IN THE SUPREME COURT OF FLORIDA

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| CRESCENT MIAMI CENTER, LLC,<br><br>Petitioner,<br><br>v.<br><br>STATE OF FLORIDA, DEPARTMENT OF REVENUE,<br><br>Respondent. | ) | Case No. SC03-2063<br><br>Lower Tribunal No. 3D02-3002 |

**CONSENTED AMICUS CURIAE BRIEF OF FLORIDA HOME BUILDERS ASSOCIATION IN SUPPORT OF THE PETITIONER**

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On Appeal from the District Court of Appeal,
Third District, State of Florida

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## PREFATORY STATEMENT

Like the opinion under review, this Brief refers to Petitioner, Crescent Miami Center, LLC, as "CMC," to its parent company, Crescent Real Estate Equities, L.P., as "Crescent," and to Crescent Real Estate Funding IX, L.P., another subsidiary of Crescent, as "Crescent Funding."

## ISSUE TO BE ADDRESSED

This Brief addresses whether section 201.02(1), Florida Statutes, imposes documentary stamp tax on deeds or other instruments that transfer unencumbered interests in real property as a contribution of capital to subsidiary entities.

## STATEMENT OF INTEREST

Amicus Curiae Florida Home Builders Association ("FHBA") is a nonprofit association composed of individuals and companies who own property and/or are engaged in construction throughout Florida. FHBA's 18,500 members have a significant interest in the proper administration of state tax laws. In furtherance of that interest, FHBA has been granted leave to submit amicus curiae briefs in other appeals before this Court involving tax issues. *See e.g., Sunset Harbor North Condo. Ass'n v. Robbins*, Case No. SC03-520 (Fla. Sup. Ct.).

FHBA members have a special interest in this Court's review of the decision below. For a variety of reasons, FHBA members routinely transfer unencumbered

real property as a contribution of capital to subsidiaries. If the decision below stands, these routine transfers, which are nothing more than book transactions, could be subjected to significant documentary stamp tax liability under section 201.02(1), Florida Statutes. Thus, FHBA offers a unique perspective on the implications of the lower court's holding for landowners throughout Florida who engage in the type of transfer involved in this appeal.

## STANDARD OF REVIEW

Disposition of this case requires the Court to interpret section 201.02(1), Florida Statutes. Judicial interpretation of a Florida statute is purely a legal question and, as such, is subject to *de novo* review. *State v. Phillips*, 852 So. 2d 922, 923 (Fla. 1st DCA 2003); *Racetrac Petroleum, Inc. v. Delco Oil, Inc*., 721 So. 2d 376, 377 (Fla. 5th DCA 1998) Furthermore, tax laws are construed strongly in favor of the taxpayer and against the government with all ambiguities or doubts resolved in the taxpayer's favor. *Maas Bros., Inc. v. Dickinson*, 195 So. 2d 193 (Fla. 1967). Section 201.02(1) is not an exemption section to be strictly construed against the taxpayer, but rather a section which defines what is to be taxed and as such is to be strictly construed against the taxing authority. *C.f., State ex rel. Drum Serv. Co. of Fla. v. Kirk*, 234 So. 2d 358, 359 (Fla. 1970). *See also, De Vore v. Gay*, 39 So. 2d 796, 797 (Fla. 1949) (When interpreting section 201.02, this Court noted

that "[i]t is an accepted statutory construction principal that laws imposing taxes should be liberally construed for the taxpayers.").

## SUMMARY OF THE ARGUMENT

Under section 201.02(1), Florida Statutes, documentary stamp tax only applies to deeds or other instruments that transfer interests in real property to a "purchaser" who acquired the property by paying an equivalent in money or other exchange value. In the decision below, the Third District Court of Appeal misapplied the statute when it held that documentary stamp tax applied to a deed that transferred unencumbered property from a parent company (Crescent) to a subsidiary limited liability company (CMC) for a nominal monetary payment.

The Third District's decision conflicts not only with the Second District's holding in *Kuro, Inc. v. State, Department of Revenue,* 713 So. 2d 1021 (Fla. 2nd DCA 1998), but, more importantly, with long-standing precedent of this Court which holds that "book transactions" of the type involved in this appeal are not taxable under section 201.02(1) because there is no "purchaser" and no "reasonably determinable" consideration.

The Third District also misconstrued language added to section 201.02(1) in a 1990 amendment, which provides that "[i]f the consideration paid or given in exchange for real property . . . includes property other than money, it is presumed

that the consideration is equal to the fair market value of the real property." This amendment did not alter the statutory requirement that there be a "purchaser" for documentary stamp tax to apply, and there is no indication that the Legislature intended to disturb this Court's prior holdings on the issue.

Furthermore, the District Court's reading of the 1990 amendment is erroneous. The 1990 statutory language does not specify that the "fair market value of the property exchanged" itself constitutes consideration. Rather, it merely establishes a presumption that, if "property other than money" is given in exchange for the conveyance, the consideration is to equal the fair market value of the conveyed property.

In this case, there was no "property other than money" given in exchange for the transfer. Contrary to the Third District's holding, any increase in the value of Crescent's equitable interest in Crescent Funding was an automatic effect of the real property transfer to CMC, not a "bargained for" exchange. The increase in value was not "property." It was not "given in exchange." And it does not constitute "consideration" as that term is commonly understood. Thus, under the plain language of the statute, the presumption regarding non-monetary consideration established by the 1990 amendment is inapplicable.

For these and other reasons, this Court should reverse the Third District Court of Appeal's decision and expressly hold that deeds transferring unencumbered real property as a contribution of capital to subsidiary entities are not subject to documentary stamp tax under section 201.02(1), Florida Statutes.

## ARGUMENT

### I. Under this Court's seminal decisions in *Palmer-Florida* and *De Maria*, a transfer of unencumbered real property to a subsidiary is not subject to documentary stamp tax, and the 1990 amendments to section 201.02(1) did not disturb those decisions.

This appeal concerns the application of Florida documentary stamp tax to a deed to real property under Section 201.02(1), Florida Statutes, which provides in relevant part:

> **Taxes on deeds or other instruments relating to real property or interests in real property.** – On deeds, instruments, or writings whereby any lands, tenements, or other real property, or any interest therein, shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the *purchaser* or any other person by his or her direction, on each $100 of the *consideration* therefore the tax shall be 70 cents. . . . For purposes of this section, consideration includes, but is not limited to, the money paid or agreed to be paid; the discharge of an obligation; and the amount of any mortgage, purchase money mortgage lien, or other encumbrance, whether or not the underlying indebtedness is assumed. If the consideration paid or given in exchange for real property or any interest therein includes property other than money, it is presumed that the consideration is equal to the fair market value of the real property or interest therein.

§ 201.02(1), Fla. Stat. (2003) (emphasis added.). Based on the underlined statutory language which the Legislature added in 1990,[1] the lower court held that a deed which transferred unencumbered property from a parent company (Crescent) to a subsidiary (CMC) owned by another wholly owned subsidiary (Crescent Funding) was taxable based on the fair market value of the transferred real property. *See, Crescent Miami Center, LLC v. State, Dep't of Revenue*, 857 So. 2d 904, 905-06 (Fla. 3rd DCA 2003).

The Third District's decision directly conflicts with the Second District's holding in *Kuro, Inc. v. State, Department of Revenue*, 713 So. 2d 1021 (Fla. 2nd DCA 1998). In that case, a father and son executed and recorded deeds that conveyed jointly owned, unencumbered real property to the capital of a new, jointly owned corporation. *Id.* at 1022. As in this case, the deeds recited nominal consideration of $10. *Id.* Accordingly, the new corporation paid the minimum documentary stamp tax. *Id.* Thereafter, the Department conducted an audit and assessed additional documentary stamp tax based on the fair market value of the property. *Id.*

[1] *See* 90-132, § 7, Laws of Fla. Other than the 1990 amendment and periodic rate increases, section 201.02(1) has not been substantively amended since its original enactment in 1931. *C.f.*, Ch. 15787, Laws of Fla., p. 1400 (1931) ("tax on deed") *with* § 201.02(1), Fla. Stat. (2003). *See also, De Vore v. Gay*, 39 So. 2d 796, 797 (Fla. 1949) (construing earlier version of § 201.02).

Based on this Court's seminal decisions in *State ex rel. Palmer-Florida Corp. v. Green,* 88 So. 2d 493 (Fla. 1956), and *Florida Department of Revenue v. De Maria,* 338 So. 2d 838 (Fla. 1976), the Second District held that no additional taxes were due because the conveyances were "mere book transactions and, otherwise, were not sales to a purchaser, as contemplated by section 201.02(1)." *Kuro*, 713 So. 2d at 1022 (citing *Palmer-Florida*). Quoting from *De Maria*, the court explained that a "purchaser" is "one who obtains or acquires property by paying an equivalent in money or other exchange in value." *Id.* The grantee corporation did not meet this definition because it effectively paid nothing for the transfer and "the beneficial ownership of the land remained unchanged."[2] *Id.*

Like *Kuro,* this case is governed by *Palmer-Florida* and *De Maria*, which the lower court succinctly summarized as follows:

> In 1956, the Florida Supreme Court held that grantee shareholders who had been transferred unencumbered property from a corporation,

[2] *Kuro* is distinguishable from the First District's subsequent decision in *Muben-Lamar, L.P. v. Department of Revenue*, 763 So. 2d 1209 (Fla. 1st DCA 2000), which held that a non-proportionate transfer of real property into a newly created partnership was subject to deed tax. As Judge Lawrence emphasized in a special concurring opinion, "the limited partnership at issue was composed of various and diverse interests, each contributing property in which the other previously had no interest for the purpose of creating a new business venture for profit." *Id.* at 1210 (Lawrence, J., specially concurring). Thus, unlike the transfers in *Kuro* and the case at hand, the *Muben-Lamar* transfer was <u>not</u> a "mere book transaction" intended "to take advantage of benefits offered to various forms of business entities." *Id.*

> were not "purchasers" because the transfer was a "mere book transaction." *State ex rel. Palmer-Florida Corp. v. Green*, 88 So. 2d 493 (Fla.1956). The grantees were not purchasers because they did not pay a "reasonably determinable, consideration for the conveyance as contemplated by Sec. 201.02."
>
> Thereafter, in 1976, the Court defined a "purchaser" for purposes of the deed tax as "one who obtains or acquires property by paying an equivalent in money or other exchange in value." *See Florida Dep't of Revenue v. De Maria*, 338 So. 2d 838, 840 (Fla.1976). In De Maria, the Court found there was no purchaser and no taxable exchange in the transfer of a corporation's equity in real property to its sole shareholder. However, the shareholder was considered a "purchaser" of the real property to the extent of the mortgage.

*Crescent Miami*, 857 So. 2d at 907. Under *Palmer-Florida* and *De Maria*, CMC was not a "purchaser" because it did not pay "an equivalent in money or other exchange in value" for the conveyance from Crescent.

Indeed, the lower court specifically recognized that under the pre-1990 statutory language reviewed in *Palmer-Florida* and *De Maria*, "there was no reasonably determinable consideration, and thus no purchaser could be found." *Id.* at 907 (citing *De Vore v. Gay*, 39 So. 2d 796 (Fla. 1949)). Emphasizing that *Palmer-Florida* and *De Maria* were decided before the 1990 statutory amendment, however, the court concluded that there was consideration:

> The value of the consideration is the deeded property's fair market value, which is the amount Crescent's equity interest in Crescent Funding increased, as a result of Crescent's deeding the property to CMC. In short, Crescent exchanged equitable ownership of land in consideration

> for a more valuable equitable ownership of an interest in another limited partnership.[3]

*Id.* at 910 (citations omitted). Moreover, the court concluded that CMC met "the statutory requirement for a 'purchaser' . . . ." *Id.* Thus, the court implicitly concluded that the 1990 amendment repudiated *Palmer-Florida* and *De Maria.* This was error.

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[3] In support of its finding of consideration, the lower court cited the Maryland Court of Appeals' 4-3 decision in *Dean v. Pinder*, 312 Md. 154, 538 A. 2d 1184 (1988). *See Crescent Miami*, 857 So. 2d at 909. In *Dean*, the court held that an increase in corporate assets resulting from a transfer of real property to it constituted consideration under Maryland's transfer tax statute. That case is distinguishable, however, because the Maryland statute, unlike Florida's, did not use the term "purchaser." Rather, the Maryland statute provided: "Except as otherwise provided in this section, a tax is hereby imposed upon *every* written instrument conveying title to real or personal property[.]" 312 Md. at 159, 538 A. 2d at 1187 (citing Md. Code Art. 81, § 277 (1984)) (emphasis added). Thus, unlike Florida's statute, the Maryland statute imposed a blanket tax on all conveyances.

The lower court also cited a distinguishable federal case. *See Crescent Miami*, 857 So. 2d at 909 (citing *Carpenter v. White*, 80 F.2d 145 (1st Cir. 1935)). In *Carpenter,* the trustees of a business trust conveyed property to a new trust. *Carpenter,* 80 F.2d at 146. In addition, a separate corporation conveyed property to the new trust. In return for the conveyances, the trustees of the new trust issued shares to both grantors. *Id.* The court concluded that federal documentary tax applied because these new equitable interests were not of identical character as the old ones; they included interests in the former property of both grantors, not just the property of the old trust. *Id.* In this case, by contrast, Crescent received no equitable interests that it did not already have. Its conveyance to CMC reflected a "mere rearrangement of the title to property for the convenience in the management in it, without real change of ownership . . . ." *Id.* The *Carpenter* court "fully recognized" that such "rearrangements" were not taxable. *Id.*

As this Court recently observed in *City of Hollywood v. Lombardi*, 770 So. 2d 1196, 1202 (Fla. 2000), the Legislature is presumed to have known and to have adopted prior judicial constructions of a law when enacting a new version of that law unless a contrary intention is expressed in the new version. The 1990 Legislature expressed no such intention to disturb *Palmer-Florida* and *De Maria* when it enacted the new version of section 201.02(1) in 1990. *See* Ch. 90-132, § 7, Laws of Fla. To the contrary, by referring to money or property "paid or given in exchange," the 1990 language confirms *Palmer-Florida's* holding that the statute only contemplates taxation of a deed that reflects a "sale to a 'purchaser'" rather than a mere "book transaction." *See Palmer-Florida*, 88 So. 2d at 495.

The lower court was simply wrong in stating that the 1990 statutory language "specifies" that the "fair market value of the property exchanged" itself constitutes consideration. *Crescent Miami*, 857 So. 2d at 907. Rather, the 1990 language provides that if consideration "paid or given in exchange" for a conveyance includes "property other than money," the consideration is presumed to equal the fair market value of the conveyed property. *See* § 201.02(1), Fla. Stat. (2003). The 1990 language does not presume that the fair market value of transferred real property itself constitutes consideration; it merely provides a means by which

consideration consisting of "property other than money" paid by the grantee can be valued for tax purposes.

In this case, CMC paid no consideration consisting of "property other than money" "in exchange" for the conveyance as required under the 1990 statutory language. Any increase in the value of the Crescent's equitable interest in Crescent Funding was an automatic effect of the real property transfer to CMC, not a "bargained for" exchange. Therefore, it does not constitute consideration as that term is commonly understood. *See Scott v. Sun Bank of Volusia County*, 408 So. 2d 591, 593 (Fla. 5th DCA 1982) (recognizing "the requirement that the consideration be bargained for"). Indeed, the automatic increase in Crescent's equitable interest did not even constitute "property" that CMC could transfer because CMC did not "own" it. *See Jerome H. Sheip Co. v. Amos*, 100 Fla. 863, 879, 130 So. 699, 705 (1930) ("property" is the sum of all the rights and powers incident to "ownership"). Thus, under the plain language of the statute,[4] the

[4] Even if the 1990 language were ambiguous, it is part of a taxing statute and, therefore, must be construed against the taxing authority with all ambiguities or doubts resolved in the taxpayer's favor. *Maas Bros., Inc. v. Dickinson*, 195 So. 2d 193 (Fla. 1967). *See also, De Vore v. Gay*, 39 So. 2d 796, 797 (Fla. 1949) (applying this longstanding rule of construction when interpreting an earlier version of section 201.02). Moreover, because section 201.02(1) defines what is to be taxed, a finding that there was no "purchaser" or "consideration" and therefore no tax liability would not "create a judicial exemption" as the Third District suggested. *See Crescent Miami*, 857 So. 2d at 910. *C.f., State ex rel. Drum Serv. Co. of Fla.*

(continued...)

presumption established by the 1990 amendment does not apply in this case, and the lower court erred in relying on it to ameliorate the statutory requirements for a "purchaser" and "consideration" as interpreted by this Court in *Palmer-Florida* and *De Maria.*

In direct contrast to the *Crescent Miami* court, the Connecticut Supreme Court recently rejected the argument that an increase in the value of a company resulting from the transfer of real property to it constituted consideration for purposes of applying Connecticut's analogous documentary stamp tax statute. *Mandell v. Gavin*, 262 Conn. 659, 669-70, 816 A.2d 619, 625 (2003). The Connecticut court explained:

> [T]he change in fair market value of the company was not the result of a bargained for exchange. The change in fair market value was the automatic effect of the transfer; the company served as a passive recipient of the property. Thus, Plaintiff did not induce any conduct on the part of the company, and that element must be present, or there is no bargain.

262 Conn. at 669-70, 816 A.2d at 625. Accordingly, on facts similar to those at hand, the court held that documentary stamp tax did not apply to a deed transferring an individual's interest in real property to a wholly owned limited

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(...continued)
*v. Kirk*, 234 So. 2d 358, 359 (Fla. 1970) ("This is not an exemption section to be strictly construed against the taxpayer but rather a section which defines what is to be taxed and as such is to be strictly construed against the taxing authority.").

liability company. *See also, Tranfo v. Gavin*, 262 Conn. 674, 678-79, 817 A.2d 88, 91 (2003) (Companion case explaining that "our decision in *Mandell* rests on the principle that there is no consideration in the absence of a bargained for exchange.").

Because the Connecticut statute, like section 201.02(1), requires both a "purchaser" and "consideration,"[5] the Connecticut Supreme Court's reasoning is equally applicable in this case and is fully consistent with *Palmer-Florida* and *De Maria.* Accordingly, this Court should adopt the Connecticut Supreme Court's reasoning and reaffirm its holding in *Palmer-Florida* that book transactions of the type involved in this appeal are not subject to documentary stamp tax.

## CONCLUSION

For the foregoing reasons, FHBA respectfully requests that this Court reverse the decision of the Third District Court of Appeal in this matter, and expressly hold that deeds transferring unencumbered real property as a contribution

[5] In relevant part, § 12-494(a), Conn. Gen. Stat. (2003), provides:

> There is imposed a tax on each deed, instrument or writing, whereby any lands, tenements or other realty is granted, assigned, transferred or otherwise conveyed to, or vested in, the *purchaser*, or any other person by his direction, when the *consideration* for the interest or property conveyed equals or exceeds two thousand dollars[.] (Emphasis added).

of capital to subsidiary entities are not subject to documentary stamp tax under section 201.02(1), Florida Statutes.

Respectfully submitted this ____ day of May, 2004.

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## CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of this brief were provided by hand-delivery to counsel for Respondent, Charles Catanzaro, Esq., Assistant Attorney General, Office of the Attorney General, The Capitol - PL 01, Tallahassee, FL 32399-1050, and by United States Mail to counsel for Petitioner,

Fred O. Goldberg, Esq., Berger Singerman, 200 S. Biscayne Blvd., Suite 1000, Miami, FL 33131-5308, on this ___ day of May, 2004.

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Attorney

**CERTIFICATE OF COMPLIANCE**

I further certify that this brief is presented in 14-point Times New Roman and complies with the front requirements of Rule 9.210.

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Attorney