IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF REVENUE,

Appellant,

Case No. SC03-2270
L.T. No. 1D02-3762

v.

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

Appellees.

APPELLEES JOSEPH C. HOWARD and JOYCE FOREMAN'S ANSWER BRIEF

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Introduction

This answer brief is filed on behalf of JOSEPH C. HOWARD and JOYCE FOREMAN, Plaintiffs in the trial court, and they will be referred to as "Plaintiffs". The Defendant, FLORIDA DEPARTMENT OF REVENUE, will be referred to as "DOR". All emphasis is ours unless indicated otherwise.[1]

Statement of the Case and Facts

Plaintiffs filed their second amended complaint for declaratory judgment "in their capacity as citizens and taxpayers" alleging they were in doubt as to the constitutionality of Fla. Stat. § 193.016. (R.5, p. 723) Plaintiff, FOREMAN, alleged she owns real estate in Miami-Dade County, and previously had filed petitions with the Miami-Dade Value Adjustment Board, seeking reductions in her ad valorem assessment on the real estate she owns, and that she anticipated she will file future petitions seeking lower assessments. (R. 5, p. 724). Plaintiff, HOWARD, alleged ownership of real estate in Broward County, Florida. (Id.)

Both Plaintiffs alleged the provisions of § 193.016 favor certain ad valorem taxpayers who own tangible personal property and receive a prior-year reduction in their assessments from the value adjustment board, and that such statutory favoritism

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[1] Plaintiffs will use the same record references as the DOR, and the appendix containing the First District's decision will be "APP. ___".

results in the

lack of uniform assessments among all ad valorem taxpayers and

adversely affects the millage rates imposed upon the Plaintiffs' property. (R. 5, p. 726). Plaintiffs requested entry of a declaratory judgment, declaring the statute unconstitutional, null and void. (R. 5, p. 736).

The trial court entered an order denying the DOR's motion to dismiss Plaintiff's Complaint for lack of standing. (R. 5, p. 833-34). The Broward County Property Appraiser, William Markham answered Plaintiffs' complaint, admitting the statute [Section 193.016] is unconstitutional. (V.5, p. 830-831). The Miami-Dade County Property Appraiser, Joel W. Robbins, similarly agrees with Plaintiffs constitutional position. Both Mr. Markham and Mr. Robbins filed their joinder in Plaintiff's motion for judgment on the pleadings. (R. 5, 855-876).

In the First District, the DOR did not renew a challenge to Plaintiffs' standing in its initial brief. The First District found that Plaintiffs had standing, and agreed with the positions of the Plaintiffs and the Defendant property appraisers, finding Section 193.016 facially unconstitutional. (APP. 1-10).

STANDARD OF REVIEW

The Plaintiffs agree with the DOR that the standard of review for a facial constitutional issue is *de novo*. Plaintiffs' Complaint and the Defendants' answers to it show that the question presented was purely one of law. *E.g.,* United Teachers of Dade, etc. v. Dade County School Bd., 472 So.2d 1269 (Fla. 1st DCA 1985).

Summary of Argument

The trial court and the First District properly found Plaintiffs, as citizens and taxpayers, had standing to seek a declaratory judgment holding that Fla. Stat. § 193.016 was an invalid and unconstitutional exercise of the Legislature's taxing authority.

The First District also correctly determined that Fla. Stat. § 193.016 is unconstitutional. The mandate that the property appraiser "shall consider" a prior-year assessment reduction made by the value adjustment board *only* for tangible personal property taxpayers violates Article VII, § 4 (A) & (B) and the equal protection and due process of law provisions of the federal and state constitutions. The Legislature may divide classes of property in only four "specifically enumerated" classifications contained in subsections (A) & (B) of Article VII of the 1968 Constitution. Interlachen Lakes Estate, Inc. v. Snyder, 304 So. 2d 433, 435 (Fla. 1974).

The Legislature's attempt to create a "ninth factor" in another statute [Section 193.016, supra, as opposed to Fla. Stat. § 193.011], and applicable only to certain tangible personal property taxpayers, is unconstitutional. Any such "ninth factor", to be constitutional, would have to apply to ***all*** property, inclusive of all tangible personal property and real property taxpayers. Since this "ninth factor" set forth in Section 193.016 does not, the statute is unconstitutional, and should be declared null and void. Moreover, the attempt by the DOR to characterize Section 193.016 as a "ninth factor" is a misnomer, since that "factor", unlike the eight existing factors contained in Fla. Stat. § 193.011 does not deal with fair market value, i.e., the constitutional standard of "just valuation".

The First District, and the trial court, were unassailably correct in determining that the second sentence of Section 193.016 impermissibly usurped the constitutional authority of the property appraiser, and is unconstitutional under Article VIII, § 1(d), Florida Constitution. Under Fla. Stat. § 193.011, the property appraiser is empowered to exercise, and must exercise, "valuation discretion" in determining the just valuation of all property annually. Each year's assessment must be predicated on its own validity, and not upon an assessment made in a prior or subsequent year. *E.g.,* Coletta v. Robbins,

745 So. 2d 1034 (Fla. 3d DCA 1999). The property appraiser's discretion may not be legislatively controlled or curtailed by a prior year determination of a value adjustment board as to select tangible personal property taxpayers.

Argument

Point I

AS TAXPAYERS AND CITIZENS PLAINTIFFS HAD STANDING TO CHALLENGE THE FACIAL CONSTITUTIONALITY OF FLA. STAT. § 193.016 (2000).

The DOR seeks radical change in the law enunciated and followed by this Court for generations. Florida taxpayers and citizens for years have been afforded standing by this Court to challenge facially unconstitutional exercises of the legislature's taxing and spending power.[2]

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[2] The DOR abandoned standing in the First District, failing to raise it in its initial brief. Hall v. State, 823 So. 2d 757, 763 (Fla. 2002)["issue not raised in an initial brief is deemed abandoned..."]. Such an abandoned issue should not be preserved for review here. *Cf.,* Krivanek v. Take Back Tampa Political Comm., 625 So. 2d 840, 842 (Fla. 1993); Markham v. Neptune Hollywood Beach Club, 527 So. 2d 814, n. 2 (Fla. 1988); Cowart v. City of West Palm Beach, 255 So. 2d 673, 674-75 (Fla. 1971); Schuster v. Blue Cross and Blue Shield of Florida, Inc., 843 So. 2d 909, 912 (Fla. 4th DCA

In Department of Administration v. Horne, 269 So.2d 659 (Fla.1972), standing was afforded in a declaratory relief action. The case, seeking to have an appropriations statute declared unconstitutional, was filed by Senator Mallory E. Horne, joined by other "eminent members of The Florida Senate". (269 So.2d 660) Standing subsisted not because Sen. Horne and others were legislators, but they were "ordinary citizens and taxpayers". (269 So.2d at 660). This Court in Horne, supra, specifically held that the so-called "Rickman" rule [Rickman v. Whitehurst, 73 Fla. 152, 74 So. 205 (1917)] (269 So.2d at 662-663) of "special injury" does not apply to constitutional challenge of the legislature's taxing and spending power:

> "...that where there is an attack upon *constitutional* [Court's emphasis] grounds based directly upon the Legislature's *taxing and spending* [Court's emphasis] power, there is standing to sue without the *Rickman* requirement of special injury,...."

This exception was addressed in City of Sarasota v. Windom, 736 So.2d 741 (Fla.2d DCA 1999):

> "...[W]e note that an exception to the requirement of special injury was established in *Department of Administration v. Horne,* 269 So.2d 659 (Fla.1972). A party possesses standing if it can establish that the constitutional challenge centers upon a

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2003); State v. Famiglietti, 817 So. 2d 901, 903 (Fla. 3d DCA 2002).

> legislative body's taxing and spending power."

Standing was allowed in Charlotte Cty. Bd. of Cty. Com'rs v. Taylor, 650 So.2d 146 (Fla.2d DCA 1995). A citizen objected to a "tax cap amendment" approved by the voters of Charlotte County. He alleged it violated article VIII, section 1(g) of the Florida Constitution. The amendment capped tax millage rates. Here, too, Plaintiffs complain the unconstitutional legislation [§ 193.016] will adversely affect millage rates, making them greater. Citing Horne, supra, the Court said, "...we agree with the trial judge that Mr. Taylor had standing to bring this action." (650 So.2d at 148). The Court "appreciated" that many in Charlotte County "wanted the tax cap amendment". Mr. Taylor's cause of action, even though there was absolutely no showing of "special injury", was proper under Chapter 86 Florida Statutes. Plaintiffs have standing to contest the constitutionality of Fla. Stat. § 193.016 for the same reason.

This Court recognized in Horne, supra, that administrative agencies and other government officials often will not support causes that adversely affect taxpayers and citizens through the enactment of unconstitutional legislation. If the courthouse doors were shut to the taxpayer/citizen to challenge

unconstitutional legislation, there might be no practical means for the courts to redress such invalid lawmaking. This court said in Horne, supra, [269 So.2d at 663]:

> "...[I]t is the 'ordinary citizen' and taxpayer who is ultimately affected and who is sometimes the only champion of the people in an unpopular cause..."[3]

Standing to a taxpayer and citizen was recognized in Jones v. Department of Revenue, 523 So.2d 1211, 1214 (Fla.1st DCA 1985). In that case, a property appraiser had standing to challenge the constitutionality of a taxing statute [Fla. Stat. § 195.096(3)(b)], not in his official capacity, but as an "ordinary citizen and taxpayer". The court allowed standing based on the fact that a legislative enactment, implementing the taxing power, was challenged.[4]

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[3] Perhaps not even the Governor can protect the citizen and taxpayer from invalid laws like § 193.016 when passed as part of comprehensive legislation. As the process is understood, the Governor only may "line-item" veto particular parts of appropriations bills; he may not prevent misguided and unconstitutional application of legislative taxing power by veto.

[4] The Defendants, Mr. Robbins and Mr. Markham, property appraisers of Miami-Dade County and Broward County respectively, answered, and admitted Plaintiffs' standing and agreed that Fla. Stat. § 193.016 is unconstitutional. Such a fact not only fortifies the Plaintiffs' standing, but also significantly supports the correctness of the First District's holding, declaring the statute unconstitutional.

The standing of taxpayers and citizens to raise facial constitutional issues pertaining to the taxing powers was recognized also in Reinish v. Clark, 765 So.2d 197, 203 (Fla.1st DCA 2000), review dismissed, Clark v. Reinish, 773 So. 2d 54 (Fla. 2000), review denied, Reinish v. Clark, 790 So. 2d 1107 (Fla. 2001), cert. denied, 534 U.S. 993, 122 S. Ct. 458, 151 L. Ed. 2d 377 (2001). Standing was found for the Reinishes, residents of Illinois, not Florida, but who paid Florida ad valorem taxes on a second home. The Reinishes challenged the facial constitutionality of Fla. Stat. § 196.031(3)(d) [as well as Art. VII, § 6, Fla. Const.]. The DOR argued they lacked standing because they had neither contested their assessment before the Value Adjustment Board, nor had they alleged compliance with Florida procedures governing annual application for homestead tax exemption. (765 So.2d at 202)

The district court affirmed the Reinishes standing, citing four decisions of this court: Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994); Chiles v. A, B, C, D, E, and F, 589 So. 2d 260 (Fla. 1991); Martinez v. Scanlan, 582 So.2d 1167 (Fla. 1991); and May v. Holley, 59 So.2d 636, 639 (Fla. 1952). The court stated [765 So.2d 202 & 203]:

> "...The Reinishes are neither challenging their assessment nor seeking an exemption from which they claim present entitlement.

> Rather, they are challenging the constitutional and statutory requirement of establishing a Florida 'permanent residence' to be eligible for the homestead tax exemption. Situations such as this constitute an exception to the general rule that requires a party first to seek, and then be denied, a refund before suing for a tax refund [citing *Kuhnlein*, supra]."
>
> * * * *
>
> "... The Declaratory Judgment Act is 'substantive and remedial,' with a purpose 'to settle and to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations,' and the Act is 'to be liberally administered and construed.' § 86.101, Fla. Stat. (1997). Individuals can challenge the validity of a statute in a declaratory action. § 86.021, Fla. Stat. (1997)."

The law enunciated in cases like Kuhnlein, supra, and Reinish, supra, only re-state what has been Florida law of standing under the Declaratory Judgments Act for generations. In Rosenhouse v. 1950 Spring Term Grand Jury, 56 So.2d 445 (Fla.1952), a private citizen sought to have legislative enactments involving spending public funds on the Grand Jury declared unconstitutional. This Court articulated:

> "The only question raised by the appellant relates to the right of appellant as a resident, citizen and taxpayer of Dade County to bring a bill for declaratory decree to construe a statute appropriating and authorizing the expenditure of public moneys and defining the duties of public officials in the execution of statutory

purpose....” (56 So.2d at pg. 447)

The Court added:

> “...The fact that appellant could have questioned the constitutionality of the acts above enumerated and the authority of public officials to perform duties thereunder in some other type of proceeding does not preclude the appellant from filing his bill for declaratory relief, because he has alleged a bona fide basis for invocation of jurisdiction under our present declaratory decree statute.”

Fla. Stat. §§ 86.021 & 86.051. Section 86.021, supra, provides, in pertinent part, that “...[a]ny person claiming to be interested or who may be in doubt about... or whose rights, status or other equitable or legal relations are affected by a statute,...may have determined any question of construction or validity arising under such statute,...and obtain a declaration of rights, status or other equitable or legal relations thereunder.” Section 86.051, supra, provides, in pertinent part, that such a declaratory judgment “...may be rendered by way of anticipation with respect to any act not yet done or any event which has not yet happened, and in such case the judgment shall have the same binding effect with respect to that future act or event, and the rights or liability to arise therefrom, as if that act or event had already been done or had already happened before the judgment was rendered.” As the district

court stated in Reinish, supra, these statutes are to be liberally administered and construed to favor taxpayers seeking access to the court for a declaratory judgment of a tax statute's constitutionality. § 86.101, supra.

Rosenhouse, supra, emphasized that declaratory relief procedure already had been employed historically "...on innumerable occasions to attack the constitutionality of a statute or charter and the appellant as a taxpayer has the right to institute such action because of his interest in the expenditure of public moneys. (citations omitted)" (56 So.2d at 448) The plain meaning of the language employed in Sections 86.021 & 86.051 affords extremely broad standing for taxpayers and citizens in Florida to challenge the constitutionality of statutes purporting to implement the taxing and spending powers of state government.

Rosenhouse, supra, stated the test for sufficiency of the complaint for declaratory relief seeking to determine a statute unconstitutional is not whether the Court believes the plaintiff will succeed in procuring a declaration in accordance with her theory and contention, but whether she is entitled at all to the declaration.

This Court also observed in Department of Revenue v. Kuhnlein, supra, 646 So.2d at 720 that Florida, unlike the

federal courts, meaningfully and liberally allows standing for citizens and taxpayers to challenge the constitutionality of legislative exercise of the taxing power. This Court noted that unlike federal courts, Florida courts "are tribunals of plenary jurisdiction". Florida's courts "have authority over any matter not expressly denied them by the constitution or applicable statutes." (646 So.2d at 720).

Department of Revenue v. Kuhnlein, supra, was echoed by this Court Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles, 680 So.2d 400 (Fla.1996). Eleven public school students, their parents and guardians, 23 citizens and taxpayers who were members of school boards and 45 school boards filed a one-count complaint for declaratory judgment. They alleged a right to a declaration that the right to a public education, adequately funded, was a "fundamental right under the Florida Constitution,..." (680 So.2d at 402) This Court quoted its decision in Chiles v. Children A, B, C, D, E & F, supra, 589 So.2d at 263, re-stating the line of Florida cases permitting liberal standing whenever "...the constitutional validity of an exercise of the legislature's taxing and spending power..." is the subject of declaratory relief. Plaintiffs mounting such a challenge to facial constitutionality of such a statute are not required "...to demonstrate a special injury." (*Ibid.* at 403).

In Chiles v. A, B, C, D, E, and F, supra, 589 So.2d at 263, n. 5, this Court said:

> "This Court has long held that a citizen and taxpayer can challenge the constitutional validity of an exercise of the legislature's taxing and spending power without having to demonstrate a special injury."

This Court should adhere to traditional law in this State affording to its citizens and taxpayers, who are "ultimately affected" by laws involving the taxing and spending power, broad standing to contest their constitutional infirmity. In this case, both citizens and taxpayers, and the actual government officials charged with enforcement of an invalid statute (property appraisers), agree that § 193.016 is constitutionality defective. Under such circumstances, the declaratory judgment act should be construed even more liberally. In sum, as both the trial court and the First District recognized, decisions like Horne, supra, and Kuhnlein, supra, and other Florida decisions, allow standing to challenge the validity of statutes involving the taxing and spending powers. Such standing is foundational and furthers the democratic process of government in the State of Florida.

Point II

THE FIRST DISTRICT CORRECTLY RULED THAT FLA.

STAT. § 193.016 IS UNCONSTITUTIONAL.

A. Facial Violation of Uniform Valuation Requirement of Article VII, Section 4, Fla. Const.

The First District correctly determined that Section 193.016, Florida Statutes, violates the uniform valuation requirement of Article VII, § 4 of the Florida Constitution. The district court also correctly affirmed that portion of the trial court's judgment holding that Section 193.016 violates Article VIII, § 1(d), of the Constitution.[5]

Fla.Stat.§ 193.016 (2000) reads:

> "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

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[5] **IV. Article VIII § 1(d), Florida Constitution; *"Counties".***

> "(d) **County officers.** There shall be elected by the electors of each county, for terms of four years, ... a property appraiser, ...; except when provided by county charter or special law approved by vote of the electors of the county, any county officer may be chosen in another manner therein specified,...."

> 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."

This statute purports to create another statutory (and constitutional) factor a property appraiser must consider in assessing just tangible personal property, not real estate. The statute violates Article. VII, § 4, Fla. Const., mandating and securing the "just valuation of ***all*** property" in this state. It egregiously transgresses both the constitutional precepts of uniform valuation of property for ad valorem taxation and equal protection afforded all similarly situated taxpayers who pay ad valorem taxes.[6]

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[6] **III. Article VII § 4, Florida Constitution; *"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 or land used exclusively for non-commercial recreational purposes may be classified by general law and assessed solely on the basis of character of use.
>
> (B) Pursuant to general law tangible personal property held for sale as stock in

The First District properly took guidance from this Court's decision in Interlachen Lakes Estates, Inc. v. Snyder, 304 So. 2d 433, 434 (Fla. 1974), addressing Article VII, § 4 of the 1968 revision to the Florida Constitution, as follows:

> "This section is different from the trade and livestock may be valued for taxation at a specified percentage of its value."

Plaintiffs also alleged that Section 193.016, supra, violated:

I. Amendment XIV, United States Constitution:

> "...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

II. Article I § 2, Florida Constitution; *"Basic Rights"*:

> "All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protest property;...."

> 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."

This Court then went on in Interlachen Lakes, Ibid., to explain that the people of this State in their 1968 Constitution took away from the Legislature any power to create differing classification of property other than four narrow classes specified in subsection (A) & (B) of Article VII, § 4 of the 1968 organic instrument. The court said [304 So. 2d at 434-35]:

> It is true that the constitutional provision allows the Legislature to prescribe regulations for the purpose of securing a just valuation of *all* [court's emphasis] property, but such regulations must apply to *all* [court's emphasis] 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* [court's emphasis] property –- save those four classes specifically enumerated in the Constitution –- must be measured under the same criteria.

The Supreme Court declared Fla. Stat. Section 195.062(1) unconstitutional in Interlachen Lakes, supra, because it did "no

more than establish a classification of property to be valued on a different standard than all other property." (304 So. 2d at 435). The statute gave subdivision developers a tax break by treating unsold lots as not platted for tax valuation purposes, while purchasers of sold lots were not similarly favored.

The court relied on Interlachen Lakes, supra, in Valencia Center, Inc. v. Bystrom, 543 So. 2d 214, 216 (Fla. 1989), holding Fla. Stat. § 193.023(6) (1987) unconstitutional because it created "a similar favored classification for property". The court emphasized and quoted Article VII, § 4 (A) & (B) of the 1968 Constitution, stating "the legislature cannot establish different classes of property for tax purposes other than" those contained within Article VII, § 4. All that the legislature may do is "establish the just valuation criteria that are to be applied to all property." *Id.* at 216.

The DOR and the dissent in the First District treat Section 193.016 as creating simply the equivalent of an additional *ninth* factor in determining just value of the [*tangible personal*] property set forth in Fla. Stat. § 193.011. Thus, they urge that Section 193.016 simply should be read in pari materia with Section 193.011. (Appendix, p. 7, n. 4).

This argument begs the constitutional question, rejected by

this Court in both Interlachen Lakes, supra, and Bystrom, supra.[7] The defect of this statute is that it applies solely and exclusively to tangible personal property, not real estate. This makes Section 193.016 totally non-conforming with the factors listed in Section 193.011, which evenhandedly apply to all property subject to ad valorem taxation. The carving out of just tangible personal property for special "consideration" alone renders Section 193.016 unconstitutional.

In constitutional terms, it is just as unconstitutional to carve out a classification of tangible personal property from real property for ad valorem tax purposes as it is to carve out a distinction between pre-1965 leased property and post-1965 leased property [as in Bystrom, supra] or unsold lots not platted and sold lots which are platted [as in Interlachen Lakes, supra].

It is a misnomer to even characterize Section 193.016 as a "ninth factor" to "just valuation of ***all*** property", the terminology employed in Article VII, § 4, Fla. Const. Unlike the eight factors in Section 193.011 which do involve "just valuation of ***all*** property", this purported "ninth factor" (a)

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[7] The DOR's argument is discredited by the simple fact that the supposedly "conforming" language of Section 193.016 is not an incorporated consideration specifically enumerated in Fla. Stat. § 193.011.

does not involve “just valuation” at all, since what a valuation adjustment board does in a prior year has nothing to do with “just valuation” in a subsequent year; and (b) it involves only tangible personal property, not all property subject to ad valorem taxation.

The Legislature could not constitutionally take the “eight factors” enumerated in Section 193.011, and split them equally into two statutes containing four of the eight factors applying just to real property in one statute and the other four factors applying just to tangible personal property in a second statute. As an even more explicit example, the Legislature could not enact a law stating the property appraiser shall consider the “condition of tangible personal property, but not real property” or shall consider “the cost of real property, but not tangible personal property”.

It follows the Legislature cannot enact a law mandating that the property appraiser “shall consider” the “reduced value” of an assessment determined by a value adjustment board in a prior tax year for just certain tangible personal property taxpayers whose assessment was reduced in a prior tax year by the value adjustment_board, but not real property taxpayers who received similar prior year reductions. Such consideration is arbitrary, unreasonable and capricious, and creates an impermissible

classification favoring select tangible personal property taxpayers over other tangible personal property taxpayers and all real property taxpayers. Therefore, Section 193.016 falls well short of passing constitutional muster, and is contrary to and inconsistent with constitutional just valuation, interpreted by a consistent body of Florida case law. In truth, the statute, rather than "conforming" to Section 193.011, negates or undermines proper consideration of the existing eight factors listed in Section 193.011, supra, and creates an embarrassing conflict with, and distortion of, its true objective, to wit: uniform and fair provisions for all Florida's ad valorem taxpayers.

The DOR and the district court dissent seem to suggest that because a "historical distinction" exists between tangible personal property and real property (DOR's brief, pg. 15-16), both this Court's decision in Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1973) and Valencia Center, Inc. v. Bystrom, 543 So. 2d 214 (Fla. 1989) are "readily distinguishable". (App. 8-9). But, they are not.

Prior to the advent of Section 193.016, in the year 2000, the Florida legislature never made any "historical distinction" between real estate and tangible personal property for purposes of uniform requirements for assessment at just valuation in

accordance with Article VII, § 4, Fla. Const. The eight factors of Section 193.011 always applied uniformly to both classes of property, despite any "historical distinction" in their characteristics. There simply is no rational reason for the sudden "distinction" between the classes of property relative to prior-year decisions by value adjustment boards to reduce the assessments of just tangible personal property.

The dissent in the First District made the irrelevant observation that "some classification of property is necessary for the administration of the tax laws. (citation omitted)" (App. 9). A classification for simple tax administration is very different from classification prohibited expressly by Article VII, § 4, Fla. Const., which very simply mandates uniformity in just valuation for either classification of property, real or tangible personal property.

The DOR's suggestion that no "classification" between real and tangible personal property, running afoul of Article VII, § 4, has been made, is untenable. A "classification" occurs in a statute when there is a "grouping of things because they agree with one another in certain particulars and differ from other things in those particulars." In Re Estate of Gainer, 466 So.2d 1055, 1059 (Fla. 1985). Tangible personal property obviously is a "grouping of things" agreeing in particulars and differing in

particulars from real property. Furthermore, Section 193.016 contains a classification within a classification because it favors only ***some*** tangible personal property taxpayers, not those who failed to obtain a prior-year reduction.

Moreover, in Estate of Gainer, supra, this Court was addressing "classifications" strictly under the equal protection provision of the constitution. This Court held that a "classification" was rational, thus reasonable, thus constitutional. But, a "classification" definition (i.e., "grouping of things") of real and tangible personal property under Article VII, § 4, carries with it a much different analysis. For purposes of just valuation taxation, whether the "classification" of real and tangible personal property is "reasonable" is not the issue; the issue is that the impermissible classification is made in the first place, because such a classification in and of itself renders just valuation something other than "uniform" for all taxpayers owning real and tangible personal property.

Any suggestion by the DOR and the First District dissent that Section 193.016 is not a "classification statute" distorts, and ignores the clear dictum of Interlachen Lakes Estates, Inc. v. Snyder, 304 So. 2d 433, 434 (Fla. 1974). The Constitution [Article VII, § 4] limits the legislature's power to enact

"separate standards for valuation" between "classes of property". ***Id.*** The legislature cannot create a "ninth factor" for just tangible personal property when the other eight apply to all property, real and tangible personal property.

Consequently, the First District properly adhered to traditional constitutional standards in this State, demanding uniform and fair assessment of property in accordance with just valuation under Article VII, § 4 and Fla. Stat. § 193.011. The First District also properly affirmed the trial court's determination that the second sentence of the statute negates and eviscerates the authority of Florida's property appraisers, who are constitutional officers of this state.

B. Section 193.016 unconstitutionally infringes upon the powers of property appraisers.

Contrary to the constitutional protection of Article VII, § 4 and Article VIII, § 1(d), Fla. Stat. § 193.016 attempts to transfer the statutory and constitutional authority from the office of the property appraiser to the value adjustment board. This new statute mandates that the property appraiser must find and "assert additional basic and underlying facts not properly considered by the value adjustment board" in a prior tax year as a basis for increasing the assessment of select tangible personal property in a subsequent tax year.

Section 193.016 preempts and subverts the constitutional authority of the property appraiser. The statute, as a practical matter, transfers irrefutable power and authority to a prior-year's value adjustment board determination of an assessment. In most instances, the property appraiser will have insufficient time to challenge "successfully" the value adjustment board's determination in the judicial system. Therefore, the property appraiser will be forced by the statute to apply the board's determination in subsequent tax years to select items of tangible personal property. Therefore, the statutory and constitutional mandate to "properly consider" the eight factors in Section 193.011, supra, is transferred from the office of the property appraiser to the value adjustment board, based on its prior-year assessments of just tangible personal property. Such a transfer of legal and statutory authority from the property appraisers is clearly unconstitutional.

The courts have time and again recognized that as a matter of "fundamental importance" the local property appraiser's "valuation discretion" must remain unscathed. *E.g.,* Walter v. Schuler, 176 So.2d 81 (Fla. 1965). This Court stated in District School Bd. of Lee County v. Askew, 278 So.2d 272 (Fla. 1973):

"We have held that the Legislature has the

> power to regulate the method of assessments, but not to interfere with the assessor's discretion.... There is great difficulty in precisely fixing property values so that the assessor is provided great leeway in his [her] assessments, so long as he [she] follows in good faith the requirements of the law. (citations omitted)"

This Court added in Department of Revenue v. Ford, 438 So.2d 798, 802 (Fla. 1983) that Florida's property appraisers "...are charged with the duty, among other things, of identifying and determining the just value of all of the real estate and tangible personal property within their respective counties each year."

The dissent in the district court admitted the second sentence of Section 193.016 raises a "closer question" in his mind of constitutionality, but seeks to rescue the statute by comparing it to criminal statutes regulating prosecutorial discretion. (App. 7-8, n. 5). There is no comparison. Property appraisers are the constitutional officers whose discretion enforces a constitutional standard, to wit: just valuation, mandated by Article VII, § 4, Fla. Const. A requirement that the property appraiser "assert additional basic and underlying facts not property considered..." by ***another*** governmental agency, i.e., a value adjustment board, which that agency made ***in a prior tax year*** is a clear encroachment upon

constitutional authority and responsibility of the property appraiser.

Moreover, left unexplained either by the DOR or the dissent in the district court is any rational reason for requiring a constitutional officer like the property appraiser to "assert additional basic and underlying facts" supporting his or her assessment under this so-called "ninth factor" when he or she does not have that obligation when "considering" the other eight factors enumerated in Section 193.011.

Adding insult to injury, not only does this new statute corrode "valuation discretion" of the property appraiser, but it does so by mandating the appraiser to "consider" a prior year's tangible property tax reduction made by the value adjustment board, unless the property appraiser successfully appeals the prior year assessment. This oppressive provision overturns a legion of Florida cases interpreting the constitutional requirement for arriving at just valuation of taxable property in this State based on its own validity each year.

The property appraisers of Florida are constitutionally and statutorily mandated to assess all property within their respective counties at just value for the given tax year, not a prior or subsequent tax year. E.g., Fla. Stat. § 193.011; Article VII, § 2 & 4, Fla. Const. All assessments must be made

annually on a fair and uniform basis. Ibid.

The true "long standing case law" in Florida is that "...each year's tax assessment must be based on its own validity and not upon the assessment of any prior or subsequent year". Coletta v. Robbins, 745 So.2d 1034 (Fla.3d DCA 1999); Page v. City of Fernandina Beach, 714 So.2d 1070, 1076, fn. 5 (Fla.1st DCA 1998); Container Corp. of Am. v. Long, 274 So.2d 571, 573 (Fla.1st DCA 1973); Escambia Chemical Corp. v. Fisher, 277 So.2d 307, 308-309 (Fla.1st DCA 1973) Overstreet v. Brickell Lum Corp., 262 So.2d 707, 709 (Fla. 3d DCA 1972); Metropolitan Dade County v. Tropical Park, Inc., 251 So.2d 551 (Fla.3d DCA 1971); Hecht v. Dade County, 234 So.2d 709 (Fla.3d DCA 1970); Keith Investments, Inc. v. James, 220 So.2d 695 (Fla.4th DCA 1969). Section 193.016 thus reverses "long standing law", flagrantly in violation of both organic and statutory law of this State.

The Court stated in Escambia Chemical Corp., supra, the eight factors of Section 193.011, supra, furnish the exclusive legal basis for a property appraiser "...to effectuate the constitutionally-guaranteed right to a fair and uniform rate of taxation among the counties of this state." (277 So.2d at 309). Evidence of a "prior year" (or subsequent year) assessment–whether determined by the property appraiser or a

value adjustment board–is irrelevant, immaterial and inadmissible into evidence to establish the present constitutional standard of just value. Overstreet v. Brickell Lum Corp., supra; Hecht v. Dade County, supra.

The statutory language of Section 193.016 eradicates this cherished constitutional standard for determining just valuation based solely and exclusively on present year criteria in Section 193.011, mandated by Article VII, § 4. The constitutional and discretionary authority of the property appraiser to determine present year "just valuation" cannot constitutionally be dependent on the irrelevant and immaterial prior year ruling of a value adjustment board. Whether or not the property appraiser appeals a prior year assessment (and, if so, whether such an appeal succeeds) is irrelevant to present year constitutional just valuation.

Adding to the constitutional mischief is that the prior-year determination of a value adjustment board is substituted for the property appraiser's discretion in favor of just select tangible personal property taxpayers. Taxpayers who own real estate or personal property taxpayers whose assessment in the prior year was not reduced have no similar right to have just value of their property determined based on an irrelevant prior-year consideration. This violates the basic right to equal

protection of the law. Article I, § 2, Fla. Const.

Another example of arbitrary, unjust and discriminatory treatment contained in Section 193.016 is that if a tangible personal property assessment is reduced by a circuit court judge [in an original proceeding brought by the taxpayer], rather than a value adjustment board, the *court's* reduced assessment is not carried forward to the subsequent year. The property appraiser is not required to "consider" a circuit court's prior year reduction, and need not appeal to the district court of appeal, either.

A prior year assessment adjustment by a value adjustment board should be no more sacrosanct than one made by a circuit court judge. Indeed, the property appraiser is entirely free to reject his or her own prior year assessment without having to "assert additional basic and underlying facts not properly considered" by the appraiser himself or herself when making that the prior year assessment.

Section 193.016 illegally discriminates against the Plaintiffs and other taxpayers who own real estate and may not obtain lower assessments based upon prior year action of the value adjustment board. The statute further results in discriminatory increase in millage rates for Plaintiffs and other taxpayers, owning real estate, since any shortfall in

revenue resulting from the favorable tax treatment benefitting only certain personal property taxpayers will be supplemented by hiking those rates.

In short, Section 193.016 is an example of a special interest taxing provision, foisting an ill-considered law, passed in the last, hectic days of a legislative session, upon the public, favoring only the special interest of particular taxpayers. The erosion of constitutional authority of property appraisers and equal protection of law for ***all*** ad valorem taxpayers, real estate and tangible personal property alike, and the constitutional limitation placed upon legislative classifications of property subject to ad valorem taxation, required the district court to hold Section 193.016 unconstitutional in its entirety, and that court commendably fulfilled its judicial duty.

Significantly, both of the defendant property appraisers, representing two of Florida's most populated metropolitan counties, agree that Section 193.016 fails constitutionally. In Fuchs v. Robbins, 818 So. 2d 460 (Fla. 2002), the court held that property appraisers may seek standing in exceptional instances "...when the public may be affected in a very important particular, its pocket-book,..." citing, Kaulakis v. Boyd, 138 So.2d 505, 507 (Fla. 1962) and Barr v. Watts, 70 So.2d

347, 351 (Fla. 1953). An enactment like Fla. Stat. § 193.016 implicates fundamental "pocket-book" issues. The only way Florida's financially-pressed local governments may cope with the adverse impact of disparate assessment methodology is to raise millage rates on all taxpayers. This results in "out of pocket" expense to all taxpayers who are not lumped into the category of favored tangible personal property taxpayers embraced by Section 193.016.

Section 193.016 adversely affects "valuation discretion" of property appraisers. Property appraisers are not mere functionaries "ministerially" enforcing the law when they annually undertake the task of assessing ***all*** property, real and tangible, at just value. Each year they must independently exercise constitutionally-mandated "valuation discretion", not "ministerial" routine. Value adjustment boards cannot limit that discretion.

Section 193.011, supra, always has guaranteed the property appraisers' valuation judgment and flexibility, acting in good faith in the performance of duty. Section 193.016, on the contrary, seeks to strait-jacket the property appraiser, turning her or him into a "ministerial" governmental automaton. This glaring erosion in constitutional responsibility alone warrants striking Section 193.016 as unconstitutional.

CONCLUSION

The district court's decision declaring Section 193.016, Florida Statutes unconstitutional should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the

foregoing Answer Brief of Joseph C. Howard and Joyce Foreman has been furnished by U.S. mail this _____day of March 2004, to Nicholas Bykowsky, Assistant Attorney General, Office of the Attorney General, PL-01 The Capitol–Tax Section, Tallahassee, FL 32399-1050, Attorney for the DOR; Thomas W. Logue, Esquire, Assistant Miami-Dade County Attorney, 111 N.W. 1st Street, Suite 2810, Miami, FL 33128, Attorney for Appellee, Joel W. Robbins; and Gaylord A. Wood, Jr., Esquire, Wood & Stuart, P.A., 304 S.W. 12th Street, Fort Lauderdale, FL 33315-1549, Attorney for William Markham.

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CERTIFICATE OF COMPLIANCE AND TYPE SIZE AND FONT

I certify that this answer brief complies with the type-volume limitation set for in Fla. R. App. P. 9.210(a)(2). This brief is typed in Courier New 12-point font.

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