IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO. SC 03-2270

DEPARTMENT OF REVENUE,

Appellant,

v. Lower Case No. 1D02-3762

JOSEPH C. HOWARD and
JOYCE FOREMAN, et al.,

Appellees.
_____/

ANSWER BRIEF OF APPELLEES
MIAMI-DADE AND BROWARD
COUNTY PROPERTY APPRAISERS

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STATEMENT OF THE FACTS

Two Florida taxpayers, Appellees Howard and Forman, sued the Department of Revenue (hereinafter "D.O.R."), the Miami-Dade County Property Appraiser, and the Broward County Property Appraiser for a declaratory judgment that section 193.016 of Florida Statutes was unconstitutional. The Taxpayers filed a motion for judgment on the pleadings. Although defendants at the trial level, the two Property Appraisers agreed with the taxpayers that the statute was unconstitutional and so formally joined the Taxpayer's motion for judgment on the pleadings. (R.V-871, 874). D.O.R. did not object to this joinder and did not challenge the Property Appraiser's standing to do so. The trial court found the statute unconstitutional in part and constitutional in part. D.O.R. appealed to the District Court.

In the appeal before the First District Court of Appeal, D.O.R. did not challenge the standing of the taxpayers Howard and Foreman in its initial brief, but did challenge their standing in its reply brief. Along with the Taxpayers, the Property Appraisers appeared as Appellees and argued that the statute was unconstitutional in its entirety. D.O.R. did not challenge the standing of the Property Appraisers in the District Court.

The First District Court of Appeal rejected D.O.R.'s belated claim that that the Taxpayers Howard and Foreman lacked standing. Slip Op. at 1, n. 2.

The Court then held that section 193.016 was unconstitutional in its entirety. D.O.R. appealed that decision to this Court and, among other arguments, challenged the standing of the Taxpayers Howard and Foreman. However, even as D.O.R. did not challenge the standing of the Property Appraiser in the circuit and district court, D.O.R. did not challenge the standing of the Property Appraisers in the Supreme Court.

STANDARD OF REVIEW

Because this case involves the constitutionality of a statute, the standard of review is de novo. *City of Miami v. McGrath*, 824 So.2d 143, 146 (Fla. 2002).

SUMMARY OF ARGUMENT

A. Standing

Pursuant to a long-line of Supreme Court cases, a taxpayer has standing to challenge a tax statute when he or she alleges *either* a special injury *or* a violation of the taxing and spending provisions of the Florida Constitution. *See, e.g. School Board of Volusia v. Clayton*, 691 So. 2d 1066, 1068 (Fla. 1997); *North Broward Hospital District v. Fornes*, 476 So. 2d 154 (Fla. 1985). In the instant case, the Appellee-Taxpayers Howard and Foreman have standing, without the need to show a special injury, because they challenge the constitutionality of a tax statute.

B. Merits

Not Uniform. For almost half a century, section 193.011 of Florida Statutes has set forth the eight valuation criteria to be considered by property appraisers when assessing property. Those eight criteria basically codify the traditional cost, income, and market approaches to value. Section 193.016 of Florida Statutes, however, creates a new "ninth" criterion. The new criterion is a value adjustment board's reduction of an assessment in a prior year that was not successfully appealed. Pursuant to this statute, the Property Appraiser must use this new criterion only when assessing personal property reduced in the prior

year only by value adjustment boards. The new criterion is not made applicable to any other type of real or personal property.

Because section 193.016 creates a "ninth" criterion that applies only to one particular class of property and not to all property, it violates the constitutional requirement that the Legislature's regulations regarding just value apply to all property, except for the classes expressly exempted from the just valuation requirement. *See, e.g., Interlachen Lakes Estates, Inc. v. Snyder*, 304 So. 2d 433, 435 (Fla. 1974). Contrary to the suggestion of the dissent below, the classification scheme of section 193.016 cannot be saved by a finding that the statute does not arbitrarily classify property for favored tax treatment. Under the 1968 Constitution, the Legislature is no longer free to establish any different valuation criteria for different classes of property, even if such classifications and criterea could be deemed "reasonable."

Not Rational. Moreover, the classifications created by section 193.016 are clearly arbitrary and operate to grant favored tax treatment to the favored class. The major classification created by the statute arises from the different treatment that it mandates for *personal property* versus *real property.* Nothing in the obvious differences between these types of property, however, serve to make a value adjustment board's reduction in an assessment in the prior year more or less relevant to the full fair market value of personal property than of

real property. Thus, while there are obvious differences between real property and personal property, those differences do not provide a rational basis to treat the two classes of property differently in the manner done by section 193.016.

Favored Tax Treatment. The statute requires property appraisers to assess only the new class of property using the new "ninth" criterion, which, unlike the eight valuation criteria of section 193.011 of Florida Statutes, is not a generally recognized indication of fair market value. This alone is favored treatment. Moreover, the statute provides that the value adjustment board's decision in a prior year must be considered only when the value adjustment board reduced an assessment -- not when it upheld an assessment. The statute therefore ratchets only one way – in favor of the class. It thereby skews the process in a manner that increases the likelihood that the favored class of property will obtain lower assessments.

Not Merely "Consider." Finally, the Court should reject the contention that the section 193.016 requires the property appraiser merely to consider the new "ninth" criterion. Even if accurate, this contention would not bring the statute into conformity with the uniformity requirement of the 1968 Constitution, nor would it change the favored tax treatment arbitrarily provided to the class. But this contention is not accurate. The statute requires more than mere consideration.

Under the statutory scheme, a property appraiser is forbidden from increasing a subsequent year's assessment above a value adjustment board's reduction of a prior year's assessment unless the property appraiser asserts "additional basic and underlying facts not properly considered by the value adjustment board." No such showing is required regarding the eight valuation criteria contained in section 193.011. By requiring this heightened showing before a property appraiser can upwardly depart from the new criterion, the statute elevates the new criterion above the traditional valuation criteria in section 193.011. It gives the prior year's value adjustment board an undue role in determining a subsequent year's assessment in a manner that usurps the property appraiser's constitutional discretion to make assessments.

ARGUMENT

I. TAXPAYERS NEED NOT SHOW SPECIAL INJURY TO HAVE STANDING TO ASSERT THAT A STATUTE VIOLATES A SPECIFIC TAXING AND SPENDING PROVISIONS OF THE FLORIDA CONSTITUTION.

In the instant case, the Appellee-Taxpayers Howard and Bush have standing, without the need to show a special injury, because they contend that section 193.016 exceeds the Legislature's constitutional authority to establish regulations to determine just value set forth in Article VII, section 4 of the Florida Constitution.

Some jurisdictions outside Florida require a taxpayer to show a special injury even when the taxpayer is making a constitutional challenge to a taxing or spending statute; other jurisdictions, to avoid the situation in which there is a wrong to a taxpayer without a remedy, do not require a taxpayer to show a special injury even when the taxpayer is making a non-constitutional challenge to a tax statute. *See, e.g.*, cases cited *in Clayton v. School Board of Volusia County*, 696 So. 2d 1215 (Fla. 5th DCA 1997). The Florida law of taxpayer standing occupies the middle ground between these two positions.

Pursuant to a long-line of Florida Supreme Court cases, a taxpayer has standing to challenge a tax statute when he or she alleges either a special injury or a violation of the taxing and spending provisions of the Florida Constitution: "We find," this Court held, "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 will still obtain in other cases." *Department of Administration v. Horne*, 269 So. 2d 659, 663 (Fla. 1972), *quoted with approval in North Broward Hospital District v. Fornes*, 476 So. 2d 154, 155 (Fla. 1985). *See, e.g. School Board of Volusia v. Clayton*, 691 So. 2d 1066, 1068 (Fla. 1997); *Department of Revenue v. Markham*, 396 So. 2d 1120 (Fla. 1981).

D.O.R. has presented no compelling reason why this Court should depart from this long line of precedent at this time. Any such departure would "only serve to insulate those government officials who ignore or who violate the law from accountability to the citizens whose trust they violate," *Fornes*, 476 So. 2d at 156 (Ehrlich, J. dissenting), in a manner never countenanced before by this Court.

II. THE FIRST DISTRICT COURT OF APPEAL PROPERLY FOUND THAT SECTION 193.016 VIOLATED ARTICLE VII, SECTION 4 OF THE FLORIDA CONSTITUTION.

A. Section 193.016 Violates the Uniformity Requirement of Article VII, Section 4.

Section 193.016 created a "ninth" criterion that applied only to personal property reduced by the value adjustment board. This new criterion clearly applied to one particular class of property and not to all property. It therefore violated the constitutional requirement that the Legislature's regulations regarding just value apply uniformly to all property, except for the classes expressly exempted from the just valuation requirement. *See, e.g., Interlachen Lakes Estates, Inc. v. Snyder*, 304 So. 2d 433, 435 (Fla. 1974).

Article VII, section 4 of the Florida Constitution (1968) provides:

> By general law regulations shall be prescribed which shall secure a just valuation of all property for ad valorem taxation, provided:
>
> (a) Agricultural land 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.
>
> 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.[1]

[1] After 1968, the Electors authorized constitutional amendments establishing three more exceptions to the requirement of fair market value: a cap on increases of homestead properties, renewable energy devices, and historic property. Art. VII, section 4(c), (d), & (e) (2003).

This Court has interpreted Article VII, section 4 of the 1968 Constitution to require uniform regulations that apply to all property:

> [t]his section is different from the prior 'just valuation clause' contained in Article IX, Section 1 of the 1885 Florida Constitution, in that the two subsections were added by the 1968 constitutional revisers. Apparently the revisers felt that the four classes of property mentioned in these two subsections should be valued according to different standards than all other property. The rule expressio unius est exclusio alterius applies, however, so that by clear implication *no separate standards for valuation may be established for any other classes of property.*
>
> 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 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.

Interlachen Lakes Estates, Inv. v. Snyder, 304 So.2d 433, 434 (Fla. 1974) (emphasis added). *See also Williams v. Jones*, 326 So.2d 425, 430 (Fla. 1975).

In *Interlachen*, the Court applied these principles to strike down a statute that required unsold lots in a platted subdivision to be valued as if they were unplatted raw land until a certain percentage of lots were sold. The Court held, "[t]he statute does no more than establish a classification of property to be valued on a different standard than all other property. Under the 1968 Constitution, Article VII, Section 4, this is no longer within the prerogative of the legislature to do." 304 So.2d at 433.

Similarly, in *Valencia Center, Inc. v Bystrom,* 543 So. 2d 214 (Fla. 1989) the Court applied these principles to strike down a statute that required properties subject to long term leases to be assessed based upon the leases and not their fair market value. The Court stated, "[o]ur decision on the constitutionality of this statute is controlled by *Interlachen* …. There, 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." 543 So.2d at 216.

Applying this precedent to the instant case, for almost half a century before enactment of section 193.016 of Florida Statutes, the Legislature enacted section 193.011 of Florida Statutes, which sets forth eight valuation criteria to be considered by property appraisers when assessing all property.[2] Those eight criteria

[2] 193.011 **Factors to consider in deriving just valuation.**--In arriving at just valuation as required under s. 4, Art. VII of the State Constitution, the property

appraiser shall take into consideration the following factors:

(1) The present cash value of the property, which is the amount a willing purchaser would pay a willing seller, exclusive of reasonable fees and costs of purchase, in cash or the immediate equivalent thereof in a transaction at arm's length;

(2) The highest and best use to which the property can be expected to be put in the immediate future and the present use of the property, taking into consideration any applicable judicial limitation, local or state land use regulation, or historic preservation ordinance, and considering any moratorium imposed by executive order, law, ordinance, regulation, resolution, or proclamation adopted by any governmental body or agency or the Governor when the moratorium or judicial limitation prohibits or restricts the development or improvement of property as otherwise authorized by applicable law. The applicable governmental body or agency or the Governor shall notify the property appraiser in writing of any executive order, ordinance, regulation, resolution, or proclamation it adopts imposing any such limitation, regulation, or moratorium;

(3) The location of said property;

(4) The quantity or size of said property;

(5) The cost of said property and the present replacement value of any improvements thereon;

(6) The condition of said property;

(7) The income from said property; and

(8) The net proceeds of the sale of the property, as received by the seller, after deduction of all of the usual and reasonable fees and costs of the sale, including the costs and expenses of financing, and allowance for unconventional or atypical terms of financing arrangements. When the net proceeds of

basically codify the traditional cost, income, and market approaches to value.

Section 193.016 of Florida Statutes, however, has the effect of creating a new "ninth" criterion for assessing property. The new criterion is the reduction in the assessment made by the value adjustment board in the previous year not successfully appealed by the property appraiser. Rather than applying uniformly to all property, this new criterion applies only to personal property reduced in the prior year by value adjustment boards. Section 193.016 states in its entirety:

> 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.

> the sale of any property are utilized, directly or indirectly, in the determination of just valuation of realty of the sold parcel or any other parcel under the provisions of this section, the property appraiser, for the purposes of such determination, shall exclude any portion of such net proceeds attributable to payments for household furnishings or other items of personal property.

As is readily apparent, the statute provides that the new "ninth" criterion will be used – not to assess all property – but only to assess a relatively small subset of the larger universe of real and personal property. The new criterion does not apply to real property and does not apply to any property whose assessment was reduced by the courts. Because there is no express authorization in Article VII, section 4 of the Constitution allowing separate treatment of such personal property, the statute cannot pass constitutional muster.

Under the 1968 Constitution, the Legislature lacks the authority to establish different classifications of property to be valued based upon different criteria. *See, e.g., Interlachen*. By establishing such a class of property to be assessed on a special and unique basis, section 193.016 violates the uniformity requirement of Article VII, section 4 of the 1968 Constitution. Like the statutes at issue in *Interlachen*, and *Valencia Center*, the statute "does no more than establish a classification of property to be valued on a different standard than all other property. Under the 1968 Constitution, Article VII, Section 4, this is no longer within the prerogative of the legislature to do." *Interlachen*, 304 So.2d at 435.

The dissent in the District Court contended that the statute at issue could be upheld on the basis that it does not "arbitrarily classify property for favored tax treatment." As discussed in the next sections of this brief, this contention

does not withstand analysis: section 193.016 arbitrary creates a special class and extends favored tax treatment to it. As a threshold matter, however, the Court

should reject the dissent's argument because, as the majority opinion properly noted, "this is not the proper inquiry for determining whether the statute complies with article VII, section 4." Slip Op. at 5, n.3. This Court specifically held in *Interlachen* that the 1968 Constitution removed from the legislature the power to classify sub-sets of property for special methods of valuation – whether rational or not. 304 So. 2d at 434-435. Instead, under the 1968 Constitution, "*all* property – save those four classes specifically enumerated in the constitution – must be measure under the same criteria." *Id.*

B. The Classes of Property Created by Section 193.016 Are Arbitrary.

As discussed above, the 1968 Constitution removed from the Legislature the power to create different classes of property to be valued on different bases, even if such classifications could be deemed "reasonable." *Interlachen.* But even if the Legislature had such authority, section 193.016 would be unconstitutional because it arbitrarily creates a new class of property to receive favored tax treatment.

Section 193.016 states that certain types of personal property should be assessed using a new "ninth" criterion. The new criterion is the reduction in a prior year by a value adjustment board, unless the reduction was successfully appealed. This new criterion applied to assess only personal property whose

assessment was reduced in the prior year only by a value adjustment board. There are at least three classifications created by this statutory scheme that are irrational and arbitrary.

In the first place, the Statute unreasonably distinguishes between *personal property* and *real property*. The judge who dissented below noted that there are differences between real and personal property. Nothing in the obvious differences between these two types of property, however, makes a prior year's value adjustment board reduction more indicative of the fair market value of personal property than of real property. For instance, the Department of Revenue noted in its brief that personal property can be transported whereas real property cannot. D.O.R. Brief at 16, n. 7. But the fact that personal property is generally more portable than real property does not cause a prior year's value adjustment board reduction to be more indicative of the fair market value of personal property than of real property.

Thus, in regards to the criterion at issue, the two classes of property are not different. A prior year's reduction is no more or less relevant to the full fair market value of personal property than of real property. Yet the statute provides that this "ninth" criterion applies only to personal property. This classification is as irrational as having one speed limit for automobiles painted green and a different speed limit for automobiles painted blue. Treating two classes of

property in a dissimilar manner in regards to a matter in which they are similar is patently arbitrary.

In the same way, this statute unreasonably distinguishes between properties whose assessments were reduced by *value adjustment boards* and properties that were reduced by *courts*. A prior year's reduction by a value adjustment board is no more relevant to the full fair market value of a property than the prior year's reduction by a court. If anything, a reduction by a court would be appear to be a more reliable indication than a reduction by a value adjustment board. Most value adjustment board hearings take less than ten minutes, are conducted pursuant to very relaxed rules of evidence and procedure, and are entered into by the parties without the benefit of discovery. In contrast a reduction by the court would normally occur only after the a full trial by the court that normally takes at least a full day, conducted pursuant to formal rules of evidence and procedure, and occur only after the parties had a full opportunity to conduct discovery. Nevertheless, the new "ninth" criterion requires assessments to be subject only to reductions by value adjustment boards – not reductions by courts. It is arbitrary to elevate the decision of a value adjustment board above that of a court in this manner.

Thirdly, this statute unreasonably distinguishes between assessments *reduced* by value adjustment boards and assessments *upheld* by value adjustment boards. A value adjustment board's decision in a prior year to reduce an assessment is no more or less relevant to the full fair market value of the property in a subsequent year than a value adjustment board's decision in a prior year to uphold an assessment. In regards to the criterion at issue, the two classes of property are not different. Yet the statute requires consideration only of value adjustment board decisions reducing an assessment – not of value adjustment board decisions upholding an assessment.

Thus, the classifications created by section 193.016 are not rational and would be unconstitutional even if the 1968 Constitution allowed the Legislature to tax different classes of property on different bases.

C. Section 193.016 Conveys Favored Tax Treatment to the Favored Classes of Property.

In addition to being arbitrary in the manner that it applies to some classes of property but not to others, the new "ninth" criterion created by section 193.016 clearly grants favored tax treatment to the special class. Indeed, it would appear somewhat naive to suggest that the favored class was legislatively singled out only for neutral treatment. It likewise would violate normal rules of statutory construction to suggest that the Legislature intended that the favored class be assessed after enactment of the statute in the same manner that it was assessed prior to enactment of the statute. *Unruh v. State*, 669 So. 2d 242, 245 (Fla. 1996).

Unlike the eight valuation criteria of section 193.011 of Florida Statutes, the new "ninth" criterion is not a generally recognized indication of fair market value. A value adjustment board's decision to reduce an assessment is not recognized as an indication of fair market value in any appraising treatise. *See, e.g.*, The Appraisal Institute, **The Appraisal of Real Estate** (12th ed. 2001); The Appraisal Institute, **The Dictionary of Real Estate Appraisal** (2d ed. 1989). Nor is it recognized as a reflection of fair market value by appraisers. There is no recorded instance, for example, of a bank extending a loan based upon a reduction in assessment made by a value adjustment board in a prior year.

In fact, the courts of this state have held that a value adjustment board's reduction of an assessment "constituted no evidence in the de novo proceeding of the property's value." *Muss v. Blake*, 416 So. 2d 2, 3 (Fla. 3d DCA 1982). This is true even for a value adjustment board decision for the tax year at issue. *Id.* It is even more true for a decision in a prior year since the long standing case law in Florida requires that "… each year's tax assessment must be based on its own validity and not upon the assessment of any prior or subsequent year." *Colleta v. Robbins*, 745 So. 2d 1034 (Fla. 3d DCA 1999). *See Keith Investments, Inc. v. James*, 220 So. 2d 695 (Fla. 4th DCA 1969). For this reason, the assessment in one year is not admissible evidence in a case contesting the assessment in another year. *Overstreet v. Brickell Lum Corp.*, 262 So. 2d 707, 709 (Fla. 3d DCA 1972); *Hecht v. Dade County*, 234 So. 2d 709, 710 (Fla. 3d DCA 1970).

Thus, a prior year's reduction in an assessment is not indicative of fair market value in a subsequent year. By mandating special consideration of this criterion only for the favored class – but not for other property -- the statute is clearly providing favored tax treatment to the special class.

This favored treatment is apparent in the manner that the new criterion applies only when the value adjustment board reduces an assessment -- not when it upholds an assessment. In regards to the application of a value

adjustment board's decision in a prior year, the statute ratchets only one way. It does not operate to uphold an assessment when the value adjustment board upheld a similar or higher assessment in a prior year. It only operates to lower an assessment for the favored class of property if the value adjustment board reduced the assessment in a prior year. It thereby skews the process in a manner that helps the favored class of property to obtain lower assessments.

If a value adjustment board's decision reviewing an assessment probative of fair market value, then such a decision would be probative whether it upheld or reduced an assessment. By ratcheting only one way, section 193.016 reveals that its true purpose to help certain favored taxpayers obtain lower assessments – not to ensure that all property is assessed at full fair market value. As the First District reasoned, "[i]n requiring the property appraiser to consider the prior year tangible personal property assessment reduction made by the value adjustment board, and in further requiring the property appraiser to explain any upward deviations from the prior year assessment, the statute increases the likelihood of a favorable assessment for the owners of this special class of property, by either the property appraiser or the value adjustment board." Slip Op. at 5, n. 3. Thus, section 193.016 does, in fact, confer favored tax treatment on a particular class of taxpayers.

D. Section 193.016 Requires the Property Appraiser to Do More than Merely "Consider."

Both the D.O.R. and the dissent below attempted to defend section 193.016 by suggesting that the new criterion it creates need only be "considered" by the Property Appraiser in making an assessment in the same manner that the criteria of section 193.011 are considered in making an assessment. D.O.R. Brief at 16. Of course, this argument begs the question raised by the Constitution's uniformity requirement. As the Court below pointed out, such "mandated consideration is nevertheless an essential component of the valuation methodology for this special class of property." Slip Op. at 4. "The Legislature is authorized to add or to modify the list of factors to be considered by the property appraiser when determining valuations for all types of property. But, except in circumstances specified in article VII, section 4, and not present in this case, it may not provide additional or different factors when are applicable to only a limited class of property." Slip Op. at 5.

But the argument of D.O.R. and the dissent below also fails because section 193.016 clearly requires the property appraiser to do more than merely consider a prior year's reduction in making an assessment. In doing so, the statute gives the new criterion more weight than the traditional indicators of fair market value listed in section 193.011 and usurps the property appraiser's constitutional discretion to assess property.

If the drafters of section 193.016 intended that the property appraiser merely consider a prior year's reduction, they would have stopped with the first sentence which states, "the property appraiser shall *consider* the reduced values determined by the value adjustment board in assessing those items of tangible personal property." But the drafters did not stop there. They added a second sentence which states: "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."

To find that the statute mandates only consideration would render the entire second sentence a meaningless nullity in violation of the "fundamental rule of statutory interpretation [that] courts should avoid readings that would render part of a statute meaningless." *Unruh v. State*, 669 So. 2d 242, 245 (Fla. 1996) (quotations and citations omitted).

Moreover, the plain meaning of this second sentence is to require the property appraiser to do more than merely consider the prior year's reduction. It provides that the Property Appraiser cannot upwardly depart from this "ninth" criterion unless he or she "asserts additional basic and underlying facts not properly considered by the value adjustment board." Section 193.016, Fla. Stat.

Under this provision, a court or value adjustment board must set aside a property appraiser's assessment if the assessment upwardly departed from a prior year's value adjustment board's reduction without an assertion of "basic and underlying facts not properly considered by the value adjustment board." Absent such an assertion, the statute prohibits the property appraiser from assessing the property in a subsequent year in excess of the value adjustment board's reduction of the assessment in a prior year.

None of the valuation criteria of section 193.011 are binding in this degree on a property appraiser. Thus, section 193.016 mandates that its new criterion receive more weight than the normal valuation criteria contained in section 193.011. Section 193.016 elevates this new "ninth" criterion above the other eight criteria, for which no such requirement exists.

In so doing, section 193.016 unconstitutionally usurps the property appraiser's constitutional discretion to assess property. In *District School Board of Lee County v. Askew*, 278 So. 2d 272, 277 (Fla. 1973), the Supreme Court reviewed a statute that allowed the property appraiser's assessment to be overridden for purposes of assigning certain education funds by an Auditor General ratio study. The court held that the statute "cannot stand."

The Florida Supreme Court explained:

> [To rule otherwise] is to negate the discretion granted to the assessor, the discretion necessary to the job, attendant to all educated estimates, and uniformly recognized in the opinions of this court. We conclude that a finding by the Auditor-General different from that reached by a county tax assessor is, therefore, insufficient to override the official assessment in the absence of a showing that the official assessment represented a departure from the requirements of law and not merely the differences of opinion to be expected when experts approach the subjective business of assessing property.

278 So. 2d at 277.

Like the statute at issue in *Askew*, section 193.016 "negates the discretion granted to assessors" because it allows a value adjustment board's reduction in a prior year to override the property appraiser's discretionary judgment concerning a subsequent year's assessment. Absent an assertion of "additional basic and underlying facts not properly considered by the value adjustment board," the value adjustment board's reduction in a prior year becomes binding on the property appraiser in the subsequent year -- without the value adjustment board ever "showing that the official assessment [for the subsequent year] represented a departure from the requirements of law."

This result reverses the constitutional structure that makes the assessment of the property appraiser -- not the decision of the value adjustment board -- presumptively correct. It violates this Court's statement that "no one should hold out any hope that [anyone other than the tax assessor] could possess and exercise the duties of the Constitutional office of tax assessor." *Walter v. Schuler*, 176 So. 2d 81, 84 (Fla. 1965).

Even as this Court in *Askew* held that an Auditor-General's finding is insufficient to replace the property appraiser's assessment "in the absence of a showing that the official assessment represented a departure from the requirements of law," this Court should hold that a value adjustment board's

reduction of an assessment in a prior year is insufficient to replace the property appraiser's assessment in a subsequent year "in the absence of a showing that the official assessment [for the subsequent year] represented a departure from the requirements of law." The statute in the instant case is unconstitutional for the same reasons this Court held the statute at issue in *Askew* unconstitutional.

For these reasons, the Court should reject the contention that the section 193.016 merely requires the property appraiser to consider the new "ninth" criterion. Even if true, this contention would not justify the statute's deviation from uniformity requirement of the 1968 Constitution. But it is not true. Section 193.016 requires the property appraiser to do far more than merely consider the new criterion. In fact it elevates the new criterion above the tradition valuation criterion in section 193.011 in a manner that usurps the property appraiser's constitutional discretion to make assessments.

CONCLUSION

For the above-stated reasons, the Miami-Dade County Property Appraiser respectfully requests this Court to uphold the decision of the First District Court

of Appeal which held that section 193.016 of Florida Statutes was unconstitutional in its entirety.

Respectfully submitted,

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Florida Bar No. 35774

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed on this _____ day of March, 2004, to ***Evan J. Langbein, Esquire,*** Langbein & Langbein, P.A., Aventura Corporate Center, Suite 506, 20801 Biscayne Boulevard, Miami, Florida 33180; and ***Nicholas Bykowsky, Esquire,*** Office of the Attorney General, The Capitol, Revenue Litigation Section, Tallahassee, Florida 32399-1050.

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Thomas W. Logue

J:\BRF\030465I

Assistant County Attorney

APPELLANT'S CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2), in that this brief uses Times New Roman 14-point font.

_____
Thomas W. Logue
Assistant County Attorney