IN THE SUPREME COURT OF FLORIDA

SUNSET HARBOUR NORTH CONDOMINIUM ASSOCIATION and STATE OF FLORIDA, DEPARTMENT REVENUE, Appellants, v. JOEL W. ROBBINS, Property Appraiser for Miami-Dade County, Appellee. _____/	)	Case No. SC03-520 Lower Tribunal No. 3D02-2316

BRIEF OF AMICUS CURIAE THE ST. JOE COMPANY, SUBMITTED BY LEAVE OF COURT WITH CONSENT OF PARTIES, IN SUPPORT OF THE APPELLANTS

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

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Statement of Interest

Amicus Curiae The St. Joe Company ("St. Joe") is a publicly held Florida corporation and, with ownership of nearly 1 million acres of real property in 29 counties, St. Joe is Florida's largest private landowner. St. Joe is actively engaged in the business of making improvements to real property. Included among its business activities are development of master-planned communities and residential subdivisions, commercial and industrial facilities and resorts. For these reasons, St. Joe is substantially affected by constitutional and legislative policy decisions regarding ad valorem taxation.

In light of its experience as a landowner and developer in many counties – and the expertise of its in-house appraisers – St. Joe offers this Court a unique perspective on the certainty and predictability that section 192.042(1), Florida Statutes, provides to every taxpayer who constructs an improvement to real property. Additionally, St. Joe identifies for the Court the practical ramifications that would result if the statute were held unconstitutional. Finally, because St. Joe has been involved in various policymaking initiatives related to section 192.042(1) in recent years, it offers this Court an informed perspective on the public policy rationale underlying that statute.

Summary of the Argument

The process by which real property is appraised for ad valorem tax purposes is an art, not a science. It is inherently inexact. Pursuant to the mandate in Article VII, section 4 of the Florida Constitution, the Legislature over many years has established a system which attempts to further a variety of competing values in a balanced and reasonable manner. Section 192.042(1), Florida Statutes, is a component of that system and prescribes guidelines for valuation of incomplete improvements for property tax purposes in an effort to infuse uniformity, predictability and certainty into ad valorem taxation notwithstanding the inherent imprecision of the appraisal process.

Especially when compared with the vagaries of the various appraisal methodologies considered by the Third District, the statute's bright-line rule for valuation of incomplete improvements provides uniformity, predictability and certainty for every taxpayer who constructs an improvement to real property. It also provides uniformity, predictability and certainty in the assessment rolls which are the basis for revenue projections in local government budget-making.

The Legislature's policy decision in section 192.042(1) is based upon the consideration and rejection of alternatives which impose greater administrative

burdens on local governments and provide less predictability and certainty for everyone. Given the inherent inexactitude of the property appraisal process and the need to balance competing concerns, section 192.042(1) represents a rational policy choice by the Legislature. In its decision, the Third District Court of Appeal has second-guessed the wisdom of this legislative decision. This Court should decline the invitation to do the same and leave this ad valorem tax policy issue to the Legislature.

Argument

I.

Section 192.042(1), Florida Statutes, infuses uniformity, predictability and certainty into the ad valorem tax scheme established by the Legislature pursuant to Article VII, section 4 of the Florida Constitution.

The appraisal process by which the just valuation of property is secured for ad valorem tax purposes is an art, not a science. Contrary to the description of the appraisal process by the Third District in *Fuchs v. Robbins*, 738 So.2d 338, 341-348 (Fla. 3rd DCA 1999) (en banc), *reversed on other grounds,*818 So.2d 460 (Fla. 2002),[1] the process of placing a value on real property for ad valorem tax purposes is inherently inexact. As a federal judge summed up the art of appraisal:

> Absent a miracle of time, place and circumstance – willing buyer, willing seller, high noon, January 1, 1984 for example – true market value for purposes of ad valorem taxation is always an estimate, always an expression of judgment, always a result built on a foundation of suppositions about knowledgeable and willing buyers and sellers, endowed with money and desire, whose desires are said to converge in a dollar description of the asset. All of this is simply a sophisticated effort at "let's pretend" or "modeling" in modern jargon, and all of it involves judgment. Not natural law, not science – judgment**.**

Union Pacific R.R. Co. v. State Tax Comm'n of Utah, 716 F.Supp. 543, 554 (D. Utah 1988) (e.a.). *Accord Powell v. Kelly*, 223 So.2d 305, 309 (Fla. 1969).

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[1] The Third District's en banc opinion in *Fuchs v. Robbins, supra*, was adopted in *Sunset Harbour North Condominium Association v. Robbins*, 837 So.2d 1181, 1181 (Fla. 3rd DCA 2003). This brief will address the en banc opinion in *Fuchs*.

Pursuant to the mandate in Article VII, section 4 of the Florida Constitution, the Legislature has enacted a statutory scheme designed to infuse uniformity, predictability and certainty into the inherently inexact appraisal process. A significant element of that uniformity, predictability and certainty will be lost if this Court affirms the decision of the Third District and declares section 192.042(1), Florida Statutes, to be unconstitutional.

If section 192.042(1) is invalidated, property appraisers will no longer have specific statutory guidance concerning the valuation of incomplete improvements to real property.[2] Taxpayers who own and develop property in more than one county, such as St. Joe, will face the prospect of property appraisers in different counties applying different standards – or applying similar standards differently – when appraising incomplete improvements for ad valorem tax purposes.

By adopting the bright-line rule of section 192.042(1), the Legislature has struck a balance among a variety of concerns in an effort to provide uniformity, predictability and certainty for everyone. It has done so here in exactly the same way that it has established January 1st as the date on which a taxpayer must qualify

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[2] For ease of reference, St. Joe will use the phrase "incomplete improvement" when referring to an improvement to real property which is not "substantially completed" as that phrase is defined in section 192.042(1).

for the constitutionally established homestead exemption for a particular calendar year. § 196.011, Fla. Stat. (2002). And in striking the appropriate balance, the Legislature has not embraced an all-or-nothing taxation scheme. Rather, section 192.042(1) represents a common sense, rational legislative decision that the value of an incomplete improvement on January 1 is zero if it cannot be used "for the purpose for which it was constructed." § 192.042(1), Fla. Stat. (2002).[3]

In light of the problems associated with the potential alternatives to section 192.042(1), it is apparent that the Third District's decision, if upheld, would create more problems than it solves.[4] The decision to retain or eliminate the bright-line rule of section 192.042(1) is vested in the Legislature because, unlike the judicial branch, it has been given the constitutional charge to address the administrative

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[3] This statute is unchanged from when it was before the Court in *Fuchs v. Robbins, supra.*

[4] If the current ad valorem tax system creates a windfall for some taxpayers because incomplete improvements are not taxed, *Fuchs*, 738 So.2d at 341 n. 4-5, it also creates a windfall for local governments because commercial improvements destroyed or substantially damaged (i.e., damaged to the extent that they cannot be used for the purpose for which they were constructed) after January 1 are still taxed at their January 1st assessed value. While homestead property is treated differently, *see* Rule 12D-8.0063(6), Fla. Admin. Code, no adjustment to the tax rolls is made to account for the reduction in value due to such damage to commercial real estate. Judicial invalidation of the bright-line rule of section 192.042(1) would not impose a more balanced or equitable system; it would judicially alter the balance set by the Legislature.

issues – such as the "timing" for putting property improvements on the tax rolls, *Collier County v. State*, 733 So.2d 1012, 1019 (Fla. 1999) – that must be decided when establishing the ad valorem tax system for this large and diverse state.

The rationale underlying section 192.042(1) becomes more apparent when standard appraisal methodologies are applied to incomplete improvements. *See Fuchs*, 738 So.2d at 342 (discussing the standard appraisal methodologies: "comparable sales"; "cost"; and "income"). *See also* Florida Dep't of Rev., "The Florida Real Property Appraisal Guidelines" § 11.1 (Nov. 26, 2002) (available at http://sun6.dms.state.fl.us/dor/property/RP/FLrpg112602.pdf) [hereinafter "Guidelines"].[5] The methodologies cited by the Third District were developed to ameliorate the inherent imprecision in the appraisal process in an effort to better determine fair market value. Based on its extensive experience in the real estate business – and the expertise of its in-house appraisers – St. Joe respectfully submits that these methodologies are not as easily applied to incomplete improvements as the Third District suggests.

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[5] The Florida Real Property Appraisal Guidelines are authorized by statute, but are not rules and are non-binding on property appraisers. § 195.062(1), Fla. Stat. (2002). *See also* "Guidelines" §§ 1.3, 2.1.5. Although property appraisers generally use mass-appraisal processes, they may use single-property techniques. The two are "similar and follow a similar process." "Guidelines" § 2.2.

First, the "comparable sales" approach allows the appraiser to value property based upon the price at which similar properties have been bought and sold. *Fuchs*, 738 So.2d at 342. *See also* § 193.011(1), Fla. Stat. (2002) ("present cash value" a factor to consider in setting just value); "Guidelines" § 14.1. In determining if a sale is "comparable," the appraiser must evaluate the physical characteristics of the properties, the location of the properties, as well as other factors and market conditions. *See* 12 Thompson on Real Property § 97.07(f)(1) (David A. Thomas ed. 1994). Because the sale of incomplete improvements to real property is a rare occurrence rather than the norm, it is unlikely that a comparable sale would exist for a particular incomplete improvement. In fact, real estate sales involving incomplete improvements frequently are the result of some distress for the landowner or developer, a unique situation that underscores the difficulty in identifying "comparable sales."

The impracticality in using the comparable sales approach to value incomplete improvements would be exacerbated by comparisons of properties in various stages of completion. The potential for variables in the stage of completion – e.g, different components completed, different development sequences – makes it difficult to imagine that a true comparable sale could be found, or that the

comparable sales approach could be used with anything approaching consistency or uniformity to appraise incomplete improvements.

Next, the Third District refers to the "cost approach" as an appraisal methodology for incomplete improvements. *Fuchs*, 738 So.2d at 342. *See* § 193.011(5), Fla. Stat. (2002) ("present replacement value" of improvements a factor to consider in setting just value); "Guidelines" § 13.1. Appraisers have three ways to estimate the replacement cost of improvements. The "quantity survey" reduces the structure to its basic elements – tons of steel, hours of labor, etc. – and puts a price on each of them based on market rates. The "unit-in-place" method relies upon price estimates for structural components – roofing, foundation, etc. – and totals them. The "aggregate cost per unit" method relies on estimates of what it costs to build similar properties on a square foot or cubic foot basis. Thompson on Real Property, supra. *See also* "Guidelines" §§ 13.5 *et seq*. These divergent methodologies can result in different values for an improvement.

The cost approach has other difficulties when applied in the context of incomplete improvements. One source of subjectivity in arriving at a cost-based appraisal is determining the stage of completion for an incomplete improvement. To take the most obvious and common example from St. Joe's experience through its home-building subsidiary, Arvida, a detached single-family home at a given point in

time may be 90 percent complete from a physical perspective – when the house is "dried-in" – but only 60 percent complete from a financial perspective because cost-intensive interior finishes have not been purchased or installed.

An additional source of subjectivity in arriving at a cost-based appraisal for an incomplete improvement is the amount of contractor's profit and developer's profit that should be attributed to the entire structure when completed as well as the proportion of those sums, if any, that should be attributed to the structure in an incomplete state. *See* "Guidelines § 13.5. *See also* The Appraisal of Real Estate (Appraisal Inst., 1992), at 327. The manner in which this issue would be addressed by an appraiser is particularly significant to residential builders and developers.

The experience of St. Joe's in-house appraisers is that the amount of depreciation that should be deducted from the replacement cost of a structure is one of the most significant variables when assessing the value of improved real property. Depreciation may be based upon physical deterioration of a structure, functional obsolesence of a structure due to changing design or materials standards, and "external" depreciation due to neighborhood decline or changing markets. *See* "Guidelines § 13.9 *et seq.* *See also* The Appraisal of Real Estate, supra, at 320. All can affect the validity of an appraisal. They can be especially subjective in the context of incomplete improvements.

Questions such as these highlight the difficulty and inequity of using the cost approach to value something that is incomplete. Simply put, the value of its parts may have little relationship to its value as a completed whole. The uncertainties raised by these questions and others support the legislative decision embodied in section 192.042(1) to establish a more objective bright-line rule for valuing incomplete improvements.

Finally, the value of real property can be assessed by means of the "income approach," which estimates value based upon the income stream produced by the property. *Fuchs*, 738 So.2d at 342. *See* § 193.011(7), Fla. Stat. (2002) ("income from said property" a factor to consider in setting just value); "Guidelines" § 15.1. *See also* Thompson on Real Property, supra. This approach is difficult to apply in the context of incomplete improvements, especially improvements intended for commercial use. If an improvement cannot be used "for the purpose for which it was constructed," § 192.042(1), Fla. Stat. (2002), it almost certainly is incapable of producing income for its owner. Therefore, its value would be zero.

That logic alone provides ample support for the legislative decision embodied in section 192.042(1) that an improvement which cannot be used "for the purpose for which it was constructed" has a value of zero for ad valorem tax purposes. *Id*. It may also explain why the Third District did not discuss the utility

of an income-based valuation in appraising real property with an incomplete improvement. *See Fuchs*, 738 So.2d at 342-343.

In administering any of the three appraisal methodologies – comparable sales, cost or income – the Department of Revenue has emphasized the importance of "stratification," that is, classifying real property into "strata, or groups, with similar characteristics." "Guidelines" §§ 13.2, 14.2 & 15.2. Properly stratifying an improvement on the basis of its construction grade, structural type, number of stories or other characteristic becomes particularly difficult when the improvement is incomplete. Thus, the status of an improvement as incomplete is a barrier to proper stratification necessary for valid assessment.

Because of the many difficulties in valuing incomplete improvements, the legislative scheme embodied in section 192.042(1) leads to a more reliable and predictable result. It also results in fewer appeals of the assessment to the local Value Adjustment Board ("VAB") and to circuit court than would likely occur if the property appraiser were required to ascribe a value to the incomplete improvements. In that respect, elimination of the bright-line rule of section 192.042(1) would increase administrative costs and burdens to local governments and the courts. Conversely, the bright-line rule of section 192.042(1) serves the valid public policy of minimizing litigation and providing uniformity, certainty and

predictability when valuing real property. *Cf. Whitten v. Progressive Casualty Ins. Co.*, 410 So.2d 501, 505 (Fla. 1982) (affirming Legislature's "[salutary] purpose" of reducing frivolous litigation through enactment of section 57.105, Florida Statutes).

The uniformity, predictability and certainty provided by the bright-line rule of section 192.042(1) is especially important to taxpayers that make improvements to real property. When a taxpayer decides to make such an improvement, the decision is based on predicted costs, including tax liabilities. Predicted costs are used in planning, budgeting and financing improvements. Without the certainty provided by section 192.042(1), all taxpayers will be less able to predict accurately their ad valorem tax liabilities. Accordingly, their business decisions will be subject to greater uncertainty and instability, thereby impeding commerce.

Likewise, local governments make decisions regarding a broad range of governmental activities based on revenue projections. Those projections are based upon the preliminary assessment rolls prepared by the property appraiser. *See generally* § 200.065, Fla. Stat. (2002) (prescribing procedure by which local governments fix millage rates and adopt budgets based upon taxable value of property within their jurisdiction as determined by property appraiser pursuant to chapter 193, Florida Statutes). *See also* § 193.122, Fla. Stat. (2002) (establishing

procedure for revision and extension of assessment rolls by the property appraiser to reflect changes to taxable value made by VAB).

The preliminary assessment rolls likely will be less reliable without the bright-line rule of section 192.042(1) due to the need for property appraisers to estimate the value of incomplete improvements. Moreover, without section 192.042(1), more assessments are likely to be appealed to the VABs and circuit courts. Therefore, the taxable value on the final (i.e., extended) assessment roll may be significantly less than that on the preliminary assessment roll which, in turn, will require additional action on behalf of the local government to fix the millage rate. *See* § 200.065(5), Fla. Stat. (2002). As a result of these and other sources of uncertainty, the local government's revenue-estimating system will be less reliable for purposes of fixing a millage rate and adopting a budget if section 192.042(1) is invalidated.

II.

The Florida Constitution directs the Legislature to establish the ad valorem tax system and the Court should abstain from upsetting the balance struck by the Legislature when it enacted section 192.042(1), Florida Statutes.

The Florida Constitution establishes the Legislature as the co-equal branch of government that is responsible for establishing specific ground rules for the administration of ad valorem taxation. Art. VII, Fla. Const. While the Legislature has delegated some of its legislative authority within the bounds prescribed by the Administrative Procedure Act, ch. 120, Fla. Stat. (2002), over the years it has enacted a comprehensive, balanced set of requirements for ad valorem taxation.

This Court has recognized the Legislature's primacy in this field. Justice Pariente gave voice to this judicial recognition for the unanimous Court in *Collier County*, when she admonished the local government that, "[i]f there is a windfall created by the current statutory scheme, as the County claims, the County's redress lies with the Legislature." *Collier County*, 733 So.2d at 1019. The wisdom of this Court's respect for legislative policymakers is highlighted again when considering the difficult balancing which the Legislature has performed by enacting and retaining the bright-line rule of section 192.042(1). The Legislature, not the courts, is the appropriate body to decide how best to balance those competing concerns.

The Third District's decision in this case usurps the power delegated to the Legislature by Article VII, section 4 of the Florida Constitution. It is contrary to the reasoning set forth in *Collier County*. Thus, it should be reversed insofar as it invalidates section 192.042(1), Florida Statutes.

Conclusion

For the foregoing reasons of law and policy, St. Joe respectfully requests that this Court reverse the decision of the Third District Court of Appeal and expressly hold that section 192.042(1), Florida Statutes, is constitutional.

Respectfully submitted this 6th day of May, 2003.

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