IN THE FLORIDA SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

LAWRENCE FUCHS, et al. Appellant, v. JOEL W. ROBBINS, et al., Appellee.	CASE NO. 96,182
THE MIAMI BEACH OCEAN RESORT, INC., Appellant, v. JOEL W. ROBBINS, et al., Appellee.	CASE NO. 96,183

AMENDED ANSWER BRIEF OF APPELLEE JOEL W. ROBBINS, THE DADE COUNTY PROPERTY APPRAISER

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INTRODUCTION

Throughout this Answer Brief, Appellee will use the following abbreviations:

"Appellants" -- For references to Appellant Miami Beach Ocean Resort, Inc. and Appellant Lawrence Fuchs. Where the context is appropriate, the word "Appellants" may also include any or all eight of the various entities that have filed amicus curiae briefs supporting the actual appellants, such as where this Answer Brief discusses arguments made by "Appellants".

"Appraiser" -- For references to Appellee, Joel W. Robbins, as property appraiser of Miami-Dade County.

"Building" -- The renovated hotel by Taxpayer that was assessed on January 1, 1992 at an uncontested fair market value of $3,790,227.

"Decision below" -- For references to the unanimous Opinion of the Third District Court of Appeals on rehearing *en banc*, in *Fuchs v. Robbins*, 738 So.2d 338 (Fla. 3d DCA 1999).

"Statute" or "Substantial Completion Statute" -- For references to the second sentence of Section 194.042(1), Florida Statutes, expressly found to be unconstitutional in the Decision below.

"Taxpayer" -- For references to the Appellant, Miami Beach Ocean Resort, Inc., owner of the Building on January 1, 1992.

Emphasis given to any particular word or words in this Answer Brief has been added by Appraiser's counsel unless otherwise indicated.

SUMMARY OF ARGUMENT

The fundamental precepts of the taxation of real property in Florida since the

adoption of the Constitution of 1968 are that all real property must be assessed on the same basis as all other real property, at its full fair market value, unless it falls within an express constitutional exemption from taxation or within an express constitutional classification allowing a valuation at a specified percentage of value or based on character or use. Notwithstanding these fundamental precepts, **Appellants argue that a Building with an admitted fair market value in excess of $3,000,000 should be assessed at zero dollars for the 1992 tax year**, based upon the application of the Substantial Completion Statute. Yet all parties agree that there is no express constitutional provision allowing for the tax exemption of incomplete buildings, or for their valuation based on character or use or at a specified percentage of value.

Appellants attempt to explain this anomaly by characterizing the Statute as one relating to the "timing" of the valuation or as one securing a "just value" of property. But there is nothing in the Constitution or relevant recent case law to suggest that incomplete improvements can legally escape taxation in a year in which all other non-exempt, non-classified properties are taxed. This Court should therefore affirm the *en banc* Decision below.

ARGUMENT

I. THE FLORIDA CONSTITUTION OF 1968 PROHIBITS THE APPLICATION OF THE SUBSTANTIAL COMPLETION STATUTE TO THE VALUATION OF THE SUBJECT PROPERTY

A. Application of the Statute to the Subject Property would violate the Constitutional Mandate to Value all Property at its Just (fair market) Value.

It is beyond dispute that Article VII, section 4 of the Florida Constitution of 1968 requires all property to be assessed at "just value". As recognized by the Decision below, this Court's precedents have firmly established that "just value" is synonymous with "fair market value". *Schultz v. TM Florida-Ohio Realty Ltd. Partnership*, 577 So.2d 573, 574 (Fla. 1991); *Valencia Center, Inc. v. Bystrom*, 543 So.2d 214 (Fla. 1989); *ITT Community Dev. Corp.*

v. Seay, 347 So.2d 1024, 1026 (Fla. 1977); *Walter v. Schuler*, 176 So.2d 81 (Fla. 1965). In the instant case, it is conceded that the subject Building had a fair market value of **$3,790,227** on January 1, 1992 (the tax year in question), but application of the Statute would have required the Building to be valued at **zero dollars** for that year. Decision below, at 341. Notwithstanding their considerable efforts, Appellants have been unable to logically explain how a purported "just valuation" of zero dollars can be synonymous with a fair market value of over three million dollars.

For Appellants to prevail in this action, this Court must conclude that the Statute permits a "just valuation" of ***all*** property. Article VII, section 4, Fla. Constitution (1968). "All" property must, by definition, include the subject Building. Pursuant to the precedents of the cases set forth above, "just value" is synonymous with "fair market value"; and "fair market value" has been defined by this Court as the amount a willing buyer would pay to a willing seller. *Walter v. Schuler*; *Valencia Center*; *ITT Community*. *Although there undoubtedly would have been many willing buyers for an almost completed oceanfront Miami Beach hotel at a price of zero dollars, it is highly doubtful that the owner would have been a willing seller at that price*. Thus, it is clear that the application of the Statute to the Building would not have resulted in a just valuation of the Building as the term "just valuation" has been defined by

this Court, and the Statute is therefore unconstitutional.[1]

This modern definition of just value should be contrasted with the older and conflicting holding of this Court in *L. Maxcy, Inc. v. Federal Land Bank of Columbia*, 111 Fla. 116, 150 So. 248 (1933) (the case that provides the legal and logical underpinnings for *Culbertson v. Seacoast Towers East, Inc*., 212 So.2d 646 (Fla. 1968), relied on extensively by Appellants). In *Maxcy*, a statute providing that

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[1] Appraiser is not arguing that all incomplete buildings necessarily have fair market value (in contrast to Appellants' argument that all incomplete buildings necessarily have *no* market value). It is possible that some gutted or abandoned buildings could have no fair market value. That determination, however, should be made by appraisers on a case by case basis. (Appraisers are already required to take into consideration the condition of property when arriving at just value. Section 193.011(6), Florida Statutes.) If taxpayers were to be dissatisfied with the valuation determination, they would have the same administrative and judicial recourse as they would with any other valuation decision made by appraisers. *See generally Bystrom v. Equitable Life Assurance Society*, 416 So.2d 1133 (Fla. 3d DCA 1982).

non-bearing fruit trees "shall not be considered as adding any value" to their underlying land was alleged to have violated the 1924 Constitutional provision requiring the Legislature to prescribe regulations securing a "just" valuation of all property for taxation purposes. *L. Maxcy*, 150 So.2d at 250. The *Maxcy* court stated that the issue was "nothing more than a question of legislative policy concerning what is to be considered a 'just' valuation of the property". *Id*. "*The fact that the 'sales value'* [of the land] *may be increased eo instante* . . . by the setting out thereon of the undeveloped trees *is no conclusive criterion by which to condemn a present valuation for tax purposes arrived at by considering some other valuation than mere 'sales' value*." *Id*. "[U]ntil the trees planted on the land . . . shall have come into a bearing state, it is obvious that they add nothing to the value of the land *except*

for purposes of sale." Id. This finding in *Maxcy* cannot be reconciled with the law as it has evolved to define "just value" as the amount a willing buyer would pay a willing seller. Ascertaining the value of property "for purposes of sale", or for its "mere 'sales' value", is the obvious goal of the willing buyer-willing seller definition. Taxpayer's contention that the term "just value" is a concept broader than that encompassed by the notion of "fair market value" finds no support from any Supreme Court case decided after *Seacoast* under the provisions of the 1968 Constitution. The argument that "just value" may be legislatively "fine tuned" by the objectives of fairness and common sense (Taxpayer's brief, at 8) is belied by

all recent Supreme Court decisions on the subject.[2]

B. The Statute Creates an Unauthorized Classification for Assessment Purposes.

Article VII, section 4 of the Florida Constitution of 1968 provides that certain types of property expressly set forth in the subsections to section 4 may be valued according to different valuation standards than all other property. *Interlachen Lakes Estates, Inc. v. Snyder*, 304 So.2d 433, 434 (Fla. 1973). "The rule 'espressio unius est exclusio alterius' applies, however, so that by clear implication no separate standards of value may be established for any other classes of property" other than those enumerated in the subsections to section 4. *Interlachen*, at 434. By enumerating in the 1968 Constitution the classes of property which may be valued according to different standards than other property, the people of the State of Florida "have removed from the legislature the power to make" any other classifications of property for ad valorem assessment purposes. *Id*.

The Court affirmed this principle of taxation some fifteen years later in *Valencia Center*, stating that "[In] *Interlachen Lakes Estates, Inc. v. Snyder* . . . we determined that the legislature cannot establish different classes of property for tax purposes other than those enumerated in article VII, section 4 of the Florida Constitution . . . ." *Valencia Center*, at 216.

The legislature, by enacting the Statute, has created a separate standard of

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[2] Appraiser would submit that any "tuning" done by the Statute in this case is not so fine, allowing a Building with a fair market value in excess of three million dollars to be valued at zero dollars.

valuation for the class of property that, as of January 1 of any tax year, cannot be used for the purpose for which it was constructed. The unauthorized separate standard of valuation placed on buildings in this class is simply that they "shall have no value placed thereon." Accordingly, the Statute unconstitutionally violates the limitations of Article VII, section 4 of the Constitution, as interpreted by this Court in *Interlachen* and *Valencia Center*.

In attempting to distinguish the Statute from the statutory classifications found unconstitutional in *Interlachen* and *Valencia Center*, Appellants have noted that the statute struck down in *Interlachen* created a classification based on ownership, and that the statute invalidated in *Valencia Center* created a classification based on use. Extrapolating from these facts, Appellants argue that a tax statute creates a "classification" in the Constitutional sense only if it has the effect of taxing two identical properties at different levels based on extrinsic characteristics such as use or ownership. Appellants further argue that, in contrast to their self-created definition of "classification", the Substantial Completion Statute does not create a classification which requires different taxes to be imposed on identical property.

Although novel, the argument is not compelling. First, there *is* no definition in *Interlachen* or *Valencia Center* that limits the word "classification" as Appellants wish. No judicial construction or common sense meaning limits the word to the strict definition urged by Appellants.[3] Moreover, if there were such a limitation,

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[3] There is, however, the plain and ordinary meaning of the word "class" that may be considered by this Court. The American Heritage Dictionary, Second (continued...)

the legislature could create almost any type of tax break without creating an unconstitutional classification. For instance, a hypothetical

statute mandating that "all buildings painted purple on January 1 shall have no value placed thereon" would not create an unconstitutional classification under Appellants' "definition" because the color of the building is intrinsic to the structure, notwithstanding the fact that such a statute would create a separate standard of valuation that is different for the group of purple buildings than it is for all other buildings. Similarly, under Appellants' view, unscrupulous hypothetical legislators could give large-scale developers (who contribute heavily to legislative campaigns) a tax break by enacting a statute saying that "all buildings over 15 stories tall on January 1 shall have no value placed thereon." Although this is admittedly an extreme hypothetical, the "15 story" statute would be constitutional under Appellant's theory because it would not create a classification (height is intrinsic to the building and no identical properties would be taxed differently).[4]

Second, even under Appellants' definition, the Substantial Completion Statute *can* cause different taxes to be imposed on identical properties. The cases

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(...continued)
College Edition (1982), defines "class" as a "set, collection, group, or configuration containing members having . . . at least one attribute in common." Thus, the group of buildings which have in common the fact that they "cannot be used for the purpose for which [they were] constructed" clearly constitute a "class" under that word's common meaning.

[4] Additionally, according to Appellants, the statute would be constitutional because it would relate to the "timing" of assessments on buildings of 15 stories or greater.

of *Hausman v. Bayrock Investment Company*, 530 So. 2d 938 (Fla. 5th DCA 1988) and *Colding v. Klausmeyer*, 387 So. 2d 430 (Fla. 2d DCA 1980) establish that "shell" structures may be assessed as substantially completed buildings if the developer's intent was to erect a "shell building" that would be marketed to tenants. *Hausman*, 530 So. 2d at 940 (buildings involved were substantially completed to the point intended by developer because they were "shells" waiting to be finished by a tenant); *Colding*, 387 So. 2d at 432 (building involved was substantially completed where developers' immediate and primary purpose was to erect a "shell building" within which individual stores would be completed by tenants). Thus, two identical buildings, in identical states of completion, could be taxed differently (one at zero value) under the Substantial Completion Statute based solely upon the "extrinsic" factor of whether a particular developer intended to finish the building for itself or to market the building as a shell to be finished by tenants.[5]

Under any common sense definition of the word, and even under Appellants' strained definition, the Substantial Completion statute creates a classification of property that is valued according to different standards than other property, in direct violation of the Supreme Court's holdings in *Interlachen* and *Valencia Center*. Accordingly, the Decision below properly found the Statute to be unconstitutional.

C. The Challenged Portion of the Statute Does Not Relate to the Timing of Assessments; Even If It Did, It Would Be Unconstitutional.

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[5] A developers "intent" has very little to do with the actual fair market value of a property. Under the *Hausman* and *Colding* holdings, however, such intent could mean the difference between a "just value" assessment of six million dollars and a "just value" assessment of zero dollars, even on identical buildings.

Appellants argue that the Statute does not create an unauthorized classification or exemption but instead merely relates to the *timing* of the valuation and assessment of incomplete property. This argument is based on a recent statement of this Court in *Collier County v. State*, 733 So.2d 1012, 1019 (Fla. 1999) that the Statute is part of a "specific statutory scheme for the timing of the valuation and assessment." Although the totality of section 192.042(1), particularly the first full sentence, clearly relates to timing of assessments, the challenged portion of the statute does not.[6]

The actual language of 192.042(1) provides that "***All*** property shall be assessed according to its just value as follows: (1) Real property***, on January 1 of each year.*** Improvements or portions not substantially completed on January 1 shall have no value placed thereon." Thus, it is clear from the terms of the Statute itself that incomplete improvements ***are*** assessed on January 1 ***of each year*** -- they are simply assessed at "no value." (The terms "all property" and "real property" must of necessity include within their sphere "improvements or portions not substantially completed.") The legislature has *not* provided a different assessment date for such properties; the assessment date is ***January 1 of each year***. The difference is in the *valuation* placed on such properties -- "no value" versus fair market value.

Even if the challenged portion of the Statute could be deemed to establish a

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[6] See Decision below, holding 192.042(1) unconstitutional, "with the obvious exception of the language establishing January 1 of each year as the taxing date." Decision below, at 348 n. 24.

timing mechanism, it would not rescue the Statute from its constitutional infirmity. Any authority of the Legislature to control the timing of assessments is not unfettered. Nothing in the Constitution expressly discusses the legislature's authority to control "timing"; thus, to the extent this implied power exists, it must of necessity be exercised within the parameters of the Constitutional imperative to assess ***all*** *property at just (fair market) value. See Miller v. Higgs*, 468 So. 2d 371, 375 (Fla. 1st DCA 1985) ("***subject only to constitutional restrictions*** . . . the legislature's power and discretion in regard to taxation are broad, plenary . . . .").

In *ITT Community*, this Court found a legislative enactment known as "Pope's Law" to be unconstitutional, in part because the statute attempted to determine the value of real property at a date remote from January 1st of the tax year in question, the date for valuation of all other real property. *ITT Community*, 347 So. 2d at 1028. In so finding, this Court ruled that the statute therein did not satisfy the requirements of, and violated, Article VII, section 4 of the Florida Constitution. *Id*., at 1028, 1029.

This Court simply could not find a compelling rationale for the fact that Pope's Law attempted to value property at least ten months after the legal assessment date of January 1st. *Id*., at 1028. Under the Substantial Completion Statute, the valuation of the Taxpayer's Building would not occur until at least *one full year* after the legal assessment valuation date of January 1, 1992, and even then the Building would be assessed *only* for the 1993 tax year, escaping taxation completely for 1992. If the legislature cannot constitutionally delay valuation for ten months, it should not be able to constitutionally delay valuation forever. Yet

this is exactly the result that obtains from application of the Statute to the Building in this case. Accordingly, the application of the Statute is unconstitutional.[7]

D. *Seacoast* is No Longer Controlling Precedent as to the Statute's Constitutionality.

It is true that this Court upheld the constitutionality of a statute similar to the instant Statute in *Culbertson v. Seacoast Towers East, Inc.*, 212 So. 2d 646 (Fla. 1968). The trial court found, however, and the Third District Court affirmed, that *Seacoast* is no longer applicable precedent because of the changes made to the taxation section in the Constitution of 1968. *Interlachen*; *Valencia Center*. Appellants nevertheless continue to argue that the 1968 amendment to the Constitution does not alter the *Seacoast* holding.

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[7] Pope's Law, similar to the Statute at issue in the instant case, did not treat identical properties differently based on factors extrensic to the property. Pope's law was nevertheless unconstitutional because, just like the Substantial Completion Statute, it delayed the valuation of property beyond January 1 of the tax year, and did not result in an assessment at fair market value. *ITT Community*. At least under Pope's law, the property would be *taxed* for the year in question; it would merely be *assessed* at a date different from other properties. Conversely, under the Statute at issue, the Building will *never* be taxed for the year in question. Moreover, although it is unconstitutional, it is certain that the application of Pope's law in the instant case would have yielded an assessment far closer to fair market value than would application of the Substantial Completion Statute.

Seacoast held that, under the Constitution of 1885, the legislature had authority to create separate *classifications* of property for assessment purposes, including the authority to classify non-substantially complete properties as property which should not be valued or assessed. *Seacoast*, at 647. Although the *Seacoast* opinion stated that the version of the Substantial Completion Statute there at issue constituted only a "temporary postponement of valuation and assessment of incomplete improvements on real property", the statement was obiter dictum. Not only was the statement incorrect in that the assessment was not postponed for the tax year in question but was rather eliminated entirely, the statement was not necessary to the Court's decision. The core holding of the *Seacoast* decision was actually set forth in the next sentence of the decision, where the Court found that the statute was constitutional because, "The requirement is simply that the ***separate classification*** of ***such property*** shall bear some reasonable relationship to the legislative power to prescribe regulations to secure a just evaluation of property". *Id*. The term "such property" as used in the sentence can only pertain to the "incomplete improvements" referenced in the preceding sentence of *Seacoast*. Thus, it is clear that the *Seacoast* court considered the "postponement of valuation and assessment of incomplete improvements" to constitute a *separate classification* of property. *Id*. Such separate classifications are now unconstitutional. *Interlachen; Valencia Center.*

In *Interlachen*, this Court reversed the core holding of *Seacoast*, based upon the new language of the Constitution of 1968. "Under the 1885 Constitution we had held that the legislature could tax different classes of property on different

bases, as long as the classification was reasonable. [This is the exact standard set forth in *Seacoast* at 647]. *Lanier v. Overstreet*, 175 So. 2d 521 (Fla. 1965). The people of this State, however, by enumerating in their *new* Constitution which classifications they want, have removed from the legislature the power to make others." *Interlachen*, at 434. *See also Valencia Center*, 543 So. 2d at 216; and *Williams v. Jones*, 326 So. 2d 425, 430 (Fla. 1975) (the limitation imposed in Article VII, section 4 of the Constitution of 1968 was clearly intended to be a check upon the legislature so as to prohibit it from classifying property for ad valorem taxation in such a manner as to result in a valuation of any class of property at less than just value).

To avoid this inherent conflict between the holding in *Seacoast* and the subsequent holdings of the Supreme Court in *Interlachen*, *Valencia Center*, and *Williams v. Jones*, Appellants argue that the Substantial Completion Statute does ***not*** create a classification. In so arguing, the Appellants effectively eliminate the core holding and rationale of the *Seacoast* decision which they rely on to support the constitutionality of the Statute -- namely, that the Statute constituted a reasonable *classification* of "such property" (i.e., incomplete improvements). Appellants are caught in a classic "Catch 22". They do not and cannot explain how or why they can disagree with *Seacoast*'s clear conclusion that "incomplete improvements" constitute a ***separate classification*** of property for taxation, while simultaneously relying on *Seacoast* as persuasive precedent to overturn the

Decision of the Third District Court below.[8]

Further, as succinctly stated by the Third District Court in the Decision below:

> It is important to know and understand that the supreme court in *Interlachen* specifically held that the legal logic of *Lanier v. Overstreet*, referenced in the above quote [from *Interlachen*], was displaced by the new constitution. It is equally important to know and understand that *Lanier v. Overstreet* had relied on *L. Maxcy's* logic, thus *Interlachen* also clearly displaced *L. Maxcy*. And because the *Seacoast* decision . . . was bottomed on *L. Maxcy*, then *Seacoast was also clearly displaced by Interlachen*. The owner's reliance on *Seacoast* and its outdated logic is erroneous.

Decision, at 347.[9]

As set forth in part I.A. of this Brief, *supra*, the *L. Maxcy* decision's express finding that the legislature may constitutionally command an appraiser to ignore improvements that add to the "sales value" of land is also hopelessly outdated in light of this Court's modern pronouncements equating "just value" to the willing buyer - willing seller concept. Accordingly, *Seacoast*, being based on *L. Maxcy*, is no longer controlling precedent as to the Statute's constitutionality, and the *en banc* Decision of the Third District Court must be affirmed.

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[8] A further problem with the Appellants' reliance on *Seacoast* is that the *Seacoast* decision *expressly* states that factors analogous to those of the substantial completion classification had in "numerous instances" been made the basis for *special statutory treatment*. *Seacoast*, at 647. Under this Court's decision in *Interlachen*, however, it is now inappropriate for the legislature to manipulate assessment standards and criteria to favor certain taxpayers over others. *Interlachen*, at 435.

[9] By extension, Appellants' reliance on *Markham v. Yankee Clipper Hotel*, 427 So. 2d 383 (Fla. 4th DCA 1983) and *Hausman v. Bayrock Inv. Co.*, 530 So. 2d 938 (Fla. 5th DCA 1988) is also erroneous, because both of those cases followed *Seacoast* as controlling precedent. See Decision below, at 346-347, n. 20.

E. If the Statute Does Not Create a Classification, Then It Creates An Unconstitutional System of Undervaluation of Certain Properties in the Same Class As Others Not so Undervalued.

Even if it were somehow constitutional to value property at a date remote in time from January 1st of the tax year, and even if the Substantial Completion Statute did not create an unconstitutional classification of property for tax assessment purposes, the Statute would still not pass constitutional muster. If it is assumed, *arguendo*, that non-substantially completed buildings are ***not*** a separate class of property for tax assessment purposes (as Appellants insist), but instead are merely a part of the larger class of "improvements to property" or "property" in general, then the Statute would still be unconstitutional because, "Intentional systematic undervaluation by state officials of other taxable property ***in the same class*** contravenes the constitutional rights of one taxed upon the full value of his property". *Allegheny Pittsburgh Coal Co. v. County Commissioner*, 488 U.S. 336, 109 S. Ct. 633, 639, 102 L. Ed. 2d. 688 (1989), *cited in Ozier v. Seminole County Property Appraiser*, 585 So. 2d 357,359 (Fla. 5th DCA 1991). The Substantial Completion Statute *compels* the intentional systematic undervaluation of non-substantially complete properties that have market value, such as the Building at issue in the instant case, thus contravening the rights of those in the "class" who own completed property.

The Third District Court's decision in *Florida Rock Industries, Inc. v. Bystrom*, 485 So. 2d 442 (Fla. 3d DCA 1986) confirms this analysis. In *Florida Rock*, the Third District Court approved the trial court's conclusion that:

> [Where property] is *not specially classified land*,

> the State Constitution requires the property to be assessed at fair market value and *precludes* it from being assessed solely on the basis of *character* or use. *Neither the Property Appraiser nor this Court is free to deviate from this Constitutional standard or to reject the compelling evidence that the property has present value.*

Id., at 446.

Here, Appellants argue that the subject Building is *not* specially classified land. If that is true, Appellants have not provided a compelling explanation for why this Court should deviate from its own expression of the Constitutional standard for determining just value (i.e., fair market value), or for why this Court should reject the uncontroverted finding that the Building had a present value of $3,790,277.

Interlachen is also instructive on this point. The statute at issue in *Interlachen* provided that platted land unsold as lots should be valued for tax assessment purposes on the same basis as unplatted acreage of similar character until 60% of the lands included in one plat were sold as individual lots. *Interlachen*, at 434.[10]

The Supreme Court in *Interlachen* held the statute to be unconstitutional because it created a classification of property to be valued on a different standard than all other properties, in violation of Article VII, section 4 of the 1968 Constitution. This Court went on to say, however, that even "if the statute applied

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[10] This statute, found unconstitutional in *Interlachen*, was cited by the Court in *Lanier v. Overstreet*, along with the *L. Maxcy* "non-bearing fruit trees" statute, as "another legislative directive providing a practical guide to tax assessors to assure that the land will be assessed in accordance with its actual *character*. . . ." *Lanier v. Overstreet*, 175 So. 2d at 524. This is but a further demonstration that the logic of *L. Maxcy*, relied on by *Seacoast*, is no longer viable. See parts I.A. and I.D., *supra*.

to *all* properties and could be considered as merely establishing *one criterion* for determining value it would still not survive because it is so unreasonable and arbitrary." *Interlachen*, at 435. The Court in *Interlachen* noted that, while it is true that at some point in the development of most subdivisions the character of the land changes and the lots increase in value, the change may not occur until long after all the lots have been sold by the developers. Moreover, any change in the value of the lots in a subdivision could be measured by the same criteria used for other lots, including those criteria listed in Florida Statute section 193.011. *Id*. Similarly, while it is true that the value of a building is affected by the state of its completion, the value of an incomplete building can be measured by the same criteria used for other real property, including those criteria listed in Florida Statute 193.011. To automatically require valuation of such properties at zero value, particularly one with market value in excess of three million dollars, is even more arbitrary and unreasonable than the 60% rule invalidated by this Court in *Interlachen*. Thus, the Decision below must be affirmed.

II. THE TRIAL COURT CORRECTLY ALLOWED THE PROPERTY APPRAISER TO CHALLENGE THE CONSTITUTIONALITY OF THE STATUTE.

A. Taxpayer Waived Its Argument That Appraiser Had No Standing, And the Constitutional Issue Was Tried By Implied Consent.

The issue of standing must be raised as an affirmative defense before the trial

court. *Krivanek v. Take Back Tampa Political Committee*, 625 So. 2d 840, 842 (Fla. 1993). The failure to raise standing as an affirmative defense constitutes a waiver of that defense. *Id*.; *see also* Rule 1.140(h)(1), Fla. R. Civ. P. (a party waives all defenses that the party does not present either by motion or in a responsive pleading).

In the case *sub judice*, Taxpayer did not raise the issue of Appraiser's standing in a motion, as an affirmative defense in its responsive pleading, or even at the trial on the merits. Further, the trial court specifically found that the constitutional issue was tried by implied consent. Accordingly, Taxpayer has waived any argument it may have had that Appraiser did not have standing to raise the constitutional issue here involved. An affirmative defense is waived and may not be argued unless it is pled as an affirmative defense or unless it is tried by implied consent of the parties. *Miami Electronic Center v. Saporta*, 597 So. 2d 903, 904 (Fla. 3d DCA 1991); *Bradford Builders v. Dept. of Water and Sewer*, 142 So. 2d 137, 138 (Fla. 3d DCA 1962).

In the instant case, the issue of standing was neither raised as an affirmative defense nor tried by implied consent, and thus the issue was waived. Conversely, the issue of the Substantial Completion Statute's constitutionality was expressly found by the trial court to have been tried by implied consent, without objection from Taxpayer, and thus was preserved for review. Taxpayer, however, failed to preserve its right to object to any error at the trial court based upon standing. *See*, *e.g.*, *Baker v. Baker*, 394 So. 2d 465, 466 (Fla. 4th DCA 1981) (appellate review of matters not objected to, or expressly acquiesced in, is foreclosed). Accordingly,

there is no need to even address the "standing" issue, let alone reverse the Third District Court's decision on that ground.[11]

B. *Turner v. Hillsborough County Aviation Authority* is Wrongly Decided and is Not Dispositive of the Standing Issue in the Instant Case.

Appellants standing arguments rely heavily on the Second District Court's recent decision in *Turner v. Hillsborough County Aviation Authority,* 739 So.2d 175 (Fla. 2d DCA 1999). This case expressly conflicts with the Third District Court's conclusion that the Appraiser had standing to challenge the Statute's constitutionality. *Turner* is not dispositive of the standing issue in the instant case for at least three reasons.

1. *Turner* does not address the issue of waiver or trial by implied consent.

As set forth immediately above, the constitutionality of the Statute was tried by implied consent and no objection was made to Appraiser's standing. Because *Turner* does not address these factors, it does not change the law that precludes appellate review of matters not raised at trial or those in which appellant acquiesced. It is therefore inapplicable to the facts before this Court.

2. *Turner* construes the statutory law incorrectly; § 194.036(1)(a) prohibits only pure declaratory actions and must be read *in pari materia* with related provisions.

The *Turner* decision recognized that section 194.036(1)(a) of the Florida

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[11] It is clear that any alleged lack of standing on the Appraiser's part is not jurisdictional or so fundamental that an objection based on standing cannot be waived. Numerous cases in Florida have considered the Constitutionality of tax statutes where the issue was raised by a property appraiser, either as plaintiff or defendant. *See*, *e.g.*, *Valencia Center*, *Interlachen*, *Seacoast*, *Yankee Clipper*, and *ITT Development*.

Statutes expressly provides that a property appraiser who disagrees with a decision of the Value Adjustment Board (VAB) may *appeal* the decision where the appraiser "determines and asserts in a legal proceeding a 'specific constitutional violation' in the decision of the VAB." *Turner*, at 179. The decision goes on to say, however, that the language following that statutory subsection prohibits the appraiser from instituting legal proceedings "even if [the] appraiser is convinced that an enactment is unconstitutional." *Id*.[12] Thus, in the *Turner* court's view, the "following language" of subsection 194.036(1)(a) renders its preceding language meaningless in any situation where the VAB applies an unconstitutional law or applies a law in an unconstitutional manner.

In addition, the *Turner* decision effectively renders meaningless section 194.181(6), Florida Statutes, which provides that, "In any suit in which the validity of any statute . . . found in . . . chapters 192 through 197, inclusive, is contested, the public officer affected may be a party *plaintiff*." The only time an appraiser is a party plaintiff under the listed Chapters is when he challenges a VAB decision. If a taxpayer chooses to forego the VAB process, the appraiser is a *defendant*, and under all views could raise the constitutionality of a tax statute in this posture.[13] Thus, section 194.181(6) would have no meaning to property appraisers if the

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[12] The "following language" of § 194.036(1)(a) reads as follows: "nothing herein shall authorize the property appraiser to institute any suit to challenge the validity . . . of any duly enacted legislative act of this state." *Id*.

[13] This creates an absurd result elevating form over substance; under this view, if the taxpayer challenges an assessment at the VAB, the appraiser has no standing to question the constitutionality of the statute -- but, if the taxpayer brings an action directly to Court, than the appraiser has such standing. Statutes, of course, should be construed so as to *avoid* absurd or unreasonable results. *Dorsey v. State*, 402 So. 2d 1178, 1183 (Fla. 1981).

Turner interpretation is correct, because an appraiser as *plaintiff* could never contest the validity of a statute.

Statutes, of course, are to be construed *in pari materia*, so that they are meaningful in all of their parts. *Wilensky v. Fields*, 267 So. 2d 15 (Fla. 1972). The *Turner* view does not accomplish this goal. An interpretation of the statutes which does accomplish this goal, however, and which accords with case law on the subject, is readily ascertainable. In *Department of Revenue v. Markham*, 396 So. 2d 1120 (Fla. 1981), this Court pronounced that mere disagreement with a statutory duty or the means by which it is to be carried out does not create a justiciable controversy or provide an occasion for an advisory opinion. *Markham*, 396 So. 2d at 1121. This pronouncement fits precisely into the statutory language misconstrued by the *Turner* court. In essence, section 194.036(1)(A) should be read only as prohibiting direct declaratory actions, where no specific assessment is at issue and there is no real justiciable controversy. In that way, all the statutory language referenced will have meaning, and form will not be elevated over substance.

3. The property appraiser cannot be denied standing under the rationale of *Atlantic Coast Line Railway* and the incorrect facts assumed by *Turner*.

In *Turner*, the Second District Court cited *State ex rel Atlantic Coast Line Railway Co. v. State Board of Equalizers*, 84 Fla. 592, 94 So. 681 (1922) for the proposition that the "right to declare an act unconstitutional . . . cannot be exercised by the officers of the executive department under the guise of their observance of the oath of office to support the Constitution." *Turner*, at 178. Given this

proposition, the *Turner* court expressly disagreed with the Third District Court's *en banc* Decision and Judge Sorondo's concurring opinion that the Appraiser had standing to challenge the Statute's constitutionality because the Appraiser raised the issue in a defensive posture. *Id*.[14] "We believe that [Judge Sorondo's defensive posture] analysis overlooks the fact that, if the property appraiser had followed the law initially, as *State ex rel. Atlantic Coast Line Railway Co.* dictates he is obligated to do, the taxpayer would not have been forced to petition the VAB and set the litigation in motion." *Id*.

The problem with the *Turner* court's analysis is that there is no evidence of record in the case *sub judice* to support the assumption that the Appraiser ignored the Statute or did not follow it initially. It must be noted that the question of substantial completion is, at the outset, a question to be determined by the due exercise of the appraiser's discretion, and that exercise carries with it a presumption of validity. *City National Bank of Miami v. Blake*, 257 So. 2d 264 (Fla. 3d DCA 1973). Given the fact that testimony established that between 75-85% of renovations were complete as of January 1, 1992, it would not be unreasonable to assume that the Appraiser deemed the building to be "substantially" complete. *See Metropolitan Dade County v. Colsky*, 241 So. 2d 440 (Fla. 3d DCA 1970) ("shell" building properly deemed substantially

complete when exterior of building approximately 85% complete on January 1). There is certainly no reason to presume that the Appraiser "ignored the statute" in

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[14] The *Turner* opinion also conflicts with Judge Sorondo's finding that the "public funds" exception to standing applied to the Appraiser, stating that section 194.036(1)(a) precludes the application of that exception. *Turner*, at 177-178.

making his preliminary assessment. Indeed, the "Legal Issues" Findings of Fact and Conclusions of Law of Special Master Milton A. Friedman, attached as an appendix to this brief, do not disclose that any constitutional argument was raised by the Appraiser before the VAB special master. Thus, the factual basis for the *Turner* court's analysis of Judge Sorondo's concurring opinion actually has no factual basis. Neither *Turner* nor any of the cases cited by Appellants stand for the proposition that an appraiser may not deem a building to be substantially completed, and then challenge the Statute's constitutionality when the statute is raised in judicial proceedings. Accordingly, the rationale of *Turner* is inapplicable to the instant case. There is no sign or evidence in the record of the "chaos and confusion" that would result if state officers were allowed to declare legislation unconstitutional, which was the concern expressed by this Court in *Barr v. Watts*, 70 So. 2d 347 (Fla. 1953). Thus, the Third District Court's Decision must be affirmed.

The Appraiser had Standing under the "Public Funds" Exception.

Judge Sorondo's concurring opinion succinctly expresses why the "public funds" exception to the "standing" rule should be applied in this case. Decision below, 738 So.2d at 349-350. Appraiser has little to add to that expression, except to note that the inspection of properties in various states of completion to determine substantial completion *vel non* requires the actual disbursement of public funds for personnel, vehicles, fuel, forms, training, etc. The Appraiser is required to physically inspect real property every three years. Section 193.023(2), Florida

Statutes. While one might argue that such disbursements would also be required to actually place a value on such incomplete structures, there would in that case be tax revenues from such properties to offset the cost of such inspections and valuations. Thus, the Appraiser had standing under the "public funds" exception, and the Decision below must be affirmed.

There are Equitable and Practical Reasons why Appraiser should have Standing.

It is fundamental in Florida that controversies surrounding the taxation of real property sound in equity. *Section 3 Property Corp. v. Robbins*, 632 So. 2d 596 (Fla. 1993). It is inequitable and impracticable to hold that Appraiser cannot challenge legislative action that prevents the levy of constitutionally allowed taxes for the support of and payment for government services, and that shifts the tax burden from one set of property owners to another. Decision below, at 341.

On the one hand, if Appraiser does not having standing to challenge the constitutionality of the Substantial Completion Statute, it is unlikely that there will ever be a party able and willing to bring the Statute's constitutionality before the court. Taxpayers directly affected by the Statute will not challenge its application because the Statute operates to such taxpayers' benefit -- their property escapes taxation only if the Statute is constitutional. On the other hand, taxpayers that are *not* directly impacted by the operation of the Statute are also unlikely to bring an action to challenge its constitutionality. Even though "one person's exemption is another person's tax", *Redford v. Department of Revenue*, 478 So. 2d 808, 812 (Fla.

1985), taxpayers indirectly affected by the Statute are unlikely to challenge it because, as owners of substantially completed property, they are unlikely to be aware of the Statute's operation, or to have sufficient economic incentive to mount the challenge. Thus, if Appraiser cannot challenge the Statute, it will likely go unchallenged regardless of its invalidity under the organic provisions of Florida law.

For example, in *Valencia Center*, a lobbyist was evidently able to secure from the legislature an unconstitutional 1986 tax break statute intended for a *specific* piece of property in Dade County. *Valencia Center*, 543 So.2d at 215-216. Who other than the Appraiser would have or could have challenged this special interest statute -- who else could have been a watchdog for the public fisc as the appraiser was in Valencia Center?

Appraiser should be held to have standing in this case because he is the most appropriate person to challenge the Statute's legality. "[I]t has long been recognized that in a representative democracy the public's representatives in government should ordinarily be relied on to institute the appropriate legal proceedings to prevent the unlawful exercise of the state's or county's taxing and spending power." *Markham*, 396 So. 2d at 1122. If Appraiser has no standing in this action, the Miami-Dade County public has no one to rely on to institute the appropriate legal proceedings to prevent the unlawful exercise of the state's taxing power.[15] In addition, Appraiser himself is caught in a "Catch 22"; he must either

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[15] The Attorney General is *not* a party that could or would challenge the Substantial Completion Statute, because he has a statutory duty to defend the

(continued...)

ignore the statutory criteria of Section 193.011 of the Florida Statutes and the "just value" mandate of the Florida Constitution (and the Florida Supreme Court), or he must ignore the provisions of the Substantial Completion Statute. It is impossible to comply with the requirements of all three laws, yet the Constitutional mandate should be preeminent. It would therefore be inequitable to Appraiser and to the people of Dade County to hold that Appraiser cannot challenge the operation of the Statute in this case.

III. A FINDING OF UNCONSTITUTIONALITY SHOULD OPERATE PROSPECTIVELY EXCEPT AS IT RELATES TO TAXPAYER.

The third major issue raised by Taxpayer in its Amended Initial Brief is completely resolved by this Court's opinion in *Interlachen Lakes Estates, Inc. v. Brooks*, 341 So. 2d 993 (Fla. 1977). This opinion holds that the declared invalidity of a taxing statute operates prospectively only, with the exception of the controversy between the parties to the litigation. *Id*., at 995. Appraiser has no quarrel with this holding.

IV. INTEREST WAS PROPERLY ASSESSED BY THE TRIAL COURT.

Taxpayer admits that interest from April 1, 1993 to January 7, 1998 at 12% is the interest rate specified by Section 194.192(2) of the Florida Statutes, and therefore also admits that the date of delinquency for this action is April 1, 1993. *See* Section 193.333, Florida Statutes (taxes become delinquent on April 1 following the year in which they are assessed). Taxpayer argues, however, that

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(...continued)
taxing statutes. See Section 194.181(5), Florida Statutes. Indeed, Appellant Lawrence Fuchs is being represented in this appeal by the Attorney General.

Section 194.192(2) is not applicable to the instant case, inasmuch as Part II of Chapter 194 is inapplicable to Taxpayer because it did not sue for review of an assessment.

If Section 194.192(2) is not applicable in this proceeding, as Taxpayer suggests, then interest should have been assessed pursuant to Section 197.172, Florida Statutes, which provides that "Real property taxes shall bear interest at the rate of 18 percent per year from the date of delinquency until a certificate is sold." Thus, if this Court is persuaded by Taxpayer's argument, this Court should affirm the main holding of the trial court, but should remand with instructions to assess interest at 18% per year from April 1, 1993 until the tax is paid or a certificate is sold.

CONCLUSION

Based upon the arguments advanced and the authorities cited herein, Appraiser respectfully asks this Court to find the Substantial Completion Statute unconstitutional in the instant case and to affirm the decision of the Third District Court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this _____ day of December, 1999, to: Dan R. Stengele, Esq., David L. Powell, Esq., T. Kent Wetherell, II, Hopping Green Sams & Smith, P.A., Post Office Box 6526, 123 South Calhoun Street, Tallahassee, Florida 32314; Robert M. Rhodes, Executive Vice President and General Counsel, The St. Joe Company, 1650 Prudential Drive, Suite 400, Jacksonville, Florida 32307; and to Joseph C. Mellichamp, III, Esq., State Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050; Larry E. Levy and Loren E. Levy, The Levy Law Firm, 1828 Riggins Road, Tallahassee, Florida 32308; Stuart Singer, Richard J. Brener and Rima Y. Mullins, Kirkpatrick & Lockhart LLP, Miami Center 20th Floor, 201 South Biscayne Boulevard, Miami, Florida 33131; Sarah M. Bleakley and Heather J. Melom, Nabor Giblin & Nicherson, P.A., 315 South Calhoun Street, Suite 800, Tallahassee, Florida 32301; Victoria L. Weber and Donna E. Blanton, Steel Hector & Davis LLP, 215 S. Monroe Street, Suite 601, Tallahassee, Florida 32301; Thomas R. Julin and Edward M. Mullins, Steel Hector & Davis LLP, 200 S. Biscayne Boulevard, 40th Floor, Miami, Florida 33131; Kenneth M. Bloom, Bloom & Minsker, Suite 700, 1401 Brickell Avenue, Miami, Florida 33131; Arnaldo Velez, P.A., 255 University Drive, Coral Gables, Florida, 33134; Robert S. Goldman, Vickers Madsen & Goldman, LLP, 1705 Metropolitan Boulevard, Suite 101, Tallahassee, Florida 32308; Charles A. Stampelos, McFarlain Wiley Cassedy & Jones, P.A., 215 S. Monroe Street, Suite 600, Tallahassee, Florida 32301; and Keith C. Hetrick, Florida Home Builders Association, 201 E. Park Avenue, Tallahassee, Florida 32301.

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