IN THE SUPREME COURT OF FLORIDA

SUNSET HARBOUR NORTH CONDOMINIUM ASSOCIATION and STATE OF FLORIDA, DEPARTMENT OF REVENUE

Appellants,

vs.

JOEL ROBBINS, Property Appraiser for Dade County,

Appellee.

CASE NO. SC03-520

Consolidated Case Nos. 3D02-2258 & 3D02-2316

L.T. CASE NO. 97-28404
11th Judicial Circuit

APPELLANT DEPARTMENT OF REVENUE'S INITIAL BRIEF

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PRELIMINARY STATEMENT

State of Florida, Department of Revenue (hereinafter "the Department"), serves this Initial Brief through its undersigned counsel. The Department was an Appellant below, a Defendant in the trial court and is an Appellant in this appeal. Sunset Harbour North Condominium Association, as representative, (hereinafter "Sunset Harbour") was the other Appellant below, the Plaintiff in the trial court and is the other Appellant in this appeal.

Joel W. Robbins, as Property Appraiser of Dade County, Florida, (hereinafter "the Property Appraiser"), was the Appellee below, the other Defendant in the trial court and is the Appellee in this appeal.

The Court below was the Third District Court of Appeal and will be referred to as "the Third District" in this Initial Brief.

The trial court was the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, and will be referred to as "the trial court" in this Initial Brief.

References to the corrected record on appeal will begin with the letter V followed by the appropriate volume numbers, then the letter R followed by the appropriate page number, e.g., VIIR-245-247.

STATEMENT OF THE CASE AND FACTS

This action was originally filed on December 15, 1997 and on February 25, 1998 an Amended Complaint was filed by Sunset Harbour Condominium Association on behalf of a number of listed individuals and businesses, pursuant to section 194.181, Florida Statutes. VIR-1; R-29-164. The Department was named as a party defendant in the Amended Complaint and originally requested the Property Appraiser's attorney to represent the Department's interests as well as those of the Property Appraiser. The Property Appraiser answered on behalf of the Defendants. VIR-165-166.

The matter was held in abeyance because the constitutionality of the statute at issue, section 192.042, Florida Statutes, had been attacked by Dade County in another case which was heard by this Court in the case of Fuchs v. Robbins, et al. Case Nos. SC96182, SC96183 and SC96674. This Court ultimately entered its decision on April 4, 2002, reported at 818 So. 2d 460, but which did not decide the constitutionality of section 192.042, Florida Statutes. Whereupon, by motion dated April 10, 2002, Dade County moved for summary judgement to uphold its original assessment on the basis that section 192.042, Florida Statutes, is unconstitutional. At this point, the Department took over representation of its own

interests.

This action was timely filed by Sunset Harbour, pursuant to section 194.171, Florida Statutes, and contests the Property Appraiser's assessments of ad valorem taxes for the tax year 1997. VIR-33-34. Sunset Harbour alleged that the entire property making up this condominium was assessed and the Property Appraiser confirms that the subject property was assessed in the amount of $22,935,100 for 1997. VIIR-242. Sunset Harbor contended that the subject property should have been assessed in the amount of $0.00 because it was not "substantially completed" on January 1, 1997, which is the result it claims is appropriate if section 192.042, Florida Statutes is applied. VIR-33-34. In his Motion for Summary Judgment, the Property Appraiser alleges that his office made the determination that the subject property was substantially complete on January 1, 1997. VIR-185.

Procedurally, the parties stipulated that the case was to be abated pending the outcome of Fuchs v. Robbins, 818 So. 2d 460 (Fla. 2002). VIR-174-175. On April 10, 2002, the Property Appraiser filed a Motion for Summary Judgment seeking a declaration that section 192.042(1), Florida Statutes, was unconstitutional. VIR-185-190. The Department filed its memorandum of law in support of the constitutionality of section

192.042(1), Florida Statutes. VIIR-226-239. The trial court heard argument on the Property Appraiser's motion.

On July 22, 2002, the trial court entered an order finding section 192.042(1), Florida Statutes, unconstitutional. VIIR-245-247. In its Order Granting Defendants' Motion for Summary Judgment, the trial court found as follows:

> The facts of this case are simple. The Property Appraiser for Dade County assessed the Plaintiff's property for $22,935,100. The Plaintiff taxpayer contends that the property should have been valued at $0 because it was not substantially complete. Taxpayer has sued the Property Appraiser seeking a reduction to $0 for 1997. It was proffered to the court that the building had some units complete, but the upper floors were still being completed at the time of valuation. A certificate of occupancy had not yet been issued for the building. There is no basic disagreement with this description.

VIIR-245.

As previously stated, the trial court found the statute at issue unconstitutional and held as follows:

> The Third District Court of Appeals held in an *en banc* opinion[1/] that 'except where the constitution specifically authorizes it, legislation which single out properties for treatment that brings about their tax assessment at something other than fair market value violates article VII, section

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1/ The trial court adopted the Third District's en banc decision in Fuchs v. Robbins, 738 So. 2d 338, 341 (Fla. 3d DCA 1999).

> 4, Florida Constitution (1968). Section 192.042(1) does exactly that.'[2/] This court, in the instant case, adopts those findings.
>
> Additionally, common sense requires a finding that this statute violates the intention of the Florida Constitution that all property has a just valuation. It is unreasonable to believe that the land upon which this building sits has lost its tax value because the building is unfinished. Would the developer concede that his unfinished has no value if it were destroyed by fire or hurricane, or would he be collecting its fair market value from his insurer!

VIIR-246-247 (e.s. in the original).

In order to resolve any uncertainty concerning the finality of its July 22, 2002 order, the trial court entered another order disposing of the case entirely. VIIR-248. Both Sunset Harbour and the Department timely appealed the trial court order. VII-244A-244F.

Subsequently, on February 26, 2003, the Third District released its decision and agreed with the trial court and affirmed the trial court's holding that section 192.042 (1), Florida Statutes, was unconstitutional for the same reasons it held the statute unconstitutional under its en banc decision in

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[2]/ Quoting Fuchs v. Robbins, 738 So. 2d, at 348.

Fuchs v. Robbins, 738 So. 2d 338, 341-348 (Fla. 3d DCA 1999).[3]/ See, Sunset Harbour North Condominium Association, et al., v. Robbins, 837 So. 2d 1181 (Fla. 3d DCA 2003). The Third District reasoned as follows:

> An extended discussion of the issue is unwarranted in light of Judge Fletcher's able, comprehensive and well-reasoned opinion en banc for this Court in Fuchs v. Robbins, 738 So.2d 338, 341-348 (Fla. 3d DCA 1999).[4] We incorporate and adopt Judge Fletcher's opinion as though it were set out fully. Employing that reasoning and analysis, we agree with the trial judge and hold that Section 192.042, Florida Statutes is unconstitutional.

Sunset Harbour, 837 So. 2d, at 1181-1182.

Thereafter, on March 14, 2003, Sunset Harbour timely filed its appeal. On March 28, 2003, the Department timely filed its Notice of Joinder in Sunset Harbour's appeal.

SUMMARY OF ARGUMENT

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[3]/ In Fuchs v. Robbins, the Third District found section 192.042(1), Florida Statutes, unconstitutional for singling out properties or classifications that would bring about their tax assessment at something other than fair market value. 738 So. 2d, at 348.

[4] "That en banc decision was reversed by the Supreme Court in Fuchs v. Robbins, 818 So.2d 460 (Fla. 2002), on the basis that, under the procedural setting in Fuchs, the property appraiser did not have standing to challenge the constitutionality of the statute. The parties here do not dispute the property appraiser's right to raise the unconstitutionality of the statute when defending against the taxpayer's challenge to the appraiser's assessment." Sunset Harbour, 837 So. 2d, at 1181, n.1.

This is an ad valorem property tax case. At issue in this case is whether the subject property was substantially completed as that phrase is defined in section 192.042(1), Florida Statutes, on January 1st of the tax year in question, 1997. The trial court did not find that the subject property was substantially complete. If there had been evidence in the record that the subject property had been substantially complete then the trial court's inquiry could have stopped there, because the statute at issue, section 192.042(1), Florida Statutes, would not have had an effect on this case. However, at the urging of the Property Appraiser, the trial court considered whether section 192.042(1), Florida Statutes, was facially unconstitutional and made such finding.

The trial court followed the Third District's decision on Rehearing En Banc in the case of Fuchs v. Robbins, 738 So. 2d 338, 341-348 (Fla. 3d DCA 1999),[5]/ which found section 192.042(1), Florida Statutes, unconstitutional for singling out

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[5]/ The Fuchs decision was certified by the Second District Court of Appeal to be in conflict with its decision in Turner v. Hillsborough County Aviation Authority, 739 So. 2d 175 (Fla. 2d DCA 1999). On April 4, 2002, this Court approved the Turner decision and reversed the Fuchs decision. See, Fuchs v. Robbins, 818 So. 2d 460 (Fla. 2002). This Court effectively vacated the Third District's En Banc decision. Thus, section 192.042(1), Florida Statutes, should have been considered by the Third District as being constitutional under current principles of statutory construction.

properties or classifications that would bring about their tax assessment at something other than fair market value. This decision is in conflict with this Court's decision of Culbertson v. Seacoast Towers East, Inc., 212 So. 2d 646 (Fla. 1968), the Fourth District Court's decision of Markham v. Yankee Clipper Hotel, Inc., 427 So. 2d 383 (Fla. 4th DCA 1983), review denied, 434 So. 2d 888 (Fla. 1983), and the Fifth District Court's decision of Hausman v. Bayrock Investment Company, 530 So. 2d 938 (Fla. 5th DCA 1988).

The Legislature is presumed to know the law as it exists when a statute is enacted and is also presumed to be acquainted with the judicial construction placed on the former laws on the subject. Furthermore, the Legislature is presumed to know the meaning of the words used and to have addressed its intent by using them in the enactment.

Article VII, section 4, Fla. Const., provides, in a non-self executing provision, that the Legislature shall by general law prescribe regulations which shall secure just valuation of all property for ad valorem taxation. Likewise, the constitution gives the Legislature the authority to define "property," "real property," and "tangible personal property." See, Park-N-Shop v. Sparkman, 99 So. 2d 571 (Fla. 1957).

The Legislature has implemented Article VII, section 4, Fla.

Const., with the various enactments contained in Chs. 192-196, Florida Statutes, specifically as it applies to the case at bar, sections 193.011; 192.001(11)(d) and (12); and, 192.042(1), Florida Statutes

Section 192.042(1), Florida Statutes, is constitutional. The decisions of this Court in Culbertson, and the Fourth District Court of Appeal in Yankee Clipper, both of which determined that section 192.042(1), Florida Statutes, was constitutional, should be followed.

STANDARD OF REVIEW

The trial court below entered Final Summary Judgment, which granted the Property Appraiser's Motion for Summary Judgment. This Court's standard of review of the trial court's Final Summary Judgment is de novo. Major League Baseball v. Morsani, 790 So. 2d 1071, 1074 (Fla. 2001); Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000); and, Smith v. Frontier Communications International, Inc., 805 So. 2d 975, 977 (Fla. 2d DCA 2001).

When the trial court enters an order on the constitutionality of a statute, the appropriate standard of review is de novo. See, City of Miami v. McGrath, 824 So. 2d 143, 146 (Fla. July 11, 2002); Florida Fish & Wildlife Conservation Commission v. Carribean Conservation Corp., Inc.,

789 So. 2d 1053, 1054 (Fla. 1st DCA 2001), review granted, 817 So. 2d 845 (Fla. 2002); and, Padavano, Florida Appellate Practice, Section 9.4 (2001-2002 ed.).

ARGUMENT

I. THE THIRD DISTRICT AND THE TRIAL COURT ERRED IN FINDING SECTION 192.042(1), FLORIDA STATUTES, UNCONSTITUTIONAL.

A. PROPER CONSTITUTIONAL INTERPRETATION OF A STATUTE

The Third District and the trial court erred in finding section 192.042(1), Florida Statutes, unconstitutional. The Department submits that a proper analysis of the constitutional issues raised in the instant case necessitates the application by this Court of the following basic guidelines to actions challenging the constitutionality of tax statutes.

Article VII, section 4, Fla. Const., provides, in a non-self executing provision, that the Legislature shall by general law prescribe regulations which shall secure just valuation of all property for ad valorem taxation.[6]/ Likewise, the constitution gives the Legislature the authority to define "property," "real property," and "tangible personal property." See, Park-N-Shop

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[6]/ One must attribute to the words "By general law regulations shall be prescribed which shall secure a just valuation" their plain meaning; legislative authorization is required to trigger this provision; it is not self-executing. Florida Department of Education v. Glasser, 622 So. 2d 944 (Fla. 1993).

v. Sparkman, 99 So. 2d 571 (Fla. 1957).[7]/

The Legislature implemented Article VII, section 4, Fla. Const., with the various enactments contained in Chs. 192-196, Florida Statutes. Sections 193.011, 192.001(11)(d) and (12), and 192.042(1), Florida Statutes, directly apply to the case at bar.

Article VII, section 4, Fla. Const., does not specify a date on which the Property Appraiser is to assess or establish "just value" of all property. The constitution left timing issues and establishment of a date for assessment to the Legislature. Were it not for the Legislature's adoption of timing statutes like the one now in dispute, the taxing system would have no beginning.[8]/

Section 192.042(1), Florida Statutes, is part of the integrated and comprehensive legislative implementation of Article VII, section 4, Fla. Const. The Legislature has properly specified the date, not a classification of property,

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[7]/ Article IX, section 1, Fla. Const. (1885), provided in pertinent part, that "[t]he Legislature . . . shall prescribe such regulations as shall secure a just valuation of all property, both real and personal, excepting such property as may be exempted by law for municipal, education, literary, scientific, religious or charitable purposes."

[8]/ The Amendment to Article VII, section 4(c), Fla. Const., (Save Our Homes, Proposition 10), established January 1 as the date for assessing homestead property.

on which property, both real and tangible, will be assessed. That date is January 1 of each year.[9]/ It has likewise determined that improvements or partial improvements to real property that are not substantially complete as of January 1 are not real property and shall not be assessed until the January 1 after the improvements have become substantially complete.

"Substantially complete" is defined as meaning that the improvement or some self-sufficient unit within it can be used for the purpose for which it is constructed. See, section 192.042(1), Florida Statutes; John Henry Jones, Inc., v. Lanier, 376 So. 2d 450 (Fla. 5th DCA 1979). The Legislature's determination that an incomplete structure, unusable for the purpose intended upon its completion, should not be assessed in that condition is a reasonable implementation of Article VII, section 4, Fla. Const.[10]/

An issue in this case is whether there was a change in the 1968 Constitution which prohibited the Legislature from defining

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[9]/ The Constitution has historically implied a yearly tax. The Legislature has provided that January 1 is the day all property shall be assessed. See, e.g., Ch. 4322, sections 3, 68, Laws of Fla. (1895). See, Ch. 5596, section 3, Laws of Fla. (1907), (which is the forerunner of present day section 192.053, Florida Statutes), wherein the Legislature set a date that a lien on the property shall attach.

[10]/ The "substantially complete" criteria is also reasonable when viewed within the definition of "real property" contained in section 192.001(12), Florida Statutes

the term "property" and establishing a specific statutory scheme for the timing of the valuation and assessment of real property. As the Florida Supreme Court has recently stated, both the 1885 and 1968 Constitutions required the Legislature to enact general law implementing the collection of ad valorem taxes. Collier County v. Florida, et al., 733 So. 2d 1012 (Fla. 1999).

The Court below initially came to the same conclusion and then completely reversed itself. The result was, as a practical matter, to overrule Culbertson, which the Court suggested was outdated. This Court has spoken sharply to judicial activism or lower court's modifying Supreme Court decisions. See Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973).

This court's decision in Collier County involved the application of section 192.042(1), Florida Statutes, to a county ordinance. The Third District in its decision on Rehearing En Banc in Fuchs v. Robbins, supra, opined that the constitutionality of section 192.042(1), Florida Statutes, was not an issue in the Collier County decision. However, the Department would suggest that the Third District has twice overlooked the impact of this Court's decision in the Collier County case, on the debate in this case, the focal point of which is whether section 192.042(1), Florida Statutes, is a general law regarding the timing of the valuation, assessment,

and collection of ad valorem taxes, or whether section 192.042(1), Florida Statutes, is an impermissible, arbitrary classification of a specific type of property or a limitation of the just value.

This Court in the Collier County case found, as it had previously done in Culbertson, that section 192.042(1), Florida Statutes, was part of a specific statutory scheme for the timing of the valuation and assessment of real property.[11]/

The constitution requires the Legislature to enact the general law regarding the collection of ad valorem taxes, and the Legislature has established a specific statutory scheme for the timing of the valuation and assessment. As this Court stated in the Collier County case, the enactment of section 192.042(1), Florida Statutes, makes clear that partial year assessments are not authorized for improvements to real property substantially completed after January 1, which "shall have no

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[11]/ Prior to the Third District's En Banc Decision in Fuchs v. Robbins, supra, this Court, the Third District and another District Court have rejected the contention that section 192.042 Florida Statutes, created an impermissible classification or implicated just value. See, Sherwood Park Ltd., v. Meeks, 234 So. 2d 702 (Fla. 3d DCA 1970), aff'd sub nom., Markham v. Sherwood Park Ltd., 244 So. 2d 129 (Fla. 1971); Metropolitan Dade County v. Colsky, 241 So. 2d 440 (Fla. 3d DCA 1970); Forte Towers East v. Blake, 275 So. 2d 39 (Fla. 3d DCA 1973); Manufacturers National Corporation v. Blake, 287 So. 2d 129 (Fla. 3d DCA 1973); Markham v. Kaufman, 284 So. 2d 416 (Fla. 4th DCA 1973); and, Yankee Clipper, supra.

value placed thereon." This Court concluded that there was no ambiguity in the statute.

Once this Court had decided that the Collier County ordinance had attempted to impose not a valid special assessment or user/ impact fee, but rather had attempted to impose an invalid tax, the Court could have stopped. However, this Court went on to discuss the existing ad valorem tax scheme, in part because Collier County had raised equitable arguments concerning lost ad valorem tax revenues. A reading of the Third District's decision below reveals an underlying equitable consideration, especially when that Court refers to the actual outcome of the statute is to fail to assess property for a particular tax year. As this Court pointed out to Collier County, section 192.042(1), Florida Statutes, is unambiguous and if it appears that a particular taxpayer seems to benefit under this taxing scheme, it is by clear legislative design. Any such perceived advantage can only be rectified by additional legislative action and not by the courts.

The timing of valuation created by the effective date of the tax year creates disadvantages to the taxpayers as well as advantages which tend, in the aggregate, to balance out. There are other circumstances whereby the County, and the various taxing authorities therein, would be at an advantage. When

property is assessed on January 1 and later in the year it is destroyed, the validity of the ad valorem tax assessment is not effected. See, Op. Att'y. Gen. Fla. 70-24 (1970); Op. Att'y. Gen. Fla. 72-252 (1972); and, 51 Fla. Jur. 2d, Taxation § 809 (1999). This would be a harsh result, but it is the clear result of the same legislative scheme, including timing, referred to by this Court in Collier County and must be respected in order to have a necessary measuring point to start the process of assessing ad valorem tax annually.

The Legislature is presumed to know the law as it exists when a statute is enacted and is also presumed to be acquainted with the judicial construction placed on the former laws on the subject. Williams v. Jones, 326 So. 2d 425, 435 (Fla. 1975). Nicoll v. Baker, 668 So. 2d 989, 991 (Fla. 1996). Furthermore, the legislature is presumed to know the meaning of the words used and to have addressed its intent by using them in the enactment. S.R.G. Corporation v. Department of Revenue, 365 So. 2d 687 (Fla. 1978); Zukerman v. Alter, 615 So. 2d 661, 663 (Fla. 1993); and, Zukerman v. Hofrichter & Quiat, P.A., 646 So. 2d 187, 188 (Fla. 1994).

When assessing the constitutionality of a statute a court should resolve all doubts as to the validity of the statute, provided the statute may be given a fair construction that is

consistent with the federal and state constitutions as well as legislative intent. State v. Stadler, 630 So. 2d 1072, 1076 (Fla. 1994). If an issue can be determined without declaring a statute unconstitutional, a court should endeavor to do so. Lloyd Enterprises, Inc., v. Department of Revenue, 651 So. 2d 735, 738 (Fla. 5th DCA 1995).

Florida courts have consistently held that examinations of the constitutionality of a statute must be restricted to the issue of whether any state of facts, either known or assumed, afford support for the challenged statute. See, e.g., State v. Bales, 343 So. 2d 9, 11 (Fla. 1977); State ex rel. Adams v. Lee, 122 Fla. 639, 166 So. 249, 254 (1935), affirmed on rehearing, 122 Fla. 670, 166 So. 262 (1936), cert. denied, 299 U. S. 542, 57 S. Ct. 15. (1936). In taxation, even more than other fields, the legislature possesses the greatest freedom in classification; the burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it. Markham v. Yankee Clipper Hotel, Inc., 427 So. 2d 383, 385 (Fla. 4th DCA 1983), rev. denied, 434 So. 2d 888 (Fla. 1983). The polestar for judging the validity of a particular classification is whether that classification rests upon some ground of difference having a fair and substantial relation to the object of legislation, so that all persons

similarly circumstanced shall be treated alike. Department of Revenue v. Amrep Corp., 358 So. 2d 1343, 1349 (Fla. 1978), quoting with approval, Ohio Oil Co. v. Conway, 281 U. S. 146, 50 S. Ct. 310 (1929).

Florida has been given great latitude in making tax classifications, and the burden is very heavy on one who seeks to overturn such classification on the basis that it violates the equal protection clause. See, R.R. Donnelley & Sons v. Fuchs, 670 So. 2d 113 (Fla. 1st DCA 1996), rev. denied, 677 So. 2d 841 (Fla. 1996), cert. denied, 519 U.S. 1021, 117 S.Ct. 540 (1996). The state is accorded a wide range of discretion when classifying for taxation purposes, provided the classification is reasonable, non-arbitrary, and rests on some ground of difference having a fair and substantial relation to the object of legislation. In Re Advisory Opinion to the Governor, 509 So. 2d 292, 303 (Fla. 1987).

One such rational justification is that the legislature determined that the taxpayer who had on his property incomplete improvements would not have a viable market for his property. Therefore, his property would be over assessed when his property had minimal “forced sales value” and there would not be any other feasible or fair method of valuation.

It is beyond question that every law is presumed valid.

Bunnell v. State, 453 So. 2d 808 (Fla. 1984); Metropolitan Dade County v. Bridges, 402 So. 2d 411 (Fla. 1981). Given this presumption, the burden of proving a statute unconstitutional is upon the party challenging the act. Peoples Bank of Indian River County v. State, Department of Banking and Finance, 395 So. 2d 521 (Fla. 1981). The challenging party must prove beyond all reasonable doubt that the challenged act is in conflict with some designated provision of the constitution. Metropolitan Dade County v. Bridges, supra; A.B.A. Industries, Inc., v. City of Pinellas Park, 366 So. 2d 761 (Fla. 1979).

Furthermore, the Florida courts will not pass upon the wisdom of the legislature in enacting the tax or question the choice made by the legislature among the various options available to it. See, Fraternal Order of Police, Metro. Dade County, Lodge No. 6, v. Department of State, 392 So. 1296 (Fla. 1980). Rather, once the legislature makes a determination that the law has an important public purpose, such as taxation for revenue sources, the party challenging the determination must show that this legislative determination was so clearly wrong that it was beyond the power of the Legislature to enact. State v. Orange County Industrial Development Authority, 417 So. 2d 959 (Fla. 1982). Public purpose determinations are reserved for Legislature and the party challenging such determination must

demonstrate that law enacted was beyond power of Legislature. State v. Hodges, 506 So. 2d 437 (Fla. 1st DCA 1987), rev. denied, 515 So. 2d 229 (Fla. 1987). Finally, legislative determinations of public purpose and facts are presumed correct and entitled to deference, unless clearly erroneous. University of Miami v. Echarte, 618 So. 2d 189 (Fla. 1993), cert. denied, 510 U.S. 915, 114 S. Ct. 304 (1993).

In sum, because every presumption is indulged in favor of the validity of the legislature's action, the trial court erred by invalidating the statute in question because it has not been shown that the Legislature has clearly usurped its power. Eastern Air Lines v. Department of Revenue, 455 So. 2d 311, 314 (Fla. 1984), (citing, Walters v. City of St. Louis, 347 U. S. 231, 74 S. Ct. 505 (1954)).

B. LEGISLATIVE HISTORY OF SECTION 192.042, FLORIDA STATUTES, THE SUBSTANTIALLY COMPLETE STATUTE.

In 1961, the Florida Legislature amended section 193.11, Florida Statutes, (1959), by adding subsection (4). See, Ch. 61-240, section 1, Laws of Fla., which states:

> (4) All taxable lands upon which active construction of improvements is in progress and upon which such improvements are not substantially completed on the 1st day of January of any year shall be assessed for such year, as unimproved lands. Provided, however, the provisions hereof shall not apply in cases of alteration or improvement of existing structures.

Chapter 61-240, section 1, Laws of Fla., is the forerunner to present day section 192.042, Florida Statutes,[12]/ which states:

> 192.042. Date of assessment
>
> All property shall be assessed according to its just value as follows:
>
> (1) Real property, on January 1 of each year. Improvements or portions not substantially completed on January 1 shall have no value placed thereon. "Substantially completed" shall mean that the improvement or some self-sufficient unit within it can be used for the purpose for which it was constructed.

This section of the Florida Statutes was added by Ch. 70-243, section 4, Laws of Fla. The committee comment after section 4, states that "[t]his section sets the effective date of taxation for all forms of property" and included elements of certain enumerated sections of the Florida Statutes.

1. COURT DECISIONS UNDER THE 1885 CONSTITUTION

In Culbertson v. Seacoast Towers East, Inc., 212 So. 2d 646 (Fla. 1968), the hotel corporation brought suit contesting its tax assessment as illegal on the grounds that the improvements

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[12]/ Section 193.11, Florida Statutes (1967), was amended by Ch. 69-55, Laws of Fla., and renumbered as section 193.071, Florida Statutes (1969). It was the "desire of the Legislature to rearrange existing statutes [Chs. 192, 193, 194, 195, 196, 197 199 and 200, Florida Statutes] in a logical and workable sequence" in order that one would be able to locate all of the law relative to a particular topic of ad valorem tax law. See both Whereas clauses to Ch. 69-55, Laws of Fla.

included in the valuation were not substantially completed as of January 1, 1967, pursuant to section 193.11(4), Florida Statutes, (1967). The taxing authority filed its answer and a motion for summary judgment contending that the statute was unconstitutional by granting an exemption from ad valorem taxation in violation of Article IX, section 1, Fla. Const., (1885). The trial court denied the taxing authorities motion for summary judgment. The taxing authority took an interlocutory appeal to the Supreme Court on the grounds that the trial court had passed on the validity of the statute.

On appeal, the taxing authority argued that section 193.11(4), Florida Statutes, (1967), granted an exemption from ad valorem taxation in violation of Article IX, section 1, Fla. Const., (1885), and that the statute had failed to define or prescribe standards for the administrative application of the terms 'substantially completed,' in violation of Article III, section 1, Fla. Const., (1885). This Court disagreed with the taxing authority and found:

> The statute constitutes only a temporary postponement of valuation and assessment of incomplete improvements on real property provided the prescribed conditions are met on the annual assessment date. The requirement is simply that the separate classification of such property shall bear some reasonable relationship to the legislative power to prescribe regulations to secure a just evaluation of property. Factors analogous to those here involved have in numerous instances been made the basis for special

> statutory treatment.
>
> We find no direct authority for the contention that the terminology of the statute is fatally ambiguous, and are not persuaded by appellants' arguments in this respect. The remaining issues raised by appellee, with reference to matters not yet determined by the trial court, have no pertinence in this appeal.

Culbertson, 212 So. 2d, at 647 (footnotes omitted).

Shortly after this Court's decision in Culbertson, the Fourth District rendered its decision in Sherwood Park Ltd., v. Meeks, 234 So. 2d 702 (Fla. 3d DCA 1970), aff'd sub nom., Markham v. Sherwood Park Ltd., 244 So. 2d 129 (Fla. 1971). In Sherwood Park, the trial court had sustained the tax assessment on certain buildings which considered a formula that was prepared and submitted by the tax assessor. In reversing the trial court's order, the Fourth District stated:

> A very good determination of substantially completed is to be found in State ex rel. Stites v. Goodman, Mo.1961, 351 S.W.2d 763, 766. It was well said there that a building is 'substantially complete' when it has reached the stage where it can be put to the use for which it was intended, even though some minor items might be required to be added. We construe that it was the intent of the legislature not to tax the property other than as unimproved property unless it was complete to the point where it could be used for the purposes intended.
>
> In our judgment the tax assessor was not authorized to promulgate a formula in derogation to the statute, and his certification that the building was less than substantially completed by 100% was in violation of the statute.
>
> We must, therefore, hold that the learned trial court

> was in error in establishing assessments based upon percentage estimates of completion of the buildings at the time in question as 80% and 90% complete.

Sherwood Park, 234 So. 2d, at 703. See also, Metropolitan Dade County v. Colsky, 241 So. 2d 440 (Fla. 3d DCA 1970); and, City National Bank of Miami v. Blake, 257 So. 2d 264 (Fla. 3d DCA 1972).

2. COURT DECISIONS UNDER THE 1968 CONSTITUTION

The starting point for the court decisions under the 1968 Constitution is just valuation as mandated by Article VII, section 4 Fla. Const. (1968).[13]/ The common thread which ran through the case law, under the 1885 Constitution, construing the statutes concerning the assessments of improvements and what was "substantially complete" was continued in the case law construing the statute enacted under the 1968 Constitution.[14]/ That common thread is that a building is "substantially complete" when it has reached the stage where it can be put to the use for which it was intended, even though some minor items might be required to be added. What constitutes a building being substantially complete is a mixed question of law and fact

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[13]/ Both the 1885 Constitution and the 1968 Constitution mandated that all property shall secure a just valuation. Compare, Article IX, section 1, Fla. Const. (1885), with Article VII, section 4, Fla. Const. (1968).

[14]/ See, Ch. 70-243, section 4, Laws of Fla.

to be found within a range of discretion of the property appraiser. The taxpayer challenging the decision of the property appraiser assumes the burden of proving, beyond a reasonable hypothesis of a legal assessment, the property appraiser determination is incorrect. See, City National Bank v. Blake, supra.

In Forte Towers East v. Blake, 275 So. 2d 39 (Fla. 3d DCA 1973), the taxpayer sought the elimination of the property appraiser's determination of a substantially completed improvement, which would lead to an ultimate reduction in the assessment.

The taxpayer filed a complaint with the trial court alleging it was the owner of certain described land and the improvements thereon. The complaint alleged that the assessment of the property for ad valorem taxation for tax year 1971 was based on valuation of the land and a valuation of the improvements thereon, namely a nine-story apartment building. The taxpayer challenged, and claimed as illegal, the assessment for including valuation of the improvement, which consisted of the apartment building, on the grounds that the building was not substantially completed on January 1, 1971, pursuant to section 192.042(1) Florida Statutes (1971). Forte Towers, 275 So. 2d, at 40. However, the trial court did not agree with the taxpayer and

sustained the property appraiser's assessment. Id.

On appeal the Third District reversed the trial court, stating as follows:

> Upon remand, a determination should be made by the court from the evidence, and additional evidence if the court finds it necessary or advisable to receive the same as to the portions of the building which were substantially completed on January 1, 1971, as provided for in s 192.042(1) Fla.Stat., F.S.A., and the portion or portions of the building not so completed and therefore not subject to taxation for the year 1971, and to enter an order modifying the assessment accordingly.
>
> Forte Towers, 275 So. 2d, at 40-41.

In Markham v. Kaufman, 284 So. 2d 416 (Fla. 4th DCA 1973), the tax assessor appealed the judgment of the trial court which held that an apartment building should not be assessed and included on the tax roll. The Fourth District reversed the trial court because that Court believed the tax assessor was legally and factually correct in his determination that the building was "substantially completed" as of the assessment day (January 1, 1971), properly assessed and included on the tax roll, and that the trial court committed reversible error when it disagreed with the tax assessor.

Manufacturers National Corporation v. Blake, 287 So. 2d 129 (Fla. 3d DCA 1973), was an action by the owner of a condominium development challenging real property assessment for improvements. The trial court entered judgment upholding the

real property assessment and the owner appealed.

In affirming the trial court, the Third District held as follows:

> We have meticulously considered the record, all of the points in the briefs, and arguments of counsel, and have concluded that the trial court's construction of Section 192.042(1) was correct.
>
> As the trial judge noted in his final judgment, the obvious intent of the Legislature in enacting Section 192.042(1) was to rectify inequities in former Section 193.11(4). The former statute mandated an all-or-nothing consideration by the tax assessor as of the January 1st taxing date. Either an improvement in its entirety was substantially completed on January 1st and included on the tax roll, or it was considered unimproved land and thereby totally excluded from taxation for the year in question.
>
> This situation resulted in some notable tax avoidance results. In Culbertson v. Seacoast Towers East, Inc., Fla.App.1970, 232 So.2d 753, this court considered a situation wherein the apartments in a highrise complex were substantially completed, but certain common elements constituting part of the 'way of life' of the luxury complex, such as the pool, pool deck and sun shades, a two-level parking garage, dining rooms, lobbies, etc., were not yet completed. This court affirmed a judgment finding the property was not subject to taxation as of the January 1st taxing date. Judge Pearson, speaking on behalf of the court, noted:
>
> > 'The essential difficulty with this case lies in the statute which entirely removes from the tax rolls improvements to land when these improvements have tremendously enhanced the value of the land. Such a seeming inequitable result reinforces the conscientious tax assessor in his conclusion that the term 'substantially completed' as used in the statute should be given a liberal construction. This portion is implied throughout appellants' argument, and while it has persuasive value it is of doubtful legal significance. Legislatures may

> do things the courts think odd, but if their acts are within constitutional limitations we may not change them . . .'

Appellant concedes the new substantial completion law was intended to rectify inequities in the former statute. However, appellant argues that the new language of Section 192.042(1) now permits assessments of individual condominium parcels which are substantially completed as of the taxing date, even though the common elements may not be substantially completed as of the same date, thus alleviating the problem in Culbertson v. Seacoast Towers East, Inc., supra. But, appellant contends the new statute does not extend to the opposite situation as was present in the cause sub judice wherein certain of the common elements are deemed taxable, even though the individual condominium parcels are not substantially completed. We cannot agree.

Appellant stresses that to permit taxation of the substantially completed common elements of condominium property prior to the time the individual parcels are substantially completed does violence to the Florida Condominium Act, particularly Section 711.19(1). This subsection provides that each condominium parcel shall be separately assessed for ad valorem taxes. The trial court harmonized the condominium law with Section 192.042(1) by ordering the tax assessor to prorate the taxable portions of the common elements among the individual condominium parcel owners.

It should be recognized that when the Legislature enacted Section 192.042(1) in 1970, the condominium act was in effect. We cannot see that the Legislature intended for the assessment of improvements in accordance with the substantial completion law to apply any differently to condominium buildings than to apartment buildings or other highrises.

'Improvements' as the word is used in Section 192.042(1) acquires further meaning by reference to Section 192.001(12) wherein real property is defined to include 'land, buildings, fixtures and all other improvements to land.' Section 192.042(1) permits the tax assessor to find that 'portions' of improvements,

> which may include building fixtures and other common elements of the property, are substantially completed.
>
> The statute defines 'substantially completed' to mean 'that the improvement or some self-sufficient unit within it can be used for the purpose for which it was constructed.' In our view, if the assessor determines that certain common elements can be used for the purpose for which they were constructed, then these elements are taxable within the meaning of the statute.
>
> This court recently has stated that it may be 'shown that certain portions of the improvement (such as the lobby, Elevator areas and some apartments), which could be regarded as self-sufficient units within the building useable for the purpose for which the building was constructed, were completed, or substantially completed on January 1, 1971, so as to render such portions subject to taxation under the statute.' Forte Towers East, Inc. v. Blake, Fla.App.1973, 275 So.2d 39.
>
> Manufacturers, 287 So. 2d, at 131-133(footnote omitted).[15]/

Markham v. Yankee Clipper Hotel, Inc., 427 So. 2d 383 (Fla. 4th DCA 1983), rev. denied, 434 So. 2d 888 (Fla. 1983), was an action brought by the property appraiser challenging the constitutionality and application of section 192.042(1), Florida Statutes (1977). The trial court held that the improvements to the subject property were not substantially completed as of January 1, 1979; and that section 192.042(1), Florida Statutes (1977), was constitutional.

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[15]/ See also, John Henry Jones, Inc., v. Lanier, 376 So. 2d 450 (Fla. 5th DCA 1979); and, Colding v. Klausmeyer, 387 So. 2d 430 (Fla. 2d DCA 1980).

On appeal, the Fourth District rejected the property appraiser's argument that the statute at issue had the effect of taxing at less than a uniform rate and provided for a tax at less than just value in violation of Article VII, section 4, Fla. Const. (1968). The Fourth District found the statute constitutional in that:

> A. That the substantial completion statute does not have the effect of making the levy of each taxing district at less than a uniform rate within that district in violation of article VII, section 2, Florida Constitution. All substantially completed buildings are taxed at a uniform rate. Some unsubstantially completed buildings are not taxed one way and other unsubstantially completed buildings, another.
>
> B. The statute does not violate article VII, section 4, Florida Constitution, by taxing at less than just valuation. That term equates with fair market value, the formula for which is "the amount a purchaser willing but not obliged to buy will pay to one willing but not obliged to sell." ITT Community Development Corp. v. Seay, 347 So.2d 1024, 1027 (Fla.1977). It strains credulity to suggest that sale of an unusable hotel, in the middle of construction, would normally be the result of action by a seller "not obliged to sell." This clause does not contemplate forced sales.
>
> C. The statute does not violate article VII, section 4, Florida Constitution, by not securing a just valuation of all property. All substantially completed property is taxed. Its just valuation is readily identifiable in terms of fair market value, which is a reasonable, constitutional classification within the framework of Lehnhausen.
>
> Yankee Clipper, 427 So. 2d, at 385-386 (footnotes omitted.)

In Hausman v. Bayrock Investment Company, 530 So. 2d 938 (Fla. 5th DCA 1988), the property appraiser appealed from a trial court judgment which had found that no value should have been attributed to four buildings in a five building strip mall for ad valorem tax purposes. The property appraiser also argued that section 192.042(1), Florida Statutes (1985), was unconstitutional because it violated the just value standard as mandated in Article VII, section 4, Fla. Const. (1968).

The Fifth District found the validity of the statute was settled by the cases of Culbertson v. Seacoast Towers, Inc., 212 So. 2d 646 (Fla. 1968) and, Markham v. Yankee Clipper Hotel, Inc., 427 So. 2d 383 (Fla. 4th DCA 1983), rev. denied, 434 So. 2d 888 (Fla. 1983), and dismissed this argument by the property appraiser. Bayrock Investment, 530 So. 2d, at 939. However, they did agree with the property appraiser that the taxpayer had failed to present sufficient evidence to overcome the presumption that the property appraiser had made a lawful assessment. Id. See also, Mikos v. Two M. Development Corporation, 546 So. 2d 1110 (Fla 2d DCA 1989).

CONCLUSION

The trial court erred in granting the Property Appraiser's Motion for Summary Judgment and the Third District erred in affirming the trial court's decision holding section 192.042(1), Florida Statutes, unconstitutional.

Statutes are presumed to be constitutional and the courts must construe them in harmony with the constitution; if there is any reasonable way for the statute to be construed not in conflict with the constitution, it must be so construed.

This Court should reverse the Third District's and the trial court's decisions and uphold section 192.042(1), Florida Statutes, as a constitutionally valid statute as set forth in Culbertson and Yankee Clipper.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by U.S. Mail this _____ day of May, 2003 to: **Thomas W. Logue, Esq. Assistant County Attorney,** Stephen P. Clark Center, Suite 2810, 111 N.W. First Street, Miami, Florida 33128-1993; **Arnaldo Velez, Esq.**, 35 Almeria Avenue, Coral Gables, Florida 33134; **Mitchell A. Feldman, Esq.**, 1021 Ives Dairey Road, Suite 111, Miami, Florida 33179; **David L. Powell, Esq.**, and **Victoria L. Weber, Esq.**, Hopping, Green and Sams, P.O. Box 6526, Tallahassee, Florida 32314-6526; and, **Joseph C. Mellichamp, III, Esq.**, Carlton Fields, 215 S. Monroe, Suite 500, Tallahassee, Fl 32301.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Department's Initial Brief complies with the font requirements of Florida Rules of Appellate Procedure 9.210(a)(2), in that this Brief uses Courier New 12-point font.

_____
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