SUPREME COURT OF FLORIDA

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

AMENDED
INITIAL BRIEF OF APPELLANT, THE MIAMI BEACH OCEAN RESORT, INC.

Kenneth M. Bloom
BLOOM & MINSKER
Suite 700, 1401 Brickell Avenue
Miami, FL 33131
(305)371-6800

ARNALDO VÉLEZ, P.A.
255 University Drive
Coral Gables, FL 33134
(305)461-9499

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CERTIFICATE OF FONT TYPE

The undersigned certifies that this brief was drafted using the Times New Roman 14 point font type.

STATEMENT OF THE FACTS AND OF THE CASE

The Third District's decision declaring §192.042, Fla. Stat. (1993) unconstitutional brings this appeal by the Miami Beach Ocean Resort, Inc. (R, 350-374).[1] The statute provides:

> 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. "Substantially completed" shall mean that the improvement or some self-sufficient unit within it can be used for the purpose for which it was constructed**.**

In the early 1990's, Miami Beach Ocean Resort acquired and began to completely renovate, improve and refurbish a hotel built in the 1940's. (R, 311). The project was not completed by January 1, 1992, rendering the improvements not substantially complete within the meaning of the statute. (R, 310).

For the tax year 1992, the Dade County Tax Assessor assessed the property at $6,227,222 ($2,277,000 for the land and $3,790,227 for the improvements). (R, 307-

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[1] The symbol “R” designates references to the record.

308).[2] The hotel sought review of the assessment before the Value Adjustment Board.[3] The Board determined the improvements were not substantially complete reducing the assessment to $50,000. (R, 308). Disagreeing with this assessment, the Dade County Tax Appraiser filed an action in the Circuit Court pursuant to §194.036(1), Fla. Stat. (1993) (R, , 1-5, 307)[4] to impose its original assessment. The appraiser asserted the board's assessment as below just value and the action taken by the board on the basis of the substantial completion statute violative of Article VII, Section 4 of the Florida Constitution. (R, 1-5).

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[2] For depreciation purposes under the Internal Revenue Code, the Hotel adopted a value of $10,500,000. (R, 311).

[3] The Value Adjustment Board is created by §194.015. It is empowered under §194.022 to hear petitions relating to assessments.

[4] The statute authorizes appeals from board decisions where the Appraiser disagrees with the decision of the board provided that 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 rule, in the decision of the board.

The statute however contains a limitation:

> **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...** (emphasis supplied)

The trial court found the improvements were not substantially complete. However, reasoning that §192.042 establishes a separate standard of value for an entire class in violation of the limitations prescribed by Article VII, Section 4[5] of the Florida Constitution, it ruled the Appraiser's original assessment correct. (See R, 317, 325). The trial Court ordered the hotel to pay the taxes based upon the original

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[5] The article provides:

§ 4. Taxation; assessments.

By general law regulations shall be prescribed which shall secure a just valuation of all property for ad valorem taxation, provided:

(a) Agricultural land, land producing high water recharge to Florida's aquifers or land used exclusively for non-commercial recreational purposes may be classified by general law and assessed solely on the basis of character or use.

(b) Pursuant to general law tangible personal property held for sale as stock in trade and livestock may be valued for taxation at a specified percentage of its value, may be classified for tax purposes, or may be exempted from taxation.

(c) All persons entitled to a homestead exemption under Section 6 of this Article shall have their homestead assessed at just value as of January 1 of the year following the effective date of this amendment. This assessment shall change only as provided herein.

1. Assessments subject to this provision shall be changed annually on January 1st of each year...;

2. No assessment shall exceed just value.

assessment with interest at the rate of 12% per annum retroactively from April 1, 1993 and upon its failure to do so within 30 days, the interest increased to 18%. (R, 327-328).

The Third District through a rehearing *en banc* affirmed the action of the trial court specifically holding that the Appraiser had standing to challenge the constitutional validity of § 192.042. (R, 329-334, 350-374).

POINTS ON APPEAL

I

IS §192.042(1) AN ENACTMENT VIOLATIVE OF ARTICLE VII, SECTION 4 AND THEREFORE UNCONSTITUTIONAL?

II

DID THE TAX ASSESSOR HAVE STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE STATUTE?

III

DID THE THIRD DISTRICT ERR IN NOT MAKING ITS FINDING OF UNCONSTITUTIONALITY PROSPECTIVE.

IV

DID THE TRIAL COURT ERR IN IMPOSING INTEREST ON THE ASSESSMENT AT 12% AND A PENALTY INTEREST AT THE RATE OF 18% PER ANNUM?

SUMMARY OF ARGUMENT

The prescription of the date, method and timing for assessments is peculiarly within the power given the legislature under Section 4, Article VII to prescribe regulations to secure a just valuation of property. Section 192.042 adopted on such authority constitutes a valid timing mechanism applying equally to all property. Unlike other statutes or regulations that result in identical parcels of property being treated differently, it applies to all property directing the Appraiser, a constitutionally identified but legislatively empowered and directed official, for appraisal purposes to place no value thereon. Its character as an incident of the regulatory process which is constitutionally delegated to the legislature, renders it immune from constitutional attack.

Additionally, the Appraiser, has no legislative or organic empowerment to challenge the constitutionality of the statute. No scholastic subterfuge can conceal the actions of the Appraiser as defensive. The Appraiser chose to ignore the law initially requiring the Taxpayer Hotel to resort to the Value Adjustment Board. When the Board acted lawfully, the Appraiser then chose the route of challenging the constitutionality of the statute in Circuit Court, a route not authorized by the legislation authorizing the Appraiser's use of the Courts or by organic law of long standing.

Assuming the validity of § 192.402 questionable, then prospective invalidity of the statute was in order allowing the Hotel, that acted in reliance on the statute, the benefits of the statute for the year in question.

Finally, assuming the invalidity of the statute authorizing the Hotel to be taxed in the form required by the Appraiser, it was improper to impose on the amount due at twelve or eighteen percent.

ARGUMENT

I

§ 192.042 IS A CONSTITUTIONAL ENACTMENT

The Constitution is the organon, defining the role of the legislature.[6] In taxation, Article VII, Section 4 requires the legislature to prescribe *"By general law* ***regulations*** ***...*** *which shall secure a just valuation of all property for ad valorem taxation..."*. The provision is not self executing[7] and no specific procedure to obtain a just valuation is mandated or required; the power allotted is plenary in nature[8] for:

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[6] The Constitution provides the framework of government. *City of Jacksonville v. Continental Can Co*., 113 Fla. 168, 151 So. 488, 489 (1933).

[7] The plain meaning of the command to prescribe regulations by general law exposes its nature as non self executing, requiring legislative action to implement its provisions.

[8] See *State ex. Rel Atty. Gen v. City of Avon Park*, 108 Fla. 641, 149 So. 409, 416 (1933). More so than in other areas the freedom for classification is

> **... the legislature's power and discretion in regard to taxation are broad, plenary, unlimited and supreme. All questions as to mode, form, character, or extent of taxation, exemption or nonexemption, apportionment, means of assessment and collection, and all other incidents of the taxing power, are for the legislature to decide**. (Emphasis supplied).[9]

The constitutional directive is for the legislature to prescribe the mode, form and means of assessments to arrive at a "just valuation" or "just value".

Through notions derived from judicial legislation[10] it is popularly felt[11] that "fair market value" is the entire dimension of "just valuation".[12] But, the term "just valuation" has greater occupancy.[13] Despite opportunity to so do, the People have not

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extensive. *Markham v. Yankee Clipper Hotel, Inc.*, 427 So. 2d 383, 385 (Fla. 4th DCA, 1983) review denied, 434 So. 2d 888 (Fla. 1983).

[9] *Miller v. Higgs,* 468 So.2d 371, 375 (Fla. 1st DCA, 1985), review denied, 479 So.2d 117 (Fla. 1985), overruled on other grounds, *Capital City County Club v. Tucker*, 613 So. 2d 448 (Fla. 1993).

[10] Oliver Wendell Holmes observed "judges do and must legislate, but they can do only interstitially, they are confined from molar to molecular motions". *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 218, 221 (1919).

[11] This popular view permeated the Third District's decision.

[12] See *Valencia Center v. Bystrom*, 543 So. 2d 214 (Fla. 1989); and *Walter v. Schuler*, 176 So. 2d 81 (Fla. 1965). Decortication of these cases to yield the source of their authority exposes the broad sweep allotted the legislature to include in the fold such concepts as "highest and best use" and the factors set out in §193.011, Fla. Stat. (1997).

[13] For example, Section 199.032, Fla. Stat. (1997) prescribes an annual tax of one mill on the dollar of the "just valuation of all intangible personal property" and

substituted "fair market value" as the polestar in the Constitution; the remaining terminology is identical to its first appearance in the 1868 Constitution[14] requiring the legislative prerogative to the enactment of a regulatory scheme for arrival at a "just value", a broader concept, capable of legislative definition to be fine tuned by the objectives of fairness and common sense.

At hand, a date for the assessment and a methodology and procedure are required. The chosen date is January 1 [15] - the regulation on how to go about doing it is contained in § 192.402 and §193.011, with §192.402 recognized by this Court as a "specific statutory scheme for the timing of the valuation and assessment".[16] Indeed,

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a nonrecurring tax of 2 mills on the dollar of the "just valuation of all notes, bonds and other obligations for payment." That the term "just valuation" in the context of this legislation could not be equivalent to "fair market value" evidences the concept of "just valuation" to be of greater magnitude.

[14] See Article XII, § 1, Fla. Const. (1868). Nonetheless, both the 1885 Constitution and the 1968 Constitution mandate a "just valuation" for all property. Compare, Article IX, § 1, Fla. Const. (1885), with Article VII, § 4, Fla. Const. (1968).

[15] Historically, a yearly tax is implied and January 1 has been legislatively chosen. See, e.g., Ch. 4322, §§ 3, 68, Laws of Fla. (1895). See, Ch. 5596, § 3, Laws of Fla. (1907), (which is the forerunner of present day § 192.053, Fla. Stat.), wherein the Legislature set a date that a lien on the property shall attach.

[16] The principle, stated in *Collier County v. State*, 733 So. 2d 1012 at 1019 (Fla. 1999), was not light, nor as the Third District hinted, the product of an incidental reference. It was deliberate and freighted with respect for the orbit given the legislature.

Additionally, Justice Pariente's invitation in *Collier County* to those

on two occasions this Court has observed that the statute constitutes only a temporary postponement of valuation and assessment of incomplete improvements.[17] The latest articulation, the Collier County case, reiterates this.

Some may press loss of revenue as an apt argument but this does not answer to reality. First, under § 200.011 and 200.065, Fla. Stat. (1997) local county bodies quantify the dollar needs specifying a budget. A millage rate is applied to the aggregate taxable value of all properties in the ad valorem tax base to produce revenue.[18] Property that is not substantially complete as of January 1 is not included in this tax base. However, the budget remains the same with tribute required on a *pari passu* basis on the tax roll resulting from the authorized and directed legislative regulation. **Revenue is not lost.** While it is true that the revenue requirement is then distributed over taxpayers whose property was appraised as complete and that the statute may provide a temporary windfall shielding some property, these are but arguments of fairness with no play in light of Justice Pariente's observation:

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considering the statute unfair to "have able and competent legislators" change it, empirically accepts the legislative ability for its enactment. If the rain checks alluded to by the Third District are not favored, the democratic solution is to have responsible legislators effect the change; the folly or wisdom of a statute differing from the rules of sporting events is not a check for its constitutionality.

[17] See *Collier County*, supra at 1019 and *Culbertson v. Seacoast Towers East, Inc.*, 212 So. 2d 646, 647 (Fla. 1968).

[18] See § 200.069, Fla. Stat. (1997).

> There is no ambiguity in the statute. It appears that any benefit to taxpayers was specifically contemplated by the legislative scheme.
>
> ******
>
> If there is a windfall created by the current statutory scheme, as the county claims, the County's redress lies with the Legislature.[19]

The statute is equal, applying to all property as of January 1. [20] It regulates the Appraiser directing improvements not substantially complete to have no value. The debate is interminable - some may say that in fairness the formula must require unfinished structures to pay something, others say it is not fair to treat the inert unfinished status as enjoying all perquisites afforded by government on January 1. Through exercise of the constitutional mandate to regulate, the debate is ended. The legislative finding[21] is that it is only *just* to place no value on the uncompleted and

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[19] *Collier County*, 733 So. 2d at 1019.

[20] While *Yankee Clipper* and *Culbertson* refer to the statute as creating a "classification", aught appears to indicate the term as one of art in the context of such cases. It is therefore unwise to proceed with the untested hypothesis that prior decisions have forever branded the statute as one creating a separate classification proscribed by Art. VII, § 4 and that it may not be considered as a reasonable regulation.

[21] Legislative findings and observations when rational must be upheld. *City of Tampa v. State ex. Rel. Evans*, 155 Fla. 177, 19 So. 2d 697 (1944). Inquiry on the issue is limited to whether any state of facts, either known or assumed, afford support for the challenged statute. See e.g. *State v. Bales*, 343 So. 2d 9, 11 (Fla. 1977); *State ex. Rel. Adams v. Lee*, 122 Fla. 639, 166 So. 249, 254 (1955), affirmed on rehearing, 122 Fla. 670, 166 So. 262 (1936), cert. denied, 299 U.S. 542, 57 S. Ct. 15 (1936).

Additionally, the public policy determination inherent in the statute is of

unfit improvements for a particular year, a result concomitant with the reign of Article VII, Section 4 to regulate and secure "a just valuation".[22] Succinctly, no value is a "just valuation" responsibly defined by the legislature for revenue raising purposes.[23]

The contours for the adoption of §192.402 do not differ from those used in adopting other regulations that are only operable in specific circumstances.[24] The statute is but another method of carrying out the just valuation mandate.[25]

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peculiar province to the legislature. *State v. Hodges*, 506 So. 2d 437 (Fla. 1st DCA, 1987) rev. denied., 515 So. 2d 229 (Fla. 1987).

[22] The definition of the components of this term of art derive from the "process of assessing or fixing the value of a thing", that has "reasonable or adequate grounds" or is "equitable". Oxford English Dictionary, 2d Edition, Clarendon Press, Oxford, 1989 Edition.

[23] We emphasize the statute does not state the improvements are worthless for market value purposes. Rather, the focus is on the just value for revenue purposes on improvements that cannot be used for the purposes for which they were intended.

[24] Compare § 193.015, Fla. Stat. (1997) involving property for which dredge and fill permits have been issued, § 193.075, Fla. Stat. (1997) involving mobile homes and see *Oyster Pointe Resort Condominium, Assoc., Inc. v. Nolte*, 524 So. 2d 415 (Fla. 1988) (involving statute prescribing method to assess time share developments); *Miller v. Higgs*, 468 So. 2d 371 (Fla. 1st DCA, 1985) (involving statute reclassifying leasehold interests in government owned land as intangible personal property instead of real property).

[25] *Hausman v. Bayrock, Inv.* Co., 530 So. 2d 938, 940 (Fla. 5th DCA, 1988).

The validity of a textually similar statute[26] was upheld by this Court in *Culbertson v. Seacoast Towers East, Inc.*, 212 So. 2d 646 (Fla. 1968). Additionally, the decline to review the Fourth District's review of the present statute in *Markham v. Yankee Clipper Hotel, Inc.*, 427 So. 2d 383 (1983), rev. denied 434 So. 2d 888 (Fla. 1983) in which the Court expressly noted the statute as constitutional[27] bolsters the belief that the statute is immune from attack. The source for the authority remains the enactment of a regulation for a "just valuation".

Neither the revision of the Constitution in 1968, the adoption of Article VII, § 4, nor *Interlachen Estates v. Snyder*, 304 So. 2d 433 (Fla. 1973) limit the legislature's ability to regulate. While the timing of the assessment and the attendant methodology regulated by § 192.042, may, to some, seem to create a separate classification with substantive rights, an equally available view displays its character as a timing regulation adopted to achieve a "just valuation".[28] This view cures the statute of

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[26] The statute, Section 193.11(4), Fla. Stat. (1967), provided "all taxable lands upon which active construction of improvements are not substantially completed on January 1, of any year shall be assessed for such year as unimproved lands.

[27] The *Yankee Clipper* decision is criticized for its reference and reliance on *Lennhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 93 S. Ct. 1001 (1973). The criticism is unwarranted as the reference is to that rationale of the case recognizing the wide constitutional latitude afforded the legislature in the enactment of tax laws.

[28] The Third District conceded its character as a timing and substantive regulation.

constitutional infirmities on the obligation to give statutes a construction upholding them when a reasonable basis [29] or theory[30] exist for doing so.[31]

Finally, the appraiser's attempted craft at irony with the Hotel's ten million plus attribution for federal income tax purposes, against the request for no value pursuant to §192.042, fails because it ignores the different vectors inherent in revenue raising laws.[32] Assuredly, it is unwise to define results, bookkeeping events or reporting

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[29] *Seaboard Air Line R. Co v. Watson*, 103 Fla. 477, 137 So. 719, (1931) app. dismissed 287 U. S. 86, 53 S. Ct. (32); *Dunedin v. Bense*, 90 So. 2d 300 (Fla. 1956); *Miami v. Kayfetz*, 92 So. 2d 798 (Fla. 1957); *Pinellas Count v. Laumer*, 94 So. 2d 837, (Fla. 1957); *Brevard County v. Harland*, 102 So. 2d 137, (Fla. 1958); *Chatlos v. Overstreet*, 124 So. 2d 1 (Fla. 1960); *Rich v. Ryals*, 212 So. 2d 641 (Fla. 1968); *Sarasota County v. Barg*, 302 So. 2d 737 (Fla. 1974); *Coen v. Lee*, 116 Fla. 215, 156 So. 747 (1934).

[30] *Adams v. Miami Beach Hotel Assoc*., 77 So. 2d 465, (Fla. 1955); *Pinellas County v. Laumer*, 94 So. 2d 837 (Fla. 1957); *Rabbin v. Conner*, 174 So. 2d 721 (Fla. 1965).

[31] Invalidation of the statute requires a showing beyond a reasonable doubt that it is in conflict with the constitution. *Metropolitan Dade County v. Bridges*, 402 So. 2d 411 (Fla. 1981); *A.B.A. Industries, Inc. v. City of Pinellas Park*, 366 So. 2d 761 (Fla. 1979). The responsible and justifiable definition as a needed timing regulation places the statute on a footing immune from such showing.

[32] Was it not Learned Hand who complained of the Internal Revenue Code, stating its words:

> merely dance before my eyes in meaningless procession. Cross-reference to cross-reference, exception upon exception- couched in abstract terms that offer no handle to seize hold of- leave in my mind only a confused sense of vitally important, but successfully concealed, purport, which it is my duty to extract, but which is within my power, if

emerging under the Federal Tax Law as definitions of a "just valuation".[33] If so, one must ask if the Appraiser insists value for depreciation purposes is the measure? If so, after five or seven years the value would be zero - an absurd result.

II

THE TAX ASSESSOR LACKS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE STATUTE.

The Assessor is constitutionally identified but has no inherent power. The duties are prescribed by the legislature[34]; adventures beyond the legislative

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> at all, only after the most inordinate expenditure of time. I know that these monsters are the result of fabulous industry and ingenuity, plugging up this hole and casting out that net, against al possible evasion...Much often the law is now as difficult to fathom, and more and more of it is likely to be so; for there is little doubt that we are entering a period of increasingly detailed regulation, and it will be the duty of judges to thread the path - for path there is- through these fabulous labyrinths.

L. Hand, "Thomas Walter Swan," in Dillard, Spirit of Liberty, p. 161.

[33] A consideration that can be gleaned from *Southern Bell Tel. and Tel. Co. v. Markham*, 632 So. 2d 272 (Fla. 4th DCA, 1994).

[34] See e.g. §193.023, Fla. Stat. (1997) detailing the duties of the property appraiser:

(1) the property appraiser shall complete his or her assessment of the value of property not later than July 1 of each year, except that the department may for good cause shown extend the time for completion of assessment of al property.

(2) In making his or her assessment of the value of real property the, property

prescription are in derogation of the statute and verboten.[35] Legislatively, the Assessor is empowered to challenge and review decisions of the value adjustment board with the limitation of §194.036(1)(a) that nothing "***authorize(s) the property appraiser to institute any suit to challenge the validity of any protection of the constitution or of any duly enacted legislative act of this statute***".

Moreover, for important policy reasons, courts have developed special rules concerning the standing of governmental officials to bring actions questioning a law the official is duty bound to apply.[36] Disagreement with a constitutional or statutory duty, or the means by which it is to be carried out, does not create a justiciable

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appraiser is required to inspect physically the property every 3 years to ensure that the tax roll meets all the requirements of law. However, the property appraiser shall inspect any parcel of taxable real property upon the request of the taxpayer or owner.

(3) in reevaluating property in accordance with constitutional and statutory requirements, the property appraiser may adjust the assessed value placed on a any parcel or group of parcels based on mass data collected, on ratio studies prepared by an agency authorized y law, or pursuant to regulations of the Department of Revenue.

[35] *Sherwood Park Ltd. v. Meeks*, 234 So. 2d 702, 703 (Fla.. 4th DCA, 1970), aff'd. sub. nom. *Markham v. Sherwood Park Ltd.*, 244 So. 2d 129 (Fla. 1971).

[36] See *Department of Revenue v. Markham*, 396 So. 2d 1120, 1121 (Fla. 1981)("courts have developed **special rules** concerning the standing of governmental officials to bring a declaratory judgment action questioning a law those officials are duty-bound to apply..."). The tax assessor is such an official. See *Miller v. Higgs*, 468 So. 2d 371, 374 (Fla. 1st DCA, 1985).

controversy or provide an occasion to assail the law and obtain an advisory judicial opinion.[37]

While *Department of Education v. Lewis*, 416 So. 2d 45 (Fla. 1982) allots a defensive challenge, the challenge in this case was not defensive. First, the Assessor ignored the improvements were not substantially complete, attributing a value in excess of that mandated by § 192.042; the value adjustment board rejected this dereliction of duty reimposing the requirements of law. Second, rather than seeking an appeal, the appraiser transgressed §194.036, filing a complaint which, in the unchallenged finding of the Master, was "*sufficient to apprise the Taxpayer, that in the Appraiser's view...the Substantial Completion Statute was unconstitutional under Article VII, Section 4*". (R, 314); this was an impermissible and unlawful challenge contrary to the teaching of the Second District in *Turner v. Hillsborough County Aviation Authority*, 24 Fla. L. Weekly, D 2034 (Fla. 2d DCA, Sept. 3, 1999).

In *Turner*, the appraiser using the permitted tool of § 194.036 (1)(a),(b) filed suit in the Circuit Court against the Aviation Authority alleging a decision of a Value

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[37] See also *Jones v. Department of Revenue*, 523 So. 2d 1211 (Fla. 1st DCA, 1988); *Brazilian Court v. Walker*, 584 So. 2d 609, 611 (Fla. 4th DCA, 1991) ("the property appraiser, as a constitutional officer, lacks standing to challenge the amendment").

Adjustment Board violated Article VII, Section 3(a) of the Constitution. Apt as may be, the imprimatur was censored with the Court stating:

> We begin our discussion of Turner's standing by reiterating the well established, common law rule that "[s]tate officers and agencies must presume legislation affecting their duties to be valid, and do not have standing to initiate litigation for the purpose of determining otherwise." Turner concedes the general rule but argues first that his complaint does not challenge the constitutionality of any statute, rather, it challenges only the decision of the VAB as being a violation of Article VII, Section 3(a) of the Florida Constitution. As explained below, we fail to see the distinction.
>
> Next, Turner argues that in any event, he is not prohibited from challenging the constitutionality of the statutory exemption in this case because three exceptions to the general rule against standing apply here. He first asserts the public funds exception that allows a constitutional challenge where there is a necessity to protect public funds...contends that if the property is granted an exemption, the loss of tax dollars amounts to a loss of public funds. Without deciding whether this exception is broad enough to apply in the context of tax assessments, as explained more fully below, we conclude that its application is precluded by the express language of section 194.036(1)(a).
>
> Turner next cites to City of Pensacola v. King, 47 So. 2d 317 (Fla. 1950), to assert the second exception — that if a statute in question imposes duties on an officer that he fears will cause him to violate his oath of office, he may challenge the constitutionality of the act. Shortly after King was decided, the supreme court rejected this same argument, distinguished the dictum in King and re-affirmed

the rule of State ex rel. Atlantic Coast Line Railway Co. v. State Board of Equalizers, 84 Fla. 592, 94 So. 681 (1922), that the "right to declare an act unconstitutional...cannot be exercised by the officers of the executive department under the guise of the observance of their oath of office to support the Constitution." Barr, 70 So. 2d at 350-351. Thus, this exception is no longer viable, **if indeed it ever was.**

The last exception Turner asserts is that the constitutionality of a statute can be raised defensively by a public official. In his brief, Turner argues that if this court reinstates his complaint and if the Aviation Authority asserts the sports facilities provision of section 196.012(6), or any other questionable statute, he may defensively raise the constitutionality of the statute. Suffice it to say, we do not view Turner to be in a defensive position as the plaintiff in his lawsuit. We acknowledge that our conclusion on this issue appears to be in conflict with Fuchs v. Robbins, Nos. 98-275, 98-274, 1999 WL 436618 (Fla. 3d DCA June 30, 1999) (en banc), appeal filed, No. 96, 182 (Fla. Aug. 4, 1999), wherein the Third District characterized a property appraiser's complaint filed pursuant to section 194.036 as a defensive action. In a concurring opinion, Judge Sorondo explains that the litigation should be viewed as beginning not when the property appraiser filed suit in circuit court, but when the taxpayer challenged the property appraiser's assessment by petition to the VAB. Thus, he reasons, the property appraiser became a plaintiff only by a procedural requirement of the statute. We believe this 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. It both defies logic and violates the rule of State ex rel. Atlantic Coast Line Railway Co. to suggest that Turner can ignore the law by denying an exemption based on his belief that it is

> unconstitutional and then be allowed to ask the court to approve his disobedience by upholding his denial.

III

THE THIRD DISTRICT ERRED IN NOT MAKING ITS FINDING PROSPECTIVE

Interlachen, the asserted pivotal authority turning the flow of law at page 435 provides:

> This decision operates prospectively from the date the opinion becomes final because persons relying on the state statute did so assuming it to be valid despite the new provision of the 1968 State Constitution.

Seemingly requiring immediate and retroactive application in this case, the decision of the Third District departs from this teaching, a point requiring additional guidance.

IV

THE TRIAL COURT ERRED IN ASSESSING INTEREST ON THE ASSESSMENT AT 12% AND A PENALTY INTEREST RATE OF 18% PER ANNUM

Part II of Chapter 194 gives a taxpayer the right to sue and obtain judicial review of an assessment.[38] Before starting the lawsuit, the taxpayer must pay the tax collector a tax equal to an amount that is in good faith admitted.[39] If the Court finds

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[38] See Part II, Chapter 194.

[39] § 194.171(3), Fla. Stat. (1995) provides:

that the amount due is greater than the amount admitted in good faith, under §194.192(2), Fla. Stat. (1995) a judgment for the deficiency is entered.[40] The statute authorizes interest at 12% per annum on the deficiency. In addition, a penalty rate of 10% on the delinquency may be charged from the date tax become delinquent if the amount of admitted tax is grossly disproportionate to the amount found to be due. No other interest rate is authorized.

> (3) Before an action to contest a tax assessment may be brought, the taxpayer shall pay to the collector not less than the amount of the tax which the taxpayer admits in good faith to be owing. The collector shall issue a receipt for the payment, and the receipt shall be filed with the complaint. Notwithstanding the provisions of Chapter 197, payment of the taxes the taxpayer admits to be due and owing and the timely filing of an action pursuant to this section shall suspend all procedures for the collection of taxes prior to final disposition of the action.

[40] Section 194.192(2), Fla. Stat. (1995) states:

> (2) If the court finds that the amount of tax owed by the taxpayer is greater than the amount the taxpayer has in good faith admitted and paid, it shall enter judgment against the taxpayer for the deficiency and for interest on the deficiency at the rate of 12 percent per year from the date the tax became delinquent or from January 1, 1971, whichever is later, and at the rate of 6 percent per year for any period of delinquency before January 1, 1971. If it finds that the amount of tax which the taxpayer has admitted to be owing is grossly disproportionate to the amount of tax found to be due and that the taxpayer's admission was not made in good faith the court shall also assess a penalty at the rate of 10 percent of the deficiency per year from the date the tax became delinquent.

Initially, part II of Chapter 194 is inapplicable. The Hotel was a defendant in the suit. It did not sue for review of an assessment. The judgment taxes interest from April 1, 1993 to January 7, 1998 at 12%. This is the interest rate specified by §194.192(2), but the statute is inapplicable to this proceeding.

Second, after January 7, 1998, the judgment amount bears interest at the rate of 18% per annum. No authority appears to support the delinquent interest rate of 18%. Absent authority the interest taxed in the final judgment is error.

CONCLUSION

Hausman v. Bayrock Inv. Co., 530 So.2d at 940 requires liberal application of the doctrine of substantial completion because of its constitutional origins in the just valuation mandate. The failure of the lower tribunals to recognize its character requires review, reversal with instructions to correct the interest requirements imposed by the trial court. If the predilection is to confirm the Third District, then prospective invalidation is warranted - on the basis of *Interlachen* we ask the Hotel realize that which other taxpayers realized until the moment of invalidity.

Kenneth M. Bloom
BLOOM & MINSKER
Suite 700
1401 Brickell Avenue
Miami, FL 33131

ARNALDO VÉLEZ, P.A.

Attorneys for MBOR
255 University Drive
Coral Gables, FL 33134
(305)461-9499
(305)461-9498

BY:_____
ARNALDO VÉLEZ

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was on April 5, 2002, served via U.S. Mail upon Jay W. Williams, Assistant County Attorney, 111 N.W. First Street, Suite 2810, Miami, FL 33128-1993, and Joseph C. Mellichamp, III, Senior Assistant Attorney General, Tax Section, Capitol Bldg., Tallahassee, FL 32399-1050.

Kenneth M. Bloom
BLOOM & MINSKER
Suite 700
1401 Brickell Avenue
Miami, FL 33131

ARNALDO VÉLEZ, P.A.
Attorneys for MBOR
255 University Drive
Coral Gables, FL 33134
(305)461-9499
(305)461-9498

BY:_____
ARNALDO VÉLEZ
Florida Bar 149589

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