IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-620

L.T. Cases Nos. 3D02-2258 & 3D02-2316
Circuit Court No. 97-28404

SUNSET HARBOR NORTH CONDOMINIUM ASSOCIATION and STATE OF FLORIDA,

Petitioners,

-vs-

JOEL ROBBINS, as Miami-Dade County Property Appraiser,

Respondent.

AMENDED BRIEF OF AMICII CURIAE,

WILLIAM MARKHAM, as Broward County Property Appraiser; FRANCIS AKINS, as Levy County Property Appraiser; KRISTINA KULPA, as Hendry County Property Appraiser; ALVIN MAZOUREK, as Hernando County Property Appraiser; LAUREL KELLY, as Martin County Property Appraiser; MORGAN GILREATH, as Volusia County Property Appraiser, and H.W. “BILL” SUBER, as Seminole County Property Appraiser, in support of JOEL ROBBINS, as Miami-Dade County Property Appraiser.

(Brief filed by consent of all parties per Rule 9.370(a), Fla.R.App.P.)

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY

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CASE LAW

IDENTITY OF AMICII CURIAE AND INTEREST IN THE CASE

Amicii curiae are the Property Appraisers of their respective Counties, responsible under the Constitution to value all property within their County at just (market) value. Their interest in this case arises because the substantial completion law is at variance with the mandate that they appraise all property in the County at just value unless the Constitution specifically permits assessment on some other basis. Amicii curiae file this Brief under the provisions of Rule 9.370(a), Fla.R.C.P., having been requested to file the same by Joel Robbins, as Miami-Dade County Property Appraiser, and having received consent of Petitioners, State of Florida, Department of Revenue, and Sunset Harbour North Condominium Association.

> POINT ON APPEAL: IS THE SUBSTANTIAL COMPLETION REGULATION PRESCRIBED BY THE LEGISLATURE UNDER SECTION 192.042(1) A LEGISLATIVE REGULATION THAT STRAYS BEYOND THE AUTHORITY OF ARTICLE VII, SECTION 4, OF FLORIDA'S CONSTITUTION?

SUMMARY OF ARGUMENT

By firmly established authority of this Court, a Property Appraiser has standing to defensively challenge the constitutionality of a statute relied upon by a taxpayer in a tax assessment challenge.

The substantial completion law fails first because it creates an irrebuttable presumption, invalid under the Due

Process Clause of the Florida Constitution. Irrebuttable presumptions are permissible only when the Legislature's concern is reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, whether there was a reasonable basis for the conclusion that the statute would protect against its occurrence, and whether the expense and other difficulties of individual determination justify the inherent imprecision of an irrebuttable presumption. There is no rational relationship between the Constitutional requirement of assessment of properties at just value and a statute which declares that improvements in fact having a market value of millions of dollars should be assessed at zero for property tax purposes.

The Substantial Completion Law is unconstitutional because it creates a class of property to be assessed at less than just value, when the Constitution does not specifically enumerate that class of property as one which may be the subject of preferential assessment.

DISCUSSION

A. Standing. As often happens where members of a Legislature combine a need to be re-elected with a cadre of lobbyists eager to support those needs, Florida's Legislature has frequently enacted unconstitutional, business-friendly tax

breaks. Examples are the Rose Law (land developers' inventory assessed as unplatted acreage until 60% of the lots have been sold); the Pope Act (companies such as ITT offered an auction procedure to set their assessments); the Valencia Center Relief Act (Section 193.023(6), F.S., requiring the Property Appraiser[1] to assess property subject to leases entered into prior to 1965 according to the income from and uses permitted by those leases); the software statute (Section 192.001[19], F.S., declaring that software is just not property for assessment purposes); the construction work in progress statute (declaring construction work in progress not to be taxable), the pollution control device statute (requiring assessment of pollution control devices at salvage value), and the substantial completion law. All of those statutes save the software law have been declared unconstitutional by the Courts when the Property Appraiser raised that issue. The construction work in progress and pollution control device statutes save millions of tax dollars per year by Florida's electric utilities, which may explain why amicus curiae Florida Power & Light Company seeks a declaration that the Property Appraiser lacks standing to

[1] Throughout its Brief, Petitioner refers to the "Tax Appraiser"; the office of Tax Assessor was abolished in 1974 and the name changed to "Property Appraiser" by Constitutional amendment.

challenge the constitutionality of a statute.[2]

The Legislature prescribed the parties to a tax suit by Section 194.181, Florida Statutes -- the taxpayer as Plaintiff, and the Property Appraiser as Defendant. If the taxpayer seeks relief based on a contention that a statute is unconstitutional, then the Department of Revenue is required to be a party Defendant.

Obviously, if the taxpayer is expecting to benefit from a suspect statute, the taxpayer will not breathe the "U word". The Department of Revenue and its counsel, the Attorney General, are required to uphold the constitutionality of statutes. This leaves the only party to the action with the responsibility to the integrity of the tax roll and interests of all the taxpayers in his or her county -- the Property Appraiser -- who can and should be authorized to raise the claimed unconstitutionality of a statute. This is the perfect three horse team to which Petitioner alludes at IB-8. As in the case here, the Attorney General will vigorously defend the constitutionality of the statute, so we do not have the specter of a Property Appraiser raising the unconstitutionality of a statute while the taxpayer argues for its constitutionality with a wink and a nod.

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[2] It should be noted in passing that Victoria Weber, author of the Florida Bar Journal article cited by Petitioner, is a registered lobbyist for Florida Power & Light Company.

This Court's holding in *Department of Education v. Lewis,* 416 So.2d 455 (Fla. 1982):

> If, ... the operation of a statute is brought into issue in litigation brought by another against a state agency or officer, the agency or officer may defensively raise the question of the law's constitutionality.

is dispositive of the standing issue. It should be incidentally noted that in *Fuchs v. Robbins*, 818 So.2d 460, 464 (Fla. 2002), this Court incorrectly characterized the holding of the Fourth District Court of Appeal in *Markham v. Yankee Clipper Hotel, Inc.*, 427 So.2d 383 (Fla. 4th DCA 1983), rev.den. 434 So.2d 688 (Fla. 1998). The decision in that case was not a "holding that a property appraiser who is dissatisfied with the wisdom of a taxation statute cannot challenge the validity of the statute in an action for declaratory relief". Footnote 3 of *Yankee Clipper* makes it clear that Mr. Markham was the Defendant in the trial Court. The Fourth District actually held, "First, appellant had standing to bring the present action. See, *Department of Education v. Lewis*, 416 So.2d 455 (Fla. 1982.)" The Fourth District should have more artfully stated that Mr. Markham had standing to "defend" rather than "bring" the action. This Court's characterization of the Fourth District's holding is not to be found anywhere in that Opinion.

The concurring opinion in *Fuchs* in the Third District Court

of Appeal discussed an additional exception to the general rule that a public official may not offensively attack a statute. *Fuchs v. Robbins*, 738 So. 2d 338, 348 (Fla. 3rd DCA 1998)(Sorondo, J. *concurring*). This is the "public funds" exception in *Kaulakis v. Boyd*, 138 So.2d 505 (Fla. 1962) wherein this Court held that a public official may attack a law which involves the disbursement of public funds, and the protection of public funds exception in *Barr v. Watts*, 70 So.2d 347 (Fla. 1953).

B. THE SUBSTANTIAL COMPLETION LAW CREATES AN IRREBUTTABLE PRESUMPTION.

The *fact proven* is the improvements to Blackacre are not completed to the point they can be used for their intended purpose. The *fact presumed* is that those improvements add no value to Blackacre. The Property Appraiser is not given the opportunity to challenge this presumption, thus making it an irrebuttable presumption. At page 17, the Department of Revenue argues that the Legislature has determined that owners of property with incomplete improvements would not have a viable market for that property. This is the irrebuttable presumption in action -- what if the Property Appraiser can demonstrate that a viable market exists for that property and that it has value in excess of its land value?

The "green belt law" contained a provision that a landowner who filed a subdivision plat was not entitled to the agricultural classification. The undersigned, who argued for the constitutionality of that statute before this Court, will never forget the incredulous question from one member of the Court: "You mean that if Farmer Jones who has a 500 acre farm and five children files a plat dividing the property into five 100-acre tracts, one for each of his children, he loses the agricultural classification even though he keeps farming?" This Court's decision is *Bass v. General Development Corp.*, 374 So.2d 478 (Fla. 1979), which holds that an irrebuttable presumption in a tax assessment statute cannot stand in the absence of conditions that do not exist here. This Court found that the agricultural classification statute reasonably extended preferential tax treatment to those persons who were in fact using their land for agricultural purposes, and that the no-platting requirement of the statute was not rationally related to achievement of that goal. In the same manner, the substantial completion law is not rationally related to the Constitutional requirement that all property save the enumerated classes be assessed at just (market) value. Had the Legislature made the substantial completion law a rebuttable presumption, the “bats of the law flitting in the twilight which disappear in

the sunlight of the facts", the statute would no doubt be constitutional. Because of its mandatory nature, the substantial completion law must fail on this basis alone.

C. THE SUBSTANTIAL COMPLETION LAW IMPERMISSIBLY CREATES A CLASSIFICATION OF PROPERTY TO BE ASSESSED AT OTHER THAN JUST VALUE.

The predecessor to Section 192.042(1), F.S., was originally enacted under the authority of the 1885 Florida Constitution. Under Article IX of that Constitution, the Legislature had broad power to tax different classes of property on different bases, so long as the classification was reasonable, *Lanier v. Overstreet*, 175 So.2d 521 (Fla. 1965). However, by enactment of the 1968 Constitution and enumeration of the classes of property that can be assessed on a basis other than just (market) value, the people of the State of Florida have limited the Legislature's ability to create new classifications. *Interlachen Lakes Estates v. Snyder*, 304 So.2d 433 (Fla. 1974). Under the 1968 Constitution, the polestar of assessment is just value, which this Court has defined as the familiar willing buyer/willing seller test, *Valencia Center, Inc. v. Bystrom*, 543 So.2d 214 (Fla. 1989).

Section 192.042(1), F.S., provides a special rule for the assessment of some, but not all, real property. Since 1968, the Legislature lacks the power to enact statutes which pertain to

the assessment of less than "all" property, or to enact statutes which result in the assessment of any property at less than market value. The Third District Court of Appeal correctly observed in *Fuchs v. Robbins*, 738 So. 2d at 348:

> And so, we see by *Interlachen, ITT Community*,[3] and *Valencia Center* that, except where the constitution specifically authorizes it, legislation which singles out properties or classifications of properties for treatment that brings about their tax assessment valuation at something other than fair market value violates article VII, section 4, Florida Constitution (1968).

D. JUST VALUE IS SYNONYMOUS WITH MARKET VALUE.

Petitioner makes the odd argument that there is a difference between "just value" and "market value", so the Legislature may prescribe regulations which are at variance with the concept of market value, but acceptable under the notion that just valuation is different. Since 1965, this Court has made it abundantly clear that the two terms are legally synonymous. See, *Valencia Center, Inc. v. Bystrom*, 543 So.2d 214 (Fla. 1989)

E. MISCELLANEOUS. The Circuit Courts of Citrus and Collier County have stricken the "pollution control device" statute and the "construction work in progress" statute, both of which provide huge tax breaks to utility companies, on essentially the

[3] *ITT Community Development Corp. v. Seay*, 347 So. 2d 1024 (Fla. 1977).

same grounds as the Third District Court of Appeal in *Fuchs v. Robbins*, *supra*. Copies of those decisions are attached.

F. CONCLUSION. The Court should affirm the Opinion of the District Court of Appeal, Third District, and disapprove the contrary holdings of *Markham v. Yankee Clipper Hotel, Inc.*, 427 So.2d 383 (Fla. 4th DCA 1983), rev.den. 434 So.2d 688 (Fla. 1998) and *Hausman v. Bayrock Investment Company*, 530 So.2d 938 (Fla. 5th DCA 1988).

Respectfully submitted,

GAYLORD A. WOOD, JR.
B. JORDAN STUART

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Amended Brief and Appendix of Amicii Curiae was served by mail this 3rd. day of July, 2003, on Mitchell A. Feldman, P.A., 1021 Ives Dairy Road, Miami, FL 33139 and Arnaldo Velez, P.A., 35 Almeira Avenue, Coral Gables, FL 33134, Attorneys for Petitioner Sunset Harbour, and Mark T. Aliff, Assistant Attorney General, Tax Section, The Capitol, Tallahassee, FL 32399-1050, Attorney for Department of Revenue; and Thomas W. Logue, Assistant Attorney, 111 N.W. 1st. Street Suite 2810, Miami, FL 33128, Attorney for Miami-Dade Property Appraiser.

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CERTIFICATE OF FONT SIZE

I certify that this Brief was prepared using Courier New 12

point type and meets the type size rules of this Court.

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TWENTIETH CIRCUIT COURT - COLLIER COUNTY - CIVIL DIVISION

QWEST COMMUNICATIONS CORPORATION, Plaintiff,	)	CASE NO. 00-4366-CA-01
-vs-	)	**ORDER GRANTING DEFENDANT**
ABE SKINNER, et al.,	)	**SKINNER'S MOTION FOR PAR-**
Defendants.	)	**TIAL SUMMARY JUDGMENT**

THIS CAUSE came on for hearing on September 4, 2002, on Defendant Skinner's Motion for Partial Summary Judgment as to the unconstitutionality of Section 192.042(2), Florida Statutes, directing that no value be placed upon tangible personal property constituting "construction work in progress."

STATEMENT OF THE CASE

1. The Complaint alleges that as of January 1, 2000, Qwest was engaged in the installation of high capacity fiber optic cable both within and without Collier County. This cable is designed for use in facilitating communications, including conventional long distance calls, use of the Internet and other transmissions for which a large bandwith is necessary or desirable. The cable consists of glass fiber strands which are encased in a conduit, and each strand is capable of carrying voice, data and video communications. As of January 1, 2000, Qwest's property in Collier County consisted of 108 strands of fiber optic cable, two conduits (one of them empty) and related equipment. The Collier County Property appraiser valued Qwest's

tangible personal property at $8,335,702. (Complaint, Paragraphs 5, 6 and 8.)

2. At the heart of Qwest's claim is the allegation that of the 108 strands of fiber optic cable, 106 strands and the empty conduit were not in service, were not connected to or used with an operational system or facility, were not substantially completed, and constituted construction work in progress under section 192.001(11)(d), Florida Statutes. Qwest then alleged that Section 192.042(2), F.S., directs that no value be assigned to construction work in progress for ad valorem tax purposes until the same is substantially completed as defined in section 192.001(11)(d), Florida Statutes. Qwest alleges that Mr. Skinner's assessment is grossly excessive *by reason of his refusal to comply with Section 192.042(2), Florida Statutes*.[4] (Complaint, paragraphs 10, 11 and 15.)

3. Mr. Skinner's Answer claims that Section 192.042(2), Florida Statutes, is unconstitutional for the following reasons:

> 5C. Section 192.042(2), Florida Statutes conflicts with Article VII, Section (4)(a), Const.Fla. 1968, the "just value law".
>
> 5D. Section 192.042(2), Florida Statutes creates an exemption not permitted by the Constitution of the State of Florida.

[4] Complaint, paragraph 15

5E. Section 192.042(2), Florida Statutes creates a non-uniform millage rate within the taxing jurisdiction contrary to the Florida Constitution Article VII, §2.

5F. By enacting Section 192.042(2), Florida Statutes, the Legislature has impermissibly created a class of property to be assessed in a manner not authorized in the Florida Constitution.

5H. The construction work in progress statute is not a regulation pertaining to the assessment of <u>all</u> property, hence it exceeds the scope of the Legislature's authority contained in Article VII, Section 4, Const.Fla. 1968.

5G. Section 192.042(2), Florida Statutes creates an irrebuttable presumption that "construction work in progress" as defined in Section 192.001(11)(d), F.S., has no value. Such an irrebuttable presumption is at variance with the presumption of correctness afforded the Property Appraiser's assessment and is contrary to the Florida Constitution. Consequently, such an irrebuttable presumption may not stand. The Property Appraiser is not given an opportunity to rebut the presumption by showing that construction work in progress has more than salvage value, hence the statute fails.

5I. Application of the construction work in progress statute to the subject assessment renders the Property Appraiser's strong presumption of correctness to be meaningless. The statute usurps the Property Appraiser's discretion and the presumption of correctness of that assessment.

STANDING TO CHALLENGE THE STATUTE

4. Because Plaintiff is the party relying upon the application of the challenged statute, the Court finds that the Property Appraiser has standing to defensively challenge the constitutionality of the statute. *Turner v. Hillsborough County*

Aviation Authority, 739 So.2d 175 (Fla. 2d DCA 1999), has been modified by *Turner v. Hillsborough County Aviation Authority*, 818 So.2d 460 (Fla. 2002), reported sub.nom. *Fuchs v. Robbins*:

> The appraiser may also raise such a constitutional defense in an action initiated by the taxpayer challenging a property assessment. See Department of Educ. v. Lewis, 416 So.2d 455, 458 (Fla. 1982) (observing that while state officers "must presume legislation affecting their duties to be valid, and do not have standing to initiate litigation for the purpose of determining otherwise," because, in such case, they do not "have a sufficiently substantial interest or special injury to allow the court to hear the challenge," if "the operation of a statute is brought into issue in litigation brought by another against a [state officer, the officer] may defensively raise the question of the law's constitutionality"). *Id.* @ 464.[5]

CONSTITUTIONALITY OF SECTION 192.042(2), F.S.

5. This Court will accord every possible presumption in favor of the constitutionality of a statute which is challenged as putatively conflicting with the Florida Constitution. *Brake v. State*, 746 So.2d 527 (Fla. 2d DCA 1999), *Miller v. Higgs*, 468 So.2d 371 (Fla. 1st DCA 1985), *Eastern Airlines, Inc. v. Department of Revenue*, 455 So.2d 311, 314 (Fla. 1984). It is within these limitations that the Court has reviewed the

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[5] The Supreme Court incorrectly characterized *Markham v. Yankee Clipper Hotel, Inc.*, 427 So.2d 383 (Fla. 4th DCA 1983), rev.den. 434 So.2d 888 (Fla. 1983) as "holding that a property appraiser who is dissatisfied with the wisdom of a taxation statute cannot challenge the validity of the statute in an action for declaratory relief." The decision does not so hold, and footnote 2 at page 384 makes it clear that Property Appraiser Markham was the Defendant in the trial court who defensively challenged the constitutionality of the substantial completion statute.

provisions of the challenged statute against Article VII of the Florida Constitution.

6. The 1968 Florida Constitution enumerates the only classifications of property that may be valued differently than at the just value standard applicable to "all" property -- agricultural land, land producing high water recharge to Florida's aquifers, land used exclusively for non-commercial recreational purposes, homestead property, property used as stock in trade, and livestock. Prior to the 1968 Constitution, the Legislature was free to create reasonable classifications of property for assessment purposes, and after 1968 it is strictly precluded from creating additional classes of property to be valued at other than just value. *Interlachen Lakes Estates, Inc. v. Snyder*, 304 So.2d 433 (Fla. 1973), *ITT Community Development Corporation v. Seay*, 347 So.2d 1024 (Fla. 1977). In both cases, the Supreme Court struck statutes which created additional classes of property to be assessed at less than just value.

7. The Court finds that by enacting §192.042(2), the Legislature created a class of property to be assessed at "zero" value, regardless of its actual market value, namely construction work in progress. The 1968 Constitution forbids creation of such a class.

8. By directing that construction work in progress be assessed at "zero", the Legislature violated the requirement in Article VII, Section 4, Const.Fla. 1968 that all property save the classes enumerated therein be assessed at just (market) value.

9. The District Court of Appeal, Third District, struck on constitutional grounds §192.042(1), Florida Statutes, the "substantial completion law" applicable to improvements to real estate. Subsection (1) gives the same unauthorized tax break to owners of buildings that are not substantially completed as of the January 1 tax date that subsection (2) gives to owners of tangible personal property that constitutes construction work in progress. *Fuchs v. Robbins*, *supra,* reversed on other grounds. The Court finds the *Fuchs* case more persuasive than the earlier cases cited by Plaintiff herein, *Hausman v. Bayrock Investment Company*, 530 So.2d 938 (Fla. 5th DCA 1988) and *Markham v. Yankee Clipper Hotel, Inc.*, 427 So.2d 383 (Fla. 4th DCA 1983) on the substantial completion issue. The Court also finds *Collier County v. State*, 733 So.2d 1012 (Fla. 1999) not to be on point. As the panel in *Fuchs* stated at page 347, the constitutionality of §192.042(1), F.S. was not before the Supreme Court in *Collier County*, so it properly declined to discuss the issue. The Court

also finds that *United Telephone Company of Florida v. Colding*, 408 So.2d 594 (Fla. 2d DCA 1982) is not on point, as the Property Appraiser has not attempted to back-assess property that was already assessed in a previous year.

10. The Court moreover finds that by directing that the Property Appraiser place no value on construction work in progress, the Legislature has created an exemption from taxation not authorized by Article VII, Section 3, Const.Fla. 1968. Regardless of the term used to describe the reduction from just value, its effect is to grant a tax exemption contrary to the Constitution. *Archer v. Marshall*, 355 So.2d 781 (Fla. 1978), *Am Fi Inv. Corp. v. Kinney*, 360 So.2d 415 (Fla. 1978).

11. Because the statute requires assessment of a particular class of property at less than just value, the statute also violates the uniform rate provisions of Article VII, §2, Const.Fla. 1968. See *Gallant v. Stephens*, 358 So.2d 536 (Fla. 1978), holding that the uniform rate provisions apply to the properties assessed rather than to the taxing body's stated millage rate.

12. Finally, the statute provides an irrebuttable presumption that once property is identified as constituting construction work in progress, the Property Appraiser is precluded from showing that the market value of that property is

greater than "zero." For a statutory presumption to pass constitutional muster, it must meet two tests. First, there must be a rational connection between the fact proved (that tangible personal property is construction work in progress) and the fact presumed (that it has no market value). Second, there must be a right to rebut the presumption in a fair manner. See *Straughn v. K & K Land Management, Inc.*, 326 So.2d 421 (Fla. 1976), *Bass v. General Development Corporation*, 374 So.2d 479 (Fla. 1979). Because the statute does not provide that the Property Appraiser can rebut the fact presumed, the statute is unconstitutional.

~~13. The Court also finds that in assessing the subject property, the Property Appraiser followed appraisal practices which are the same as the appraisal practices generally applied by my department in appraising comparable property within the same class. Additionally, the Property Appraiser properly considered each of the eight criteria found in Section 193.011, Florida Statutes and made a standard appraisal of this property using normal techniques. Accordingly, the Court finds that the Property Appraiser's assessment retains the presumption of correctness stated in §194.301, Florida Statutes.~~

It is, accordingly, ORDERED and ADJUDGED as follows:

1. The following words in Section 192.042(2), Florida

Statutes, are hereby declared to be unconstitutional:

> ...except construction work in progress shall have no value placed thereon until substantially completed as defined in s.192.001(11)(d).

~~2. Plaintiff has not shown that the Property Appraiser either has failed to consider properly the criteria in s. 193.011 or if the property appraiser's assessment is arbitrarily based on appraisal practices which are different from the appraisal practices generally applied by the property appraiser to comparable property within the same class and within the same county, hence at the final hearing herein the Property Appraiser's assessment is presumed to be correct as provided in §194.301, Florida Statutes.~~

3. This Partial Summary Judgment is not intended to be a final judgment and shall have no effect on Plaintiff's ability to present evidence as to the just (market) value of its tangible personal property as of January 1, 2000, and the case shall continue on that issue.

DONE and ORDERED in Chambers at the Court House, Naples, Collier County, Florida, this 7th. day of November, 2002.

/s/ Ted Brousseau
CIRCUIT JUDGE

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