SUPREME COURT
STATE OF FLORIDA

Case No. **SC03-2270**

O R I G I N A L

FLORIDA DEPARTMENT OF REVENUE,

Appellant,

Lower Tribunal No. 1D02-3762

vs.

JOSEPH C. HOWARD, and **JOYCE FOREMAN, ET AL.**,

Appellees.
_____/

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

(Unopposed; Order Issued March 30, 2004)

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PRELIMINARY STATEMENT

Appellant, Florida Department of Revenue, will be referred to herein as the "department." Appellees, Joseph C. Howard and Joyce Foreman, will be referred to collectively herein as "appellees." Appellee, William Markham, Broward County Property Appraiser will be referred to herein as "Markham." Appellee, Joel Robbins, Dade County Property Appraiser, will be referred to herein as "Robbins." Amicus Curiae, Property Appraisers' Association of Florida, Inc., will be referred to herein as the "PAAF."

This Court accepted jurisdiction on the request of the department, and the PAAF submits this brief in support of the position of the department.

STATEMENT OF THE IDENTITY OF THE AMICUS CURIE AND ITS INTEREST IN THE CASE

The Property Appraisers' Association of Florida, Inc. (PAAF), is an association comprised of elected county property appraisers throughout the State of Florida, and is the oldest association of county constitutional officers in Florida. The 2003-2004 membership consists of property appraisers from the following 39 counties: Baker, Bay, Bradford, Calhoun, Citrus, Clay, Columbia, DeSoto, Dixie, Escambia, Flagler, Franklin, Gadsden, Gilchrist, Glades, Gulf, Hamilton, Hardee, Highlands, Holmes, Jackson, Jefferson, Lafayette, Leon, Levy, Liberty, Nassau, Okeechobee, Osceola, Putnam, St. Johns, St. Lucie, Santa Rosa, Suwannee, Taylor, Union, Wakulla, Walton, and Washington.

The members of the PAAF are constitutional officers charged with the duty of administering the Florida Constitution and duly enacted laws of the State of Florida pertaining to appraising all real and tangible personal property, assessing same for ad valorem tax purposes, and administering exemptions. The case at bar construes Article VII, Section 4, Florida Constitution, and directly affects property appraisers' duties administering the constitutional provision.

PAAF is interested in this case because it involves the constitutionality of section 193.016, Florida Statutes (2003), which provides a special methodology

applicable to certain tangible personal property. The statute directly affects the constitutional duty of property appraisers to assess property at just value.

SUMMARY OF ARGUMENT

The PAAF supports the decision of the majority of the First District Court of Appeal in Dept. of Revenue v. Howard, 859 So.2d 619 (Fla. 1st DCA 2003). PAAF respectfully urges this Court to uphold the district court's decision as a correct analysis and expression of the law on the subject.

On appeal, the department has contended for the first time that the appellees (taxpayers) do not have standing to challenge the constitutionality of the statute without showing special injury. Florida law is quite clear on this subject and has been for many years. See School Bd. of Volusia County v. Clayton, 691 So.2d 1066 (Fla. 1997); North Broward Hosp. Dist. v. Fornes, 476 So.2d 154 (Fla. 1985); Dept. of Administration v. Horne, 269 So.2d 659 (Fla. 1972). These cases held that taxpayers are not required to show a special injury to challenge the constitutionality of a taxing statute.

The involved statute, section 193.016, Florida Statutes (2003), was created in chapter 00-262, section 2, Laws of Florida (2000), and provides:

> **193.016 Property appraiser's assessment; effect of determinations by value adjustment board.—**If the property appraiser's assessment of the same items of

> tangible personal property in the previous year was adjusted by the value adjustment board and the decision of the board to reduce the assessment was not successfully appealed by the property appraiser, the property appraiser shall consider the reduced values determined by the value adjustment board in assessing those items of tangible personal property. If the property appraiser adjusts upward the reduced values previously determined by the value adjustment board, the property appraiser shall assert additional basic and underlying facts not properly considered by the value adjustment board as the basis for the increased valuation notwithstanding the prior adjustment by the board.

(Emphasis added.)

PAAF suggests that this language is invalid and faulty for the following reasons: (1) it creates a separate class of property and subjects it to different assessment procedures by the property appraiser; (2) it elevates the determination by the value adjustment board (VAB) as to the valuation of specific property to the level that the effect is to place the burden on the property appraiser to assert and establish factual considerations why the VAB is incorrect, the effect of which is to remove or dilute the property appraiser's presumption of correctness afforded by numerous judicial decisions and other appellate courts in Florida, subsequently recognized in section 194.301, Florida Statutes (2003), and Mazourek v. Wal-Mart Stores, Inc., 831 So.2d 85 (Fla. 2002), Turner v. Bell Chevrolet, 819 So.2d 177 (Fla. 2d DCA 2002), and Turner v. Tokai Financial Servs., Inc., 767 So.2d 494,

497-98 (Fla. 2d DCA 2000); (3) it places a responsibility on the property appraiser to try to ascertain the basic and underlying facts which were not considered by the VAB in reaching its decision; and (4) it requires consideration of the prior year's value violating the principle that each tax year stands on its own. Each of these will be more fully addressed in the argument.

The statute's validity must be considered against the operational framework of VAB's in Florida. Although the present statutes require VAB's to make findings of fact and conclusions of law as to their decisions, these normally are prepared by the county attorney or the board attorney and commonly are perfunctory at best. Many times, the VAB's will, for unknown reasons, reduce the assessment of the property appraiser and the appraiser will decide to "live with" the reduction for reasons which could include: (a) the reduction is of such amount that it does not meet the percentage thresholds specified in section 194.036(1)(b), Florida Statutes (2003); (b) the property appraiser may simply feel disinclined to initiate a lawsuit against the taxpayers for reasons which could include the amount of the valuation reduction is not so significant as to warrant the expense of the lawsuit; or (c) the property appraiser simply may decide to "let it go" this year and address it the following year.

As the court well knows, special masters are used in many counties throughout the state and the property appraiser may simply feel that a particular special master "missed the boat" and that in the following year there is a likelihood of obtaining a different and more knowledgeable special master.

The difficulty involving VAB (formerly Board of Adjustment and Property Appraisal Adjustment Board) decisions was recognized by this court in Spooner v. Askew, 345 So.2d 1055 (Fla. 1976).

From a practical and logistical standpoint, the boards and special masters frequently make decisions and make reductions without enough explanation as to what is "in the minds of the board members or special masters" for the property appraiser to know what their thoughts were. Placing the burden on property appraisers to ascertain what matters were not considered simply is not logistically practical.

As to the first reason stated herein, section 193.016 patently is unconstitutional for the same reasons noted by the majority in Howard. Section 193.011, Florida Statutes (2003), contains the eight criteria which are required to be considered by a property appraiser in assessing property, and these criteria generally embrace the cost approach, income approach, and market approach to value. The effect of the offending statute is to create an additional criterion or

consideration for a specific parcel of property as well as a class of property. It is only those parcels of property for which the VAB reduced values which are subject to this additional criterion, and the statute clearly only applies to tangible personal property (TPP), not real property.

This Court has held invalid statutes which provided for special tax treatment of a given class of property and has clearly articulated that under the 1968 Florida Constitution the legislature is wholly without authority to classify any property other than the four classes mentioned in the constitution, and require their assessment on any basis other than the basis for all property, that is, just valuation. See Valencia Center, Inc. v. Bystrom, 543 So.2d 214 (Fla. 1989); Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1974); City of Naples v. Conboy, 182 So.2d 412 (Fla. 1965).

STANDARD OF REVIEW

Since the district court held the involved statute, section 193.016, Florida Statutes (2003), unconstitutional, the standard of review is de novo. City of Miami v. Magrath, 824 So.2d 143 (Fla. 2002).

ARGUMENT

I. THE APPELLEES HAVE STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE STATUTE INVOLVING AD VALOREM TAXATION WITHOUT A SHOWING OF SPECIAL INJURY.

The district court pointed out that the department did not raise this issue at the trial level and, thus, it was not properly before the district court. PAAF agrees with the district court, but even if the issue had properly been raised, it is well settled in Florida that a taxpayer has standing to challenge the constitutionality of a statute involving taxes without a showing of special injury.

This Court resolved this question early on and it was firmly laid to rest in Dept. of Admin. v. Horne, 269 So.2d 659, 662-63 (Fla. 1972), in which this Court stated:

> Essentially, the 'Rickman Rule' requires a showing of special injury. We find, however, that the instant case presents a valid exception to the so-called 'Rickman Rule.' Appellees have alleged the *unconstitutionality* of certain sections of an appropriations act. These sections are said to be violative of constitutional provisions which place limitations upon enacting legislation regarding state funds. We hold that such allegation in this narrow area satisfies the requirement for 'standing' to attack an appropriations act.
>
> We find direct precedent for this exception in Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed. 947 (1968).

That landmark case deals with a federal taxpayer's 'standing' to challenge the validity of a federal spending program. Mrs. Flast and other federal taxpayers brought suit to enjoin the expenditure of federal tax funds under the Elementary and Secondary Education Act of 1965. In essence, their complaint alleged that this 1965 congressional enactment under the federal *taxing and spending clause* violated the First Amendment's prohibition against any federal law respecting the establishment of a regulation. On these facts, the U.S. Supreme Court announced a new federal rule on 'standing."

> [A] taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power. (392 U.S. 83, 105-106, 88 S.Ct. 1942, 1955)

Applying this rationale, the U.S. Supreme Court said Mrs. Flast had standing to challenge the constitutionality of the 1965 Education Act because the establishment clause imposes a specific limitation upon the federal taxing and spending power. Thus we find that where there is an attack upon *constitutional* grounds based directly upon the Legislature's *taxing and spending* power, there is standing to sue without the *Rickman* requirement of special injury, which we still obtain in other cases.

Also see McSween v. State, Live Stock Sanitary Bd., 97 Fla. 749, 122 So. 239, 125 So. 704 (1929); R. L. Bernardo & Sons, Inc v. Duncan, 134 So.2d 297 (Fla. 1st DCA 1961); 16 C. J. S. Const. Law §§ 76 & 80; 81 C. J. S. States § 191.

II. SECTION 193.016, CREATED IN CHAPTER 00-262, SECTION 2, LAWS OF FLORIDA (2000), IS INVALID, UNCONSTITUTIONAL, NULL AND VOID, IN VIOLATION OF ARTICLE VII, SECTION 4, FLORIDA CONSTITUTION.

The district court addressed the statutory language quoted previously herein, and held same to be unconstitutional because it operated to provide special assessment standards for a specific class of property not permitted by the Article VII, Section 4, Florida Constitution, thereby establishing a non-uniform procedure for assessment and valuation not permitted by the constitution, citing Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433, 434-35 (Fla. 1973), which held:

> 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. 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.
>
> It is true that the constitutional provision allows the Legislature to prescribe regulations for the purpose of securing a just valuation of *all* property, but such regulations must apply to *all* property and not to any one

> particular class. The regulations contemplated by the Constitution are those which establish the criteria for valuing property; and *all* property - save those four classes specifically enumerated in the Constitution - must be measured under the same criteria.
>
> The statute we are examining here is a classification for taxation purposes, which is impermissible under Article VII, Section 4, Florida Constitution. The statute classifies property based on the ownership thereof, a classification which we might have found to be in violation of the 1885 Constitution as well, as being unreasonable, arbitrary, and not related to any valid legislative purpose.
>
> If the statute applied to all property and could be considered as merely establishing one criterion for determining value, it would still not survive because it is so unreasonable and arbitrary.
>
> * * * * *
>
> This Court has in the past pointed out the fundamental unfairness of statutorily manipulating assessment standards and criteria to favor certain taxpayers over others. See Walter v. Schuler, 176 So.2d 81 (Fla. 1965); Franks v. Davis, 145 So.2d 228 (Fla. 1962); and Schleman v. Connecticut General Life, 151 Fla.96, 9 So.2d 197 (1942).

PAAF agrees with the majority decision in the district court and the rationale for same.

Some examination of the VAB procedures in Florida is in order. In Florida, petitions for review of valuation and exemption disputes by taxpayers are

either heard by the VAB or by special masters employed by the VAB for that purpose, depending upon a county's population. See §194.035(1), Fla. Stat. (2003). It is common knowledge that the procedures for review of evidence and testimony either by the special master or the VAB is subject to certain time constraints. The VAB is comprised of 3 county commissioners and two school board members which sit as the VAB to hear taxpayer's petitions. See § 194.015, Fla. Stat. (2003).

Whether heard by a special master or the VAB, the final decision is required to be prepared in written form and to contain findings of fact and conclusions of law. These commonly are very perfunctory and, if heard by the VAB, are prepared by either the board's attorney or county attorney, depending on the county involved. If the petitions are heard by a special master, he/she makes recommendations to the VAB and his/her recommendations will contain findings of fact and conclusions of law also. These are not required to be exhaustive or to include everything considered, whether relied upon or rejected.

There are situations when neither the action of the VAB, if it hears the petition, or the recommendation of the special master, if heard by same, elucidate or contain any particular or enlightening factual matters or considerations underlying the final decision or recommendation as the case may be. As a practical matter, a

property appraiser may not actually be able to know what the considerations were that prompted the final decision overturning the assessment or what was not considered. See e.g., Palm Bch. Gardens Comm. Hosp. v. Nikolits, 754 So.2d 729 (Fla. 4th DCA 1999)(court observing "total absence" of findings of fact or reasons for upholding the property appraiser); Higgs v. Property Appraisal Adjustment Bd., 411 So.2d 307 (Fla. 3d DCA 1982)(court observing that VAB had failed to make sufficient findings of fact and conclusions of law). The wording of section 193.016, however, requires the property appraiser to assert a factual basis as to what considerations were overlooked or not considered as a prelude to assessing the property for the current year in an amount higher than the amount fixed by the VAB.

Furthermore, there is no legal requirement that a property appraiser file suit every time a VAB reduces or overturns an assessment. Presently the statutes provide a mechanism whereby property appraisers can initiate circuit court action against taxpayers if the decision of the VAB reduces the assessment by the percentages specified in section 194.036(1)(b), or the property appraiser makes the determination required in section 194.036(1)(a), Florida Statutes (2003). However, a property appraiser may simply decide not to proceed further that year and to wait

and see what happens the following year, even though he believes that the VAB action was incorrect.

Beginning in the early 1970's, an obvious problem with attempting to value all property in Florida at 100 percent of just value was the fact that VAB's frequently reduced assessments for whatever reason might be chosen at the moment which commonly were of a political nature having nothing to do with the just valuation of the property. Early on, a case arose in Gadsden County which ultimately reached this Court dealing with such a situation. See Spooner v. Askew, 345 So.2d 1055 (Fla. 1977).

In Spooner, the assessment review board (at that time called the Property Appraisal Adjustment Board), made a blanket 30 percent across the board reduction in valuation of all property in Gadsden County. On direct appeal from the trial court, this Court reversed the trial court's decision and held that the Gadsden County board lacked the authority to make a blanket reduction in assessments and, furthermore, that it had no authority to make a blanket reduction on the basis that other counties were assessed at a lower level compared to 100 percent just value as the property in Gadsden County.

In Spooner, the Gadsden County board decided to reduce the valuations "across the board" by the amount of 30 percent because it felt that the

Department of Revenue's (department) review of Gadsden County's level of assessments was more strict than that in neighboring counties.

The first statutory mechanism adopted by the legislature to deal with situations where VAB's were reducing property appraisers' assessments was an amendment to section 193.122(1), Florida Statutes (Supp. 1974). See Ch. 73-172, § 9, Laws of Fla. (1973); Ch. 74-234, § 4, Laws of Fla. (1974). Statutory attempts to address the problem began in 1973–section 193.122(1), Fla. Stat. (1973)–and culminated in the mechanism now embodied in section 194.036(1). At that time, the legislature established a procedure whereby every reduction made by a county assessment review board throughout Florida was automatically reviewed by the department. During the same time, the legislature created section 195.098, Florida Statutes (1973), establishing the Assessment Administration Review Commission through the enaction of chapter 73-172, section 7, Laws of Florida (1973), to provide for an administrative tribunal to hear cases involving disapproval of assessment rolls. See Slay v. Dept. of Revenue, 317 So.2d 744 (Fla. 1975).

These procedures proved totally unworkable. There were not enough lawyers in the department and the Attorney General's Office combined to review the thousands of cases where the county boards reduced values and the due process problem was also insurmountable. See Hollywood Jaycees v. Dept. of

Revenue, 306 So.2d 109 (Fla. 1975). The result was that, in 1976, the legislature repealed that law and created in chapter 76-234, section 3, Laws of Florida (1976), section 194.032(6), Florida Statutes (Supp. 1976), now section 194.036(1), which gave discretion to the property appraiser to file suit against the taxpayer in those situations where the reduction met the thresholds and also provided a mechanism for the property appraiser to make an assertion to the Department of Revenue for the department to review the board's action in any county which the property appraiser felt there was a consistent and continued violation of the law in the assessment process. See § 194.032(6), Fla. Stat. (Supp. 1976); § 194.036(1)(c), Fla. Stat. (2003); § 193.122(1), Fla. Stat. (1973). Cases involving this statutory chronology are Williams v. Law, 368 So.2d 128 (Fla. 1979), and Hollywood Jaycees.

As can be seen, the effect of the statute in many instances will place a virtually impossible burden on property appraisers to ascertain what exactly was or was not considered by the VAB in the decision it made reducing the assessment. Thus, if the property appraiser does not file suit as authorized in section 194.036(1) or (2), Florida Statutes (2003), or if the statutory threshold requirements to file suit cannot be met, or if the property appraiser does not choose to attempt to go to the trouble to prepare specific assertions that he thinks the VAB failed to consider, or

is unable to because the decision does not enlighten him/her as to exactly what considerations were used by the VAB in making the reductions, the effect is the reduction in value for the involved TPP for the prior year will remain the same that year and continue to remain the same for each year thereafter. The only way this could change would be for the taxpayer to file another petition seeking a further reduction from the reduction ordered by the VAB the previous year or 2 or 3 years prior. Presumably this would reactivate the process, but since the property appraiser had not made the findings called for by the statute, he could not contend before the VAB that the value should be increased because, not having made the findings and filed suit to challenge the assessment, he is "locked in" by the value as lowered by the VAB. See Bystrom v. Equitable Life Assurance Soc'y, 416 So.2d 1133 (Fla. 3d DCA 1982), review denied, 429 So.2d 5 (Fla. 1983); Vero Beach Shores, Inc. v. Nolte, 467 So.2d 1041 (Fla. 4th DCA 1985). Moreover, the VAB could make reductions in percentages which did not meet the statutory thresholds, and the property appraiser would not be authorized to file suit.

The roll of the VAB in fixing values flies directly in the face of the well-established rule that each tax year requires an assessment anew and that an assessment for a prior year is not generally admissible and could not be used to determine the value of the current year. See Simpson v. Merrill, 234 So.2d 350

(Fla. 1970); Container Corp. v. Long, 274 So.2d 571 (Fla. 1st DCA 1973); Homer v. Hialeah Race Course, Inc., 249 So.2d 491 (Fla. 3d DCA 1971); Hecht v. Dade County, 234 So.2d 709 (Fla. 3d DCA 1970); Keith Invs., Inc. v. James, 220 So.2d 695 (Fla. 4th DCA 1969).

The operation of the statute is explained in the following example. Assume that the VAB reduced the TPP's value from $2,000,000 to $99,000. This would not meet the 5 percent statutory threshold and a property appraiser could not sue. Notwithstanding the fact that the property appraiser could not sue, section 193.016 would activate the statute's requirements preventing the property appraiser from assessing the TPP as he deemed proper without being subject to the statutory requirement of making the required findings.

The effect of the statute's requirements is that the VAB's values for that year, for instance 2002, becomes the assessed value of that particular TPP for each year thereafter if the property appraiser does not, or cannot, file suit. This operates to prevent an annual assessment by the property appraiser and, in effect, delegates to the VAB the authority to fix the value of such TPP. This Court has held that the property appraiser's constitutional duties cannot be usurped or delegated. See Cassidy v. Consolidated Navel Stores, 119 So.2d 35 (Fla. 1960); District Sch. Bd. of Lee County v. Askew, 278 So.2d 223 (Fla. 1973).

This statute's operation is somewhat akin to the situation created by the statute involved in Cassady. There, the property appraiser was permitted to assess subsurface interests in real property only when a return of same was filed with his office. If no return was filed, he was precluded from assessing subsurface interests. This court invalidated the statute in Cassady. Here, the property appraiser is precluded from assessing the involved TPP after a VAB reduction by not filing suit against the involved TPP's owner even if he had no statutory authority to have sued because the threshold requirements were not met. In the example given previously, using the $2,000,000 valuation, if two parcels were appealed to the VAB and the board reduced one to $99,000 and the other to $101,000, one could sue and the other could not. There is no constitutional basis for such disuniformity in the assessment process and no constitutional basis for such classification justifying the creation of special criterion for one class of property.

CONCLUSION

PAAF respectfully requests that this Court find and hold section 193.016 unconstitutional in violation of the uniformity requirements of Article VII, Section 4, and as constituting an improper classification of TPP not permitted by the Florida Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to **NICHOLAS BYKOWSKY, ESQUIRE,** Assistant Attorney General, Office of the Attorney General, Tax Section - The Capitol, Tallahassee, Florida 32399-1050; **EVAN J. LANGBEIN, ESQUIRE**, Langbein & Langbein, P.A., 20801 Biscayne Boulevard, Suite 506, Miami, Florida 33180; **THOMAS W. LOGUE, ESQUIRE**, and **JAY W. WILLIAMS, ESQUIRE**, Assistant Dade County Attorneys, Metro Dade Center, Suite 2810, 111 N.W. 1st Street, Miami, Florida 33128-1930; and **GAYLORD A. WOOD, JR., ESQUIRE**, Wood & Stuart, P.A., 304 SW 12th Street, Fort Lauderdale, Florida 33315-1521 on this the **5th** day of April 2004.

Larry E. Levy

CERTIFICATE OF COMPLIANCE

The undersigned counsel for amicus curiae, Property Appraisers' Association of Florida, Inc., certifies that the font size and style used in the foregoing amicus brief is 14 Times New Roman and complies with the font requirement of Florida Rule of Appellate Procedure 9.210(a).

Larry E. Levy