled by the 1968 constitution's limitations.

In fact, the same contentions made herein by the department and the resort that section 192.042 is merely a part of the legislature's "statutory scheme for the timing of the valuation and assessment," (DB-9), "is but another method of carrying out the just valuation mandate," (RB-12), and that "no value is a 'just valuation' responsibly defined by the legislature for revenue raising purposes," were the same or similar contentions made in Valencia Center, ITT Community Dev. Corp. v. Seay, 347 So.2d 1024 (Fla. 1977), and Interlachen Lakes, all of which were rejected.

Any concerns because of perceived administrative difficulties should be disregarded. Prior to 1961 property appraisers annually assessed all property,

including that under construction. The building boom in Florida in the 1950's and thereafter created the perceived need for the legislature to provide what amounted to a developers' or builders' "inventory" tax break, where subdivisions were being developed with hundreds of houses under construction at the same time. The "substantially complete" statute provided same by eliminating taxation of such partially completed structures. See ch. 61-240, Laws of Fla. (1961). Current administration of the substantially complete statute presently requires tracking of structures under construction to assess all such structures deemed "substantially complete" on January 1 through buildings permits. Costs associated with construction at various stages of completion provide a basis for valuation.

The district court's analysis of the standing issue is proper and well supported by prior decisions of this Court wherein it held invalid statutes at the instance of the property appraiser. Judicial recognition in the past of the requisite interest to properly litigate legislative intrusion into the county tax base and public coffers reflects adherence to the "public funds" importance noted by the district court, and addressed by this Court with clarity in Barr v. Watts, 70 So.2d 347 (Fla. 1953). Whether a constitutionally suspect special exemption is authorized by a tax refund to be made in the future or by an assessment reduction made in the assessment process, the result is the same. On numerous occasions this Court has

held that where funds are to be expended the affected official or agency has standing to challenge any statute authorizing same because of the public funds - public coffers importance. Whether prior assessment reduction or post-assessment refund, the result is the same.

A taxpayer has standing to challenge the constitutionality of a statute involving public funds. See Department of Admin. v. Horne, 269 So.2d 661 (Fla. 1972). Horne held that a taxpayer without a showing of specific interest could directly challenge a provision in the General Appropriations Act, and this Court made "short shift" of the argument made by the state that "standing" should be limited to situations involving "expenditures" of funds only stating:

> Appellees cite Florida and sister state authorities allowing taxpayer attacks upon "unlawful *expenditures*." Appellants accept these authorities insofar as efforts to stop actual expenditures or levying of a tax is concerned but would distinguish "expenditure" and "appropriation" (as in the General Appropriations Act) which appellants see as only a "cutting of the pie" and not at all as "eating" it by the ultimate expenditures of funds. This seems to be a "distinction without a difference." We do not view the matter as turning upon whether or not it constitutes a direct "expenditure."

Horne, 269 So.2d at 660 (emphasis added). Here, too, drawing a distinction between a "tax reduction" afterwards by way of refund, and a "tax reduction" prior, by way of assessment reduction is a "distinction without a difference."

Furthermore, a taxpayer, unless directly affected, as was the case in State ex rel. Burbridge v. St. John, 197 So. 131 (Fla. 1940), and State ex rel. Miller v. Doss, 2 So.2d 303 (Fla. 1941), is unlikely to file suit to remove an unconstitutional tax advantage because (1) he would not know about it because the average citizen is bewildered by the myriad of tax laws and exemptions anyhow and has no comprehension of the constitutional restrictions on legislative action, and (2) the average citizen does not have the financial wherewithal to mount such an assault. As this Court stated in Horne at 662:

> We understand the distinction that the actual expenditure will not take place until the particular agency shall act upon it. That naturally follows, however, unless the agency chooses not to make the expenditure (a rather rare occurrence) or unless the money runs out–or unless a taxpayer stops it as illegal, the appellees' purpose here. If a taxpayer does not launch an assault, it is not likely that there will be an attack from any other source, because the agency involved is usually in accord with the expenditure.

ARGUMENT

I. SECTION 192.042, THE SUBSTANTIALLY COMPLETE STATUTE, IS UNCONSTITUTIONAL, IN CONFLICT WITH THE 1968 CONSTITUTION IN THAT IT CONSTITUTES AN IMPERMISSIBLE CLASSIFICATION OF REAL PROPERTY NOT PERMITTED THEREBY AND OPERATES TO UNLAWFULLY EXEMPT PROPERTY NOT EXEMPT UNDER THE 1968 CONSTITUTION.

This case, like Interlachen Lakes and City of Tampa v. Birdsong Motors, Inc., 261 So.2d 1 (Fla. 1972), involves statutes enacted under the 1885 constitution whose validity cannot be sustained under the 1968 constitution. In both Interlachen Lakes and Birdsong Motors, this Court held that the new constitution controlled. In Birdsong Motors, the challenged tax levy was authorized by special or local law as permitted under the old constitution, but the 1968 constitution required that it be authorized by general law. This Court held the involved tax was not authorized by general law and, hence, was invalid.

The holding in Markham v. Yankee Clipper Hotel, Inc., 427 So.2d 383 (Fla. 4th DCA 1983), review denied, 434 So.2d 888 (Fla. 1983), which relied on Seacoast Towers, is incorrectly decided and that decision should be disapproved. As the Third District Court of Appeal pointed out in Fuchs v. Robbins, 733 So.2d 338 (Fla. 3d DCA 1999), the Fourth District Court of Appeal in Yankee Clipper apparently totally overlooked this Court's decision in Interlachen Lakes in arriving at its conclusion.

There can be no serious question but that the substantially complete statute operates to provide an exemption for improvements to real property during the period of construction. As such, it constitutes a legislative attempt to classify

or define improvements to real property which have not reached a point of being deemed "substantially complete" and treat such property as if it does not "exist" for ad valorem tax purposes. As the resort states at page 12 of its brief, it establishes a value of "nothing" on property stipulated to be worth over $3 million. The truth and fact of the matter is that any such improvement to real property while under construction would require the same, if not more, police protection and fire protection as it would require upon reaching completion. Police protection is needed because of the common problem of theft of building materials at a job site during construction. Fire protection would be required and indeed needed in the event of fire in the materials at the job site or partially completed structure. The situation is glaringly demonstrated by the example in the present case where it is undisputed that the value of the property in its uncompleted state exceeds three million dollars. At bar, a fire could cost over $3 million of value which is, no doubt, insured by at least that amount. This is exactly the type classification deemed impermissible in Interlachen Lakes.

Even under the 1885 Constitution, this Court recognized the constitutional limitations on legislative classification in State ex rel. Miller by citing Maxey, Inc. v. Federal Land Bank of Columbia, 150 So. 248 (Fla. 1933) stating:

> This Court held in Maxey, Inc. v. Federal Land Bank of Columbia, 111 Fla. 116, 150 So. 248, 250, 151 So. 276:
>
> "The principle has been more than once affirmed in this state that the Constitution must be construed as a limitation upon the power of the Legislature to provide for the exemption from taxation of any classes of property except those particularly mentioned classes specified in the organic law itself."
>
> To afford the exemption the Constitution contemplates the actual, total and immediate use. The use by renting to persons in competition with taxpayers and applying the rents to charity is too remote. 61 C.J. 461, 26 R.C.L. 325.
>
> Exemptions from taxation are special favors frowned upon by the courts. They invariably cast a greater burden on other taxpayers. Statutes granting exemptions should be strictly construed. Lummus v. Florida-Adirondack School, Inc., 123 Fla. 810, 168 So. 232; Miami Battlecreek v. Lummus, 140 Fla. 718, 192 So. 211.

State ex rel. Miller, 2 So.2d at 304.

On numerous occasions since the adoption of the 1968 constitution, this Court has invalidated legislative attempts to provide exemptions, in whole or in part, not permitted by the Florida Constitution. In Archer v. Marshall, 355 So.2d 781 (Fla. 1978), certain special acts were invalidated. In Seay, cited by the district court in Robbins, the statute allowed departure from the constitution by permitting the assessment at other than "just value" because a forced sale or

auction mechanism does not establish just value, and thus the legislative statutory attempt was held unconstitutional. More recently, in Sebring III, the Second District Court of Appeal invalidated a legislative attempt to "define" or "classify" certain uses of property as public/governmental so as to provide an exemption for privately used property which this Court has previously held to be taxable. This attempt was held unconstitutional by the Second District Court of Appeal noting the same limitations on legislative power articulated by the Third District Court in Robbins.

In Sebring III, the legislature was no doubt reacting to this Court's decision in Sebring Airport Auth. v. McIntyre, 642 So.2d 1072 (Fla. 1994) (Sebring II), which had held such property taxable. The cases cited demonstrate that the legislature has a long history of attempting to find ways to inventively create or authorize special tax exemptions for select properties or persons. In fact, in Archer, the legislature was attempting to circumvent this Court's decision in Williams v. Jones, 325 So.2d 425 (Fla. 1976). Another attempt to circumvent Williams was recognized by this Court in Capital City Country Club v. Tucker, 613 So.2d 448 (Fla. 1993), when this Court addressed chapter 80-368, Laws of Florida, which had amended several provisions in chapter 196, Florida Statutes (1991), for the specific purpose of providing the exemption to public-owned

property held and used by private individuals for commercial or residential purposes. In Capital City, this Court squarely recognized what the legislative intent was but held that the law could not be so interpreted because of constitutional limitations.

The Third District Court of Appeal mentioned this Court's decision in Collier County v. State of Florida, 733 So.2d 1012 (Fla. 1999), in which this Court invalidated a legislative enactment brought about by the restrictions of the "substantially complete" law which has now been held unconstitutional. Florida's property tax structure evolves around selecting a specific day certain, January 1, and assessing all property for ad valorem tax purposes as of said date and the constitution recognizes this in article VII, section 4, where the January 1 date is specifically mentioned and also in article VII, section 9, which provides a limitation on the millage of 10 mills that may be levied which has always been understood to mean an implied limitation on the legislature from creating two tax rolls in the same year. A limitation of 10 mills by necessary implication means 10 mills per fiscal year. The Third District Court of Appeal's decision recognizes that not assessing all property physically in existence as of January 1 of each year creates an inequity in the tax base by selecting certain partially completed improvements to real property and exempting same from the valuation.

Whether creating an inequity in the tax base by selective exclusion of partially completed structures or creating exemptions not constitutionally permissible, the result on public coffers is the same and this Court has repeatedly held invalid such exemptions at the instance of public officials. In an earlier case when the comptroller had supervision over property appraisers, this Court held unconstitutional a statute purporting to exempt house or automobile trailers used for housing accommodations from ad valorem taxation if the owner purchased a motor vehicle license tag. Palethorpe v. Hillsborough County Aviation Auth., 171 So.2d 526, 529 (Fla. 1968). The court adopted the defendants', the St. John's County Property Appraiser and the Comptroller of Florida, argument that the statute was unconstitutional because it effectively created an exemption from taxation that the constitution did not expressly permit. This Court held that the legislature exceeded its bounds in attempting to create a per se exemption for motor vehicles primarily used for housing accommodations, where the constitution required just valuation of all real and personal property and only permitted exemptions for property used for municipal, education, literary, scientific, religious, or charitable purposes. 171 So.2d at 529-530. C.f. Department of Revenue v. Florida Boaters Ass'n, Inc., 409 So.2d 17 (Fla. 1989)(legislature lacked

authority to exclude live-aboard vessels from definition of boats and thereby subject such vessels to ad valorem taxation).

Similar conclusions were reached in Presbyterian Homes of Synod v. Wood, 297 So.2d 556 (Fla. 1974)(statutory income test for determining charitable status of home for the aged is unconstitutional because general law must contain criteria which correspond to constitutional limitation); Franks v. Davis, 145 So.2d 228, 231(Fla. 1962)(statute assessing stock in trade at 25 percent of invoice cost unconstitutionally violated just value requirement and effectively created exemption where none was permitted); State ex rel. Miller, 2 So.2d at 304 (granting taxpayer's mandamus action to coerce property appraiser to deny exemption for property only used predominately, and not exclusively, for charitable purposes because statute–insofar as it permitted an exemption for property not used exclusively for charitable purposes–was unconstitutional under the 1885 constitution); State ex rel. Burbridge, (granting taxpayer's mandamus action to coerce property appraiser to deny exemption even though he relied upon statute providing that housing finance agency performed municipal purposes; statute was unconstitutional because agency activities were proprietary and legislative definition cannot circumvent the constitution); see also Lykes Bros., 354 So.2d 878 (Fla. 1978)(recognizing that legislature did not have constitutional

authority to exempt municipally-owned property leased to a private lessee using the property for a proprietary purpose but interpreting statute to avoid declaring it unconstitutional).

In summary, for the reasons stated, section 192.042 is unconstitutional as creating an exemption and classification not permitted by the Florida Constitution.

II. PROPERTY APPRAISERS HAVE STANDING TO CHALLENGE THE CONSTITUTIONALITY OF A STATUTE WHICH DIRECTLY AFFECTS THEIR DUTIES IN ASSESSING PROPERTY FOR COLLECTION PURPOSES.

The PAAF submits that the district court's analysis of this issue was eminently correct and should be affirmed by this court. Since the Third District Court of Appeal's decision in the instant case, the Second District Court of Appeal reached the opposite conclusion in Turner v. Hillsborough Co. Aviation Auth., 739 So.2d 175 (Fla. 2d DCA 1999), which noted that its decision was in conflict with the instant case. The PAAF submits that Turner was incorrectly decided.

Under this point appellants contend that, although a property appraiser, based on case decisions of this court consistently holding that property appraisers, and indeed all public officials and agencies, have standing to challenge the constitutionality of a statute placed in issue defensively, a property appraiser cannot raise the validity of a statute where the actions of a value adjustment board (VAB) in overturning a property appraiser's assessment is challenged by the appraiser suing the taxpayer under section 194.036, Florida Statutes (1997).

Appellants also acknowledge the public funds exception but state that this should be limited solely to the situation where an illegal disbursement of public funds is involved and that the rule would not apply to the collection of

public funds. Were this premise correct, if the legislature passed a statute providing favored tax treatment to a specific taxpayer and resulting in a $10,000.00 tax reduction, but placed a mechanism in the statute so that instead of the taxes being reduced in the assessment process, the taxpayer would be entitled to a refund during January of the year following payment, the statute could be challenged by the property appraiser in determining whether the taxpayer was entitled to the refund, but could not be challenged in the initial assessment process. This makes absolutely no sense. In either scenario, the result is the county coffers are diluted and the involved taxpayer receives direct financial benefit from the enactment of the statute. Ten thousand dollars is a significant amount whether received by way of special reduced valuation, pre-assessment, or by way of special refund, post-assessment. Public funds are public funds.

It appears that in Turner the court was not made aware of the factual circumstances which gave rise to the instant case. At bar, the hotel resort, which was the subject property involved in the suit, had been in existence for many years but had sold and the new owner was in the process of totally remodeling and refurbishing same. The appraiser included the property on the tax roll as it had been in prior years and the resort challenged the assessment on the basis that the assessment was excessive, and on the basis that the hotel resort no longer was

substantially complete and, accordingly, should have no value placed thereon. The appraiser's action was wholly defensive. Notwithstanding this factual difference, the PAAF submits that property appraisers as public officials specifically vested with the authority to ensure the fiscal stability of the tax roll for the county in accord with the constitutional mandate, have standing to challenge a statute which deviates therefrom.

On numerous occasions, this Court has accepted jurisdiction of such situations and ruled on the constitutionality of the statute recognizing the property appraiser's constitutional duty to assess at just value and has considered and held unconstitutional various statutes placed in issue. See Valencia Center; Am Fi Investment Corp. v. Kinney, 360 So.2d 415 (Fla. 1978); Archer; Seay; Interlachen Lakes. Like the statutes involved in the cases cited, the involved statute prevents the property appraiser from performing his or her constitutional duty of assessing at just value.

This Court stated unequivocally in Department of Educ. v. Lewis, 416 So.2d 455 (Fla. 1982), that the general rule applicable to any state agencies or officers is that any time the constitutionality is brought into litigation by another against a state agency or officer, the agency or officer may defensively raise a question of the law's constitutionality. In Lewis this Court stated:

> If, on the other hand, the operation of a statute is brought into issue in litigation brought by another against a state agency or officer, the agency or officer may defensively raise the question of the law's constitutionality. *City of Pensacola v. King*, 47 So.2d 317 (Fla.1950); *State ex rel. Harrell v. Cone*, 130 Fla. 158, 177 So. 854 (1937) *State ex rel. Florida Portland Cement Co. v. Hale*, 129 Fla. 588, 176 So. 577 (1937). The comptroller is one officer that has been allowed by Florida courts to initiate litigation in his official capacity seeking to establish the unconstitutionality of a statute. *See Dickinson v. Stone*, 251 So.2d 268 (Fla.1971); *Green v. City of Pensacola*, 108 So.2d 897 (Fla. 1st DCA 1959), *aff'd*, 126 So.2d 566 (Fla.1961). It has also been recognized that the attorney general may, in limited circumstances, initiate litigation to challenge the constitutionality of legislation. *See Department of Administration v. Horne*, 269 So.2d 659 (Fla.1972); *State ex rel. Landis v. S. H. Kress & Co.*, 115 Fla. 189, 155 So. 823 (1934); *State ex rel. Moodie v. Bryan*, 50 Fla. 293, 39 So. 929 (1905). The comptroller, as the state's chief officer for disbursement of funds, would have standing to challenge a proviso in an appropriations bill. But the Department of Education, the State Board of Education, and the Commissioner of Education in his official capacity, do not.

416 So.2d at 458-59 (emphasis added). It is noted that this Court stated the general rule concerning raising the constitutionality of a statute defensively applies to any state agency or officer, and also noted that the comptroller, because of his involvement with public funds, may initiate actions challenging the constitutionality of statutes. The importance of safeguarding and ensuring the

protection of public funds was addressed by this Court in Barr, which was quoted in Robbins, as follows:

> In *Barr v. Watts*, 70 So.2d 347 (Fla.1953), the Supreme Court, having observed that "chaos and confusion" would result if state officers and agencies were allowed to declare legislation unconstitutional, went on to clarify:
>
> > [There] is of course an exception to this rule–and that is, when the public may be affected in a very important particular, its pocket-book. In such a case the necessity of protecting the public funds, is of paramount importance, and the rule denying to ministerial officers the right to question of validity of the Act must give way to a matter of more urgent and vital public interest.
>
> *Id.* at 351. *Green v. City of Pensacola*, 108 So.2d 897 (Fla. 1st DCA 1959).

Robbins, 738 So.2d at 349 (Emphasis added). Thereafter, the special concurring opinion focused on the public fund doctrine stating:

> Although I have been unable to find a case which specifically equates the "disbursement" of public funds with the "collection" of same for purposes of establishing standing in the present context, it is absurd to conclude the standing would exist for one and not for the other. The language of the Supreme Court in *Barr* speaks of the overriding importance of "protecting the public funds." It is axiomatic that before government can "disburse," it must "collect." Indeed, although disbursing public funds is sometimes done whimsically and capriciously, collecting public funds is always serious business.

> Accordingly, even if the Appraiser had not raised the constitutional issue in a defensive posture, he had standing to raise it under the "public funds" exception.

Robbins, 738 So.2d at 349-50 (emphasis added).

In Florida, the collection of ad valorem taxes is a two-step process involving two independent constitutional officers. The duty falls upon the property appraiser to assess all taxable property and administer exemptions and to include all property on the assessment rolls for each year. This is the first step in the overall process of collecting the county's money. That is, the property appraiser must identify each parcel of property in the county, determine its taxable or exempt status, assign a value to each such parcel, and extend the millage against such properties as certified by the local budgeting entities. Once the taxes are extended, this same tax roll is then used by the tax collector to send the tax notices (bills) to each owner of the property listed on the tax roll as listed by the property appraiser. The function of collecting the money is exactly that; a basic ministerial function since the tax collector has no authority to deviate from the assessments as certified by the appraiser and extended as taxes on the tax rolls. The entire burden of ensuring that all properties in the county pay their proper share of the taxes for the operation of the budget entities rests on the property appraiser. Property appraisers have the constitutional duty to assess all taxable property at just value and any

statutes which sanction deviation from just value prevent them from performing their constitutional duty. The constitution is quite specific that all property must be assessed at its just valuation, except those specific classes of property listed in the constitution. See Art. VII, § 4, Fla. Const. (1968), and except those specifically exempted. See Art. VII, § 3, Fla. Const. It was this exact duty which was addressed by this Court in Interlachen Lakes. There, the constitutionality of the involved statute, the "Rose Law" was placed in issue by the assessing officer in the county. A taxpayer demanded that he be taxed pursuant to the provisions of the Rose Law and the property appraiser declined thereby resulting in the lawsuit which placed in issue the validity of same under the new constitution.

In State ex rel. Florida Portland Cement Co. v. Hale, 176 So. 577 (Fla. 1937), this Court held that the state road department could question the validity of a the state's cement inspection law because said law placed the duty of an inspection on the state road department. Therein this Court stated:

> While the question has not been presented by either of the respective parties, it has been suggested that the respondents may not be heard to question the validity of the act on authority of the opinion and judgment in the case of State ex rel. Atlantic C. L. R. R. Co. v. Board of Equalizers of Florida, 84 Fla. 592, 94 So. 681, 684, 30 A. L. R. 362.

Hale, 176 So. at 584-85. Thereafter, this Court stated:

In the case of State ex rel. Atlantic C. L. R. R. Co. v. Board of Equalizers of Florida, supra, the court refers to the case of Board of Public Instruction for of Santa Rosa County v. Croom et al., 57 Fla. 347, 48 So. 641, and says:

> "The case of Board of Public Instruction for Santa Rosa County v. Croom, 57 Fla. 347, 48 So. 641, is not in conflict with the doctrine herein announced. In that case Mr. Knott's interest was directly affected. He was State Treasurer, and under a heavy bond. If he paid money out of the treasury under the provisions of an unconstitutional act, he or his bondmen would have had to bear the loss. His right to raise the question of the constitutionality of the act involved did not grow out of the obligation of his oath of office, not out of his official position, but because he was liable to be injured pecuniarily."

There is no difference between the status of the State Road Department in the instant case and the status of Mr. Croom, as comptroller, and Mr. Knott, as state treasurer, in that case. If the State Road Department complied with the mandatory provision of the act, the members of that department would be required to pledge or expend public funds in so doing and while if the act should be enforced and should be held valid the fund pledged or expended would ultimately come from those paying the inspection fees, such fact does not place the State Road Department in such position that it is required to expend public money pursuant to provisions of a legislative act which it in good faith believes to be invalid and unenforceable. The act here under consideration is of such a nature that its constitutionality may have well been, and in good faith, doubted. One who is required to pay out public

> funds should be at least reasonably certain that the same are paid out under valid law.

Hale, 176 So. at 585 (emphasis added.) In said case, this Court noted that there was no material difference between the status of the state road department in that case and the status of Mr. Croom as comptroller and Mr. Knott as state treasurer in Board of Public Instr. for Santa Rosa Co. v. Croom, 48 So. 641 (Fla. 1908). It held that "the reasonable doubt of the constitutionality of a legislative act may justify an officer, charged with the duty of expending public funds only pursuant to valid law, in declining, in the absence of a controlling court order, to pay out public funds under provisions of such a doubtful statute, . . ." Id. Property appraisers are required to expend public funds to administer the substantially complete law. They must track construction of improvements through building permits and physical inspection to know the state of completion on January 1.

As a purely practical matter, the only "watchdog" for the county in ensuring that all properties are assessed according to the mandates of the constitution is the property appraiser. It is only he who, by virtue of the duties reposed upon him by law, has the function of ensuring on an annual basis that all property subject to tax in the county is properly identified, reported, and included on the county's assessment rolls. The average John Q citizen would have no way

of knowing that the legislature had passed statutes providing special tax exemptions to select taxpayers thereby diluting the funds available for the operations performed by the budget entities for the county, such as the schools, the county, municipalities, and others. That fact is squarely recognized by the numerous cases which have arisen involving such statutes which have come before this Court in the past. See Capital City; Archer; Seay; Interlachen Lakes; Hale; Croom,.

There are many innovative ways of manipulating Florida's constitutional requirements of just value for all taxable property and Florida's limitations of that which can be exempted or classified by law. Many of these have already been before this Court. For instance, after Williams was decided, the first legislative attempt to circumvent this decision were the special acts addressed and held unconstitutional by this Court in Archer and Am Fi. There, the legislature attempted to create the exemption by characterizing the tax break or reduction provided by said special acts as merely a recompense for "unjust enrichment." This Court saw through such subterfuge and held such statutes unconstitutional in litigation where the constitutionality was placed in issue by the local elected officials.

In Lykes Bros., this Court "reigned in" the attempted "abuse" of legislative power by pointing out that the legislature did not have the power to continue in force and effect an illegal exemption, even though it may have been ratified by contract by the involved municipality or other governmental body. There, the validity of the statute was placed in issue by the Florida Department of Revenue and the local property appraiser.

In Valencia Center, this Court reigned in a legislative attempt to provide for a special exemption through manipulation of the proper standards of assessments of property in Florida so that the particular property involved, a shopping center, would not be assessed in the same manner as other properties in the county. The legislation there sought to require the property appraiser to assess such property solely on the basis of the actual rent derived as opposed to the economic or market rent.

This distinction between economic (market) rent and actual rent also was noted by this Court in Capital City in which this Court corralled yet another attempt by the legislature to provide special tax treatment and special exemptions by mandating that, where government property was leased and used for private purposes, the improvements located thereon would be assessed as part of the intangible leasehold subject to state tax. There, the legislature sought to dilute the

tax base of the county by removing from the real property tax roll improvements constructed on governmental property used for purely proprietary purposes. In other words, the statute considered and construed by this court in Capital City was a legislative attempt to classify buildings and structures on real property owned by a governmental entity as intangibles so that the state could tax them instead of local government. Contrary to the contentions of appellants, the legislature does not have plenary or absolute authority to "define" what is real property as Lykes Bros. noted and held. In fact, even where the court itself authorized the legislature to define "boats," this Court held that this did not allow the legislature to depart from the normal meaning. See Florida Boaters Ass'n.

Whether diluting the tax base, as was attempted in Capital City and Valencia Center, so as to provide for a special tax exemption thereby saving the taxpayer money, or by way of an improper payment to the taxpayer by way of refund or any other manner, the result is the same; that is, a taxpayer receives a monetary benefit at the expense of the remainder of the property owners in the county.

If a statute were drawn which would have the affect of making a direct payment to the property owner in an amount exempted by some legislative enactment, under prior case law the expenditure of such money pursuant to said

law would provide the necessary standing or interest for the public official to challenge the constitutionality of the statute requiring such expenditure. Thus, there certainly is no logical reason why the same legitimate fiscal interest concerns would not supply the same basis for holding that an illegal exemption resulting in non-collection of the money should not be treated the same as an attempted refund of the amount exempted by such preferential legislation. In either situation, the amount of money would be the same and the special treatment would be identical.

Both Robbins and Turner involved situations where the respective VAB's overruled the appraiser so that the appraiser was required to resort to the appeal mechanism provided for in section 194.036(1)(a), Florida Statutes (1997), which provides:

> Appeals of the decisions of the board shall be as follows:
> (1) If the property appraiser disagrees with the decision of the board, he or she may appeal the decision to the circuit court if one or more of the following criteria are met:
> (a) The property appraiser determines and affirmatively asserts in any legal proceeding that there is a specific constitutional or statutory violation, or a specific violation of administrative rules, in the decision of the board, except that nothing herein shall authorize the property appraiser to institute any suit to challenge the validity of any portion of the constitution or of any duly enacted legislative act of this state;

Suffice it to say that the language in the statute is not a model of clarity. It begins by providing that the appraiser must determine and affirmatively assert in any legal proceeding that there is a specific constitutional or statutory violation, in the decision of the board. A constitutional violation occurred because no constitutional provision authorizes exemption for buildings under construction. In Robbins the appraiser complied to the letter with the statute and asserted that there was a constitutional violation, said constitutional violation being that the property was not assessed according to the constitution and the reason for same was because of the statute. The last phrase in the statute seems to directly contradict the first part of the statute because it states that nothing therein would authorize a property appraiser to institute any suit to challenge the validity of any portion of the constitution or of any duly enacted legislative act. It would be difficult to perceive any situation where the appraiser could or would challenge a constitutional provision. However, it is possible to reconcile the two seemingly conflicting parts by holding that the latter part of the statute prevents an appraiser from independently filing a suit against, for instance, the Florida Department of Revenue, challenging the constitutionality of a statute or where no assessment of any particular property was involved.

In any analysis, section 194.181(6), Florida Statutes (1997), must be considered and could not be overlooked because it provides:

> (6) In any suit in which the validity of any statute or regulation found in, or issued pursuant to, chapters 192 through 197, inclusive, is contested, the public officer affected may be a party plaintiff.

There can be no question but that the instant suit involves the assessment of property. The statute is in one of the chapters referenced in the section 194.181(6) and the appraiser, the sole officer with exclusive responsibility to determine the assessment of the property, is directly involved. It clearly states that such person may be a party plaintiff. By the clear language, it expressly authorizes an appraiser to challenge the validity of a statute as a party plaintiff.

Notwithstanding the legislature's somewhat confusing statutory directions, determination of standing or interest is a purely judicial function as part of the judicial power to assure that the issues being considered involve parties possessing the necessary adversarial interest in the subject matter. The court has repeatedly recognized that the duties of property appraisers provide the requisite interest by holding legislative attempted constitutional circumvention impermissible. The legislature certainly could not constitutionally pass a statute

providing therein that it could not be judicially challenged because this is beyond the legislature's power.

For instance, under section 194.181(6), the Holmes County Property Appraiser could not sue a taxpayer or the Leon County Property Appraiser in Leon County and challenge an assessment because he has no duty in Leon County, notwithstanding the apparent legislative authorization in said section. The judiciary would determine his standing or lack thereof. If the legislature cannot giveth, it cannot taketh away. There are instances in federal law where Congress has created statutory aids to standing so that an agency can take judicial action to protect individual rights in the civil rights arena, and frequently against governmental instruction on such rights. But, in Florida, determination of the requisite standing or interest are part of the judicial power, not legislative.

Sections 197.122(3) and 197.182, Florida Statutes (1997) provide statutory mechanisms for refunding ad valorem taxes. If a bill was passed and became law providing for refund of taxes for a prior year or years, under established case law the involved officers or agencies could challenge the validity of said law by initiating action against the beneficiary, if he/she felt the constitutionality was questionable because expenditure of public funds was involved. For instance, assume the legislature in 1999 enacted a law providing a

retroactive exemption to XYZ Power Corporation to be implemented by refund of tangible personal property taxes paid in 1998. Assume the law provided that such tangible personal property would be assessed at 50 percent of its just value and directed refund pursuant to section 197.182 ordering the property appraiser to make a correction to the prior year's tax roll pursuant to section 197.122, and ordered both the property appraiser and the department to approve and make the refund. Under well settled case precedent, the property appraiser and the department would have standing to initiate action challenging the validity of said law. If they refused to make refund, and XYZ filed suit, they could challenge the constitutionality of the law defensively as well.

The point is that the end result of protecting the public coffers is accomplished whether suit is initiated or defended, and that is the objective and purpose recognized by this Court in Barr and many other cases.

CONCLUSION

For the reasons stated herein, the PAAF respectfully submits that section 192.042 is unconstitutional, that the decision of the district court holding that section 192.042 is unconstitutional and that property appraisers have standing to challenge the validity of said statute should be upheld.

Respectfully submitted,

Larry E. Levy
Fla Bar No. 047019
Loren E. Levy
Fla Bar No. 0814441
The Levy Law Firm
1828 Riggins Road
Tallahassee, Florida 32308
850/219-0220

Counsel for amicus curiae, Property Appraisers' Association of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Amicus Curiae, Property Appraisers' Association of Florida, Inc., has been furnished to the following persons on this the **15th** day of November 1999:

Kenneth M. Bloom, Esquire
Bloom & Minsker
1401 Brickell Avenue, Suite 700
Miami, Florida 33131

Joseph C. Mellichamp, III
Senior Assistant Attorney General
Department of Legal Affairs
Tax Section - The Capitol
Tallahassee, Florida 32399-1050

Arnaldo Velez, P.A.
255 University Drive
Coral Gables, Florida 33134

Jay Williams, Esquire
Assistant County Attorney
111 N.W. First Street, Suite 2810
Miami, Florida 33128-1993

Victoria L. Weber, Esquire
Donna E. Blanton, Esquire
Steel, Hector & Davis LLP
215 S. Monroe Street, Suite 601
Tallahassee, Florida 32301

Thomas R. Julin, Esquire
Edward M. Mullins, Esquire
Steel, Hector & Davis LLP
200 S. Biscayne Blvd., 40th Floor
Miami, Florida 33131-2398

Robert S. Goldman, Esquire
Vickers Madsen & Goldman, LLP
1705 Metropolitan Blvd., Suite 101
Tallahassee, Florida 32308

Charles A. Stampelos, Esquire
McFarlin, Wiley, et al.
215 S. Monroe Street, Suite 600
Tallahassee, Florida 32301

Stuart H. Singer, Esquire
Richard Brener, Esquire
Rima Y. Mullins, Esquire
201 S. Biscayne Blvd., 20th Floor
Miami, Florida 33131-2399

Dan R. Stengle, Esquire
David L. Powell, Esquire
T. Kent Wetherell, II, Esquire
Post Office Box 6526
Tallahassee, Florida 32314

Robert M. Rhodes, Esquire
St. Joe Paper Company
1650 Prudential Drive, Suite 1400
Jacksonville, Florida 32307

Keith Hetrick, Esquire
Florida Homes Builders Ass'n
201 East Park Avenue
Tallahassee, Florida 32301

Larry E. Levy