IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC03-783
First District Court of Appeal Case No. 1D02-3265

LEWIS Y. and BETTY WARD, et al,
Petitioners,

v.

GREGORY BROWN, Property Appraiser
of Santa Rosa County, et al,
Respondents.

ANSWER BRIEF OF RESPONDENT GREGORY BROWN

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

Elliott Messer, Esq.
Florida Bar No. 054461
Thomas Findley, Esq.
Florida Bar. No. 0797855
Messer, Caparello & Self, P.A.
215 S. Monroe Street, Suite 701
Tallahassee, Florida 32301
Telephone (850)222-0720

Roy Andrews, Esq.
Florida Bar No. 228291
Lindsay, Andrews & Leonard
P.O. Box 586
Milton, Florida 32572
Telephone (850)623-3200
Counsel for Respondents

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STATEMENT OF THE CASE AND FACTS

The Petitioners' Statement of the Case and Facts contains declarations of "fact" contradicted by the First District Court of Appeal's opinion. Contrary to the Petitioners' Statement of the Case and Facts, the Property Appraiser did not determine that Petitioners' leasehold interests should be reclassified as real property. Instead, the issue is whether the fee interests in the buildings on Navarre Beach are owned by the Petitioners or owned by Santa Rosa County. The Property Appraiser's assessments are directed against the fee interest in such buildings, and not against any leasehold or intangible interest in such buildings.

The Property Appraiser determined that the Petitioners own certain buildings and improvements located on land leased from Santa Rosa County under 99-year ground leases with automatic renewal options for additional, unlimited 99-year periods. These improvements are used purely for private purposes. Because the Petitioners have not only legal title to improvements under the land leases, but also exclusive possession and control of such improvements, the Property Appraiser determined that the Petitioners legally and equitably own them as private property. The First District confirmed that this was the underlying issue: "The instant case involves a deliberate conclusion reached by the property appraiser that the appellant's beach homes should be assessed as *private* property because the improvements will not vest in the county until the termination of the 99-year lease."

Ward, et al. v. Brown, et al., 28 Fla.L.Weekly D731, D732 (Fla. 1st DCA March 13, 2003), *rev. granted*, 843 So.2d 1157 (Fla. 2003). As private property, the Petitioners' properties were subject to assessment just like any other property in Santa Rosa, County. The Property Appraiser correctly applied section 196.199(2)(b), Florida Statutes, which provides that, even on government leases of land, the "buildings, or other real property improvements **owned** by the lessee" do not qualify for any exemption.

The individual Petitioners properly filed their action within the 60-day non-claim period of section 194.171, Florida Statutes. The case filed by these individual Petitioners is currently pending in the circuit court. This appeal pertains only to the Petitioners' attempt to add new plaintiffs after the expiration of the 60-day period by amending their original complaint to add class allegations, despite the fact that none of the putative class members had filed suit within 60 days. Because there was no jurisdiction under section 194.171's 60-day period of non-claim for these additional plaintiffs, the trial court struck the class allegations.

SUMMARY OF ARGUMENT

The Property Appraiser's tax assessment was based on his deliberate judgment that the Petitioners own the improvements on land leased from Santa Rosa County and located on Navarre Beach. Consequently, he concluded that such improvements were not immune or exempt from real property ad valorem taxation. The Property Appraiser's assessment of the Petitioners' improvements was subject to challenge only within the 60-day period of non-claim in section 194.171, Florida Statutes, which provides the sole statutory basis for challenging an assessment. In fact, the Petitioners alleged in the first paragraph of their Amended Complaint that they were challenging the assessments under section 194.171, Florida Statutes. Yet, they now seek to avoid the period of non-claim that is part of the statute under which they elected to proceed.

Section 197.182, Florida Statutes, provides for a 4-year statute of limitations for refund claims, but it applies only in the context of an overpayment, and it applies only to actions against the Department of Revenue. In this case, the Petitioners paid no tax, so there is certainly no overpayment. The Petitioners have not made a claim or filed any suit against the Department of Revenue. Therefore, section 197.182 is inapplicable.

To the extent the Petitioners rely on the 4-year limitations period of section 95.11(3)(m), Florida Statutes, such reliance is misplaced. Not only should the

specific statute relating to assessment challenges apply over the general limitations period of section 95.11, but also section 95.11(3)(m) applies only to recover "money paid" to a governmental entity "by mistake or inadvertence." The Petitioners have not pled that they paid money to the government, nor have they pled that they made payments by "mistake or inadvertence." Therefore, section 95.11(3)(m) is inapplicable.

Contrary to the suggestion of the Petitioners in their brief, there is no separate statutory basis for a different period of non-claim or limitations applicable to alleged "misclassifications." Although some district courts have used language suggesting the existence of a 4-year period of limitations for "misclassifications," they have done so primarily in the context of refund claims against the Department of Revenue. In those cases, the statutory basis for the 4-year period was not based on a "misclassification" *per se*, but because the taxpayers in those cases had paid taxes and were seeking refunds from the Department of Revenue under section 197.182.

Given the absence of any statutory authority for a 4-year period of limitations or non-claim, the Petitioners' argument must fail. The 60-day period of non-claim found in section 194.171 is the sole basis for challenging an assessment. The trial court correctly concluded that it had no jurisdiction to hear challenges to assessments for those taxpayers who did not file within this 60-day period.

ARGUMENT

I. THE FIRST DISTRICT COURT OF APPEAL CORRECTLY CONCLUDED THAT THE 60-DAY PERIOD OF NON-CLAIM UNDER SECTION 194.171, FLORIDA STATUTES, APPLIES TO ALL TAXPAYER CHALLENGES TO ASSESSMENTS OF REAL PROPERTY.

The First District held that the 60-day period of non-claim in section 194.171, Florida Statutes, applied to the Property Appraiser's assessment of the real property improvements owned by the Petitioners. The improvements at issue are buildings built on land leased from Santa Rosa County. The Property Appraiser considered these buildings to be real property for assessment purposes. The Petitioners challenged these assessments, citing section 194.171, as the basis for their Complaint. The trial court and the First District Court of Appeal correctly ruled that the Petitioners' attempt to add more plaintiffs to their Complaint after the 60-day period of non-claim was barred by section 194.171, Florida Statutes.[1]

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[1] Contrary to the argument of Petitioners, the statutes at issue should not be construed in favor of the taxpayer. When a taxpayer seeks to be exempted or otherwise excepted from the application of taxing statutes, the application of those statutes are construed against the party seeking to avoid the tax. The Petitioners' argument that they are not subject to taxation must be "strictly construed" against them. §196.001(1), Fla.Stat. (all real property in this state is subject to tax, unless "expressly" exempt); *Sebring Airport Authority v. McIntyre*, 642 So.2d 1072, 1073 (Fla. 1994); *Department of Revenue v. Skop*, 383 So.2d 678 (Fla. 5th DCA 1980)(argument construing exceptions to taxation are construed against taxpayers).

Contrary to the Petitioners' argument, the Property Appraiser has not attempted to assess any leasehold interest as real property. Instead, the Property Appraiser has assessed the fee interests in the Petitioners' beach homes on the basis that the Petitioners have complete dominion, control, and title over these buildings for 99 years plus unlimited 99-year automatic renewal terms. The First District opinion noted: "The instant case involves a deliberate conclusion reached by the property appraiser that the appellant's beach homes should be assessed as private property because the improvements will not vest in the county until the termination of the 99-year lease." *Id.* at D732.

This Court has concluded on three prior occasions that the Petitioners are the owners of the improvements under any equitable standard. In *Williams v. Jones*, 326 So.2d 425 (Fla. 1975), this Court held that the type of lease involved in this case "for a term of 99 years or more is **tantamount to ownership of the fee** . . . ." *Id.* at 436. This Court concluded that Ain the case of leases for an initial term of 99 years or more the lessee may be considered to be the owner >in **fee simple:** and the property subject to the lease shall be valued for tax purposes as all other property owned in fee simple.@ *Id.* at 436.

Although *Williams v. Jones* preceded a statutory revision in 1980 regarding private leaseholds in government property, the 1980 statutory revisions did not alter this Court's holding that 99-year leasehold interests confer rights equivalent to fee

simple ownership. Moreover, the 1980 revisions did nothing to alter the pertinent provisions of section 196.199(2)(b), providing that "buildings, or other real property improvements **owned** by the lessee" are subject to ad valorem taxation as real property. That *Williams v. Jones* remains the basic core of Florida law on this issue was recently confirmed by this Court, which cited *Williams v. Jones* as setting forth the "guiding principles" for the constitutional doctrine that "all privately used property must bear the proper tax burden." *Sebring Airport Authority v. McIntyre*, 783 So.2d 238, 243 (Fla. 2001).

Again, in *Archer v. Marshall*, 355 So.2d 781 (Fla. 1978), this Court held: "Since these leaseholders have the **equivalent of fee simple ownership**, it does not appear that they have enriched the county in any manner by building on the land." *See also AM FI Investment Corp v. Kinney*, 360 So.2d 415 (Fla. 1978). Following the precedents of this Court, the Property Appraiser assessed the improvements as privately owned real property under the authority of section 196.199(2)(b), Florida Statutes.

1. This Court has held that the 60-day period of non-claim applies to all tax assessment challenges, even when a taxpayer contends that the subject property is not subject to the tax assessed.

This Court concluded in *Markham v. Neptune Hollywood Beach Club*, 527 So.2d 814 (Fla. 1988), that the 60-day period of non-claim in section 194.171, Florida Statutes, applies to all challenges to property tax assessments, even when the

taxpayer alleges that the assessment is void because the property at issue is not subject to the tax being assessed. In *Neptune Hollywood Beach Club*, the taxpayers made the same argument that the Petitioners make in this case, in the context of a challenge to tax assessments of time-share units. The taxpayers in *Neptune Hollywood Beach Club* argued that as long as they were not challenging a valuation assessment, but were instead seeking to have an assessment declared "void," the 60-day period of non-claim would not apply. This Court rejected that argument holding that the "void/voidable analysis" was no longer applicable. *Id.* at 815.

In *Neptune Hollywood Beach Club*, this Court defined a "void" or "unauthorized" assessment to include a situation in which "the property is not subject to the tax assessed." *Id.* at 815, n. 4. This Court held that, even in those situations in which a taxpayer challenges an assessment on the grounds that the property was not subject to the tax assessed, the 60-day period of non-claim still applies. Here, the Petitioners argue that the property is not subject to the tax assessed. The Petitioners use the word "classification" to try to distinguish their situation, but the essence of their argument is that their property rights are not subject to the tax assessed by the Property Appraiser. Under the holding of this Court in *Neptune Hollywood Beach Club*, the Petitioners' challenge is subject to the 60-day period of non-claim.

As this Court held in *Neptune Hollywood Beach Club*, section 194.171 is a "jurisdictional statute of non-claim." *Id.* at 815. Thus, it does not matter whether the taxpayer argues that the assessment is simply incorrect as a matter of value or whether the taxpayer argues that the property at issue is exempt or immune from the tax assessed. The 60-day non-claim period is an absolute bar to all challenges to property tax assessments.

In *Department of Revenue v. Stafford*, 646 So.2d 803, 807 (4th DCA 1994), the Fourth District Court of Appeal ruled: "The rational and sensible construction is that section 194.171 is the **only statute** which applies when an assessment decision is to be challenged." (emphasis added). The *Stafford* Court expressed reliance on this Court's decision in *Neptune Hollywood Beach Club*. In *Stafford*, the taxpayer was also attempting to misuse the 4-year limitations applicable to refund actions in an assessment decision that the taxpayers argued was void and unlawful. The *Stafford* Court ruled that the 4-year limitations period was not applicable, because it applied only in the situation of an "overpayment." *Id.*

Other district courts have followed this Court's lead in applying section 194.171 and its 60-day period of non-claim to exemption cases. *See Department of Revenue v. Eastern American Technologies Corporation*, 762 So.2d 1044 (Fla. 5th DCA 2000)(60-day time limit applied to claim of lessees of Canaveral Port Authority); *Nikolits v. Ballinger*, 736 So.2d 1253 (Fla. 4th DCA 1999)(removal of

homestead exemption subject to 60-day jurisdictional limit) *rev. denied*, 749 So.2d 502 (Fla. 1999); *Palmer Trinity Private School v. Robbins*, 681 So.2d 809 (Fla. 3d DCA 1996)(60-day time limit applied to claim that taxpayer was entitled to educational exemption); *Hall v. Leesburg Regional Medical Center*, 651 So.2d 231 (Fla. 5th DCA 1995); *Davis v. Macedonia Housing Authority*, 641 So.2d 131 (Fla. 1st DCA 1994), *rev. denied*, 651 So.2d 1195 (Fla. 1995)(60-day time limit for challenge to denial of low-income housing exemption); *Markham v. Moriarty*, 575 So.2d 1307 (Fla. 4th DCA 1991)(60-day time limit applied to claim of Abundant Life Christian Centre), *cert. denied*, 112 S.Ct. 440 (1991).

In this case, the Property Appraiser simply determined that the Petitioners, not the County, own the improvements at issue. This determination that the properties were privately owned implicitly denied the existence of any governmental immunity or exemption. The Petitioners' argument that there was a "classification" issue that drove this issue from the normal herd of tax cases is manufactured. The "classification" statute cited by the Petitioners, section 195.073, is no help to the Petitioners' argument, because it classifies "leasehold interests" as "real property." In any event, this statute does not in any way address taxpayer challenges to assessments, and certainly does not impact this Court's express holding that, even if one is attacking an assessment on the grounds that the property is not subject to taxation, the 60-day period of non-claim still applies.

The Petitioners persist in an argument that this case does not involve an exemption question. To the extent this distinction is relevant, this Court has determined that the characterization of the Petitioners' interests as intangible property would constitute an "exemption." In *Williams v. Jones*, similarly situated taxpayers on Santa Rosa Island, operating under identical facts, argued that they should be subject only to intangibles tax. This Court held: "Basically, the appellants contend for a constitutional ***exemption*** from ad valorem real estate taxation . . . ." *Id.* at 432 (emphasis added). Again, in *Archer v. Marshall*, 355 So.2d 781, 784 (Fla. 1978), this Court relied upon Article VII, Section 3, to conclude that a special law designed to provide similar tax relief to Santa Rosa Island property owners had "the effect of a ***tax exemption***," which was not authorized by the Florida Constitution. (emphasis added). *See also AM FI Investment Corp v. Kinney*, 360 So.2d 415 (Fla. 1978). Thus, the Petitioners are requesting that their property be exempt from real property tax assessment. As this Court held in *Neptune Hollywood Beach Club*, the 60-day period of non-claim applies even when one argues that the property is not subject to tax at all.

2. There is no statutory basis for the Petitioners' position that a 4-year limitations period applies to the challenged assessments.

The Petitioners cite four statutes in their discussion of the applicable statute of non-claim or limitations. These statutes are quoted in pertinent part below. A

review of the precise language of these statutes, however, reveals that only section 194.171, Florida Statutes, applies to the challenge in the case at bar.

Section 194.171, entitled "Circuit court to have jurisdiction in tax cases," provides in pertinent part:

(2) No action shall be brought to contest a tax assessment after 60 days from the date the assessment being contested is certified for collection . . . .

(5) The requirements of subsection (2) are jurisdictional . . . .

Section 197.182, entitled "Department of Revenue to pass upon and order refunds," provides in pertinent part:

(c) Claims for refunds shall be made in accordance with the rules of the department [of Revenue]. No refund shall be granted unless claim is made therefor within 4 years of January 1 of the tax year for which the taxes were paid.

Section 95.11(3)(m) provides in pertinent part:

Actions other than for recovery of real property shall be commenced as follows: . . . (3) WITHIN FOUR YEARS . . . (m) An action for money paid to any governmental authority by mistake or inadvertence.

Section 197.182, Florida Statutes, provides no authority for a challenge to a tax classification absent an overpayment. Here, there has been no overpayment. In fact, there has been no payment at all. Moreover, no administrative refund claim has been made with the Department of Revenue (presumably because they paid no tax), nor have the Petitioners named the Department of Revenue in their lawsuit. Thus,

section 197.182 provides no statutory basis for the Petitioner's claim to a 4-year limitations period.

The Petitioners argue that section 95.11(3)(m), Florida Statutes, provides a 4-year limitations period for actions under section 197.122, Florida Statutes. Petitioners' Brief, p. 20. Section 197.122 contains no period of limitation or non-claim, and simply permits the property appraiser to correct a "material mistake of fact" if the property appraiser deems it necessary. Here, no mistake of fact has occurred. Moreover, section 197.122 does not provide any authority for a taxpayer suit. Nevertheless, the Petitioners argue that the general limitations period of section 95.11(3)(m) applies in the context of declaratory judgment actions involving section 197.122. This argument must fail, however, because section 95.11(3)(m) applies only to actions for "money paid" by "mistake or inadvertence." The Petitioners have paid no money in connection with these assessments. Moreover, the element of paying by mistake or inadvertence has not been pled and cannot be shown. In any event, the specific statute for challenges to property tax assessments, i.e., section 194.171, should control over the Petitioners' convoluted attempt to use the general limitations provisions of section 95.11.

Unlike sections 197.182 and 95.11(3)(m), section 194.171 applies readily to the tax assessments at issue. In fact, the Petitioners pled in the first paragraph of their Amended Complaint that they were proceeding under section 194.171, Florida

Statutes. Thus, Petitioners' characterization of "Argument I," at page 5 of their Brief, that the challenge in this case should be "subject to the time limitation of the statute under which they are brought" leads one directly to their own allegation that they are proceeding under section 194.171, Florida Statutes. Having elected to proceed under that statute, they are bound by the period of non-claim prescribed by that statute.

3. The District Court decisions relied upon by Petitioners do not support their claim that their assessment challenges are subject to a 4-year limitations period.

The Petitioners rely on certain district court decisions that contained critical, factual distinctions with the instant case. The First District Court's opinion examined these factual distinctions in great detail. First, the Petitioners rely on *Sartori v. Department of Revenue*, 714 So.2d 1136 (5th DCA), *rev. denied*, 727 So.2d 904 (Fla. 1998), despite the fact that *Sartori* involved a suit for a refund against the Department of Revenue under section 197.182, which carries the 4-year statute of limitation. Unlike the taxpayers in *Sartori*, the Petitioners have not even named the Department of Revenue in this action and now wish to rely on a statute of limitations under a section entitled "Department of Revenue to pass upon and order refunds." §197.182, Fla. Stat. (2001).

The *Sartori* opinion acknowledged the difference between its facts, which involved an "overpayment," and a situation where one has not paid any tax, but

seeks to challenge "judgments" made by a Property Appraiser. *Id.* at 1140. In *Sartori*, property was valued at fair market value, when it should have been taxed as pollution control equipment, as the result of an inadvertent mistake. As the court noted, the County apparently was "not familiar with" the pertinent provisions of law relating to pollution control equipment and therefore made a mistake in the assessment. After the taxpayer paid his tax, the County "realized that Sartori's tax assessment was improper and, wanting to correct the error, requested that DOR refund Sartori the $117,354 which he had paid in taxes." *Id.* at 1137. The *Sartori* decision was based on the fact that all parties agreed that an error had occurred due to "mistake or inadvertence." *Id.* at 1139.

The *Sartori* Court also distinguished situations such as the one presented in the instant case in another manner: "Importantly, unlike the taxpayer in *Stafford*, Sartori never contended that the County's assessment was 'unjust,' 'arbitrary,' 'capricious,' or 'illegal.'" *Id.* at 1140. The *Sartori* Court suggested that such challenges would be subject to the 60-day period of non-claim. Unlike the taxpayer in *Sartori*, the Petitioners in this action have alleged that the assessments were "unreasonable, unequal, arbitrary and unlawful." Amended Complaint, par. 29. In this case, the Petitioners challenge a deliberate conclusion reached by the Property Appraiser that the Petitioners' beach homes should be assessed as private property

because these improvements will not vest in the County until the termination of the 99-year leases. Amended Complaint, par. 22-23.

In this case, the Property Appraiser reached his judgment in light of an opinion of the Attorney General provided directly to him about this issue. *Attorney General Opinion* 2001-38. As pointed out in that opinion, Florida case law firmly establishes that a lessee of government land is the owner of all improvements constructed upon such leasehold when the lease states that improvements vest in the government only upon termination of the lease. *Marathon Air Services v Higgs*, 575 So.2d 1340 (Fla. 3d DCA 1991); *Parker v. Hertz Corporation*, 544 So.2d 249 (Fla. 2d DCA 1989). Thus, the Property Appraiser's decision to assess the Petitioners' improvements was a matter of deliberate judgment, not an inadvertent misclassification.

The Petitioners also rely on *Department of Revenue v. Gerald Sohn*, 654 So.2d 249 (Fla. 1st DCA 1995), despite the fact that *Sohn* also was a suit against the Department of Revenue in connection with an alleged overpayment. The *Sohn* decision supports the argument of the Property Appraiser in this action in concluding: "It is clear that mistakes in judgment cannot be corrected after the tax rolls are certified." *Id.* at 251. The Court explained that in order for the issue to be characterized as a classification error subject to a 4-year limitation period, it has to be "an error of omission or commission." *Id.* In direct contradiction to the facts of

the instant case, the deputy property appraiser in *Sohn* submitted an affidavit in which he swore to "errors of *commission* or *omission*, and not errors of *judgment* by the property appraiser." *Id.* (emphasis supplied by Court). In *Sohn*, all parties agreed that there was "**no exercise of 'judgment' by the property appraiser."** *Id.* The Court described this as the "crucial issue." *Id.* Simply put, errors of judgment of the property appraiser must be challenged within 60 days of the certification of the tax rolls. Only those errors that are acknowledged by the property appraiser to be mistakes of commission or omission are eligible to be corrected under Chapter 197.

The only case cited by the Petitioners which did not involve a refund claim is *Florida Government Utility Authority v. Day*, 784 So.2d 494 (Fla. 5th DCA 2001), *rev. denied*, 800 So.2d 613 (Fla. 2001). This case appears to be an aberration based on the administrative breakdown in the process for reviewing exemption applications. The decision in that case arose from convoluted facts and the "botched procedures" of the Property Appraiser's office. *Id.* at 498 (Pleus, J., concurring). In that case, a bona fide governmental utility had purchased property mid-year and wished to obtain an exemption. The Property Appraiser told the utility that it could not file for an exemption because exemption applications had to be filed by March 1st, and the property was purchased after that date. The tax collector informed the utility that the exemption question would be addressed later, upon preparation of the tax roll, at which time the parties could issue a certificate of correction. *Id.* When

the correction was not issued, the utility immediately informed the property appraiser, who "advised the Utility not to pay that bill . . . ." *Id.* at 496. When the exemption was subsequently denied, the utility had no opportunity to challenge the decision within the 60-day period of section 194.171, Florida Statutes.

The *Day* case is a shining example of why hard cases make bad law. Judge Pleus wrote a blistering, concurring opinion expressing concern over the "apparent lack of due diligence on the part of the property appraiser" and the "delays and botched procedures" that caused the problem. *Id.* at 497-98. As reflected in the concurring opinion, the case was actually a case of errors of omission and commission in the administrative process. Such errors fall in the category of "administrative errors," which the Attorney General has opined are subject to correction after the 60-day period of non-claim, unlike errors of judgment which must be challenged within the 60-day period. *Attorney General Opinion* 91-031.[2]

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[2] Another case cited by the Petitioners was clearly decided in error. In *Bankunited Financial Corp. v. Markham*, 763 So.2d 1072 (4th DCA 1999), the Fourth District mistakenly relied on the overruled case of *Lake Worth Towers, Inc. v. Gerstung*, 262 So.2d 1 (Fla. 1972). The *Lake Worth Towers* case was overruled when the Legislature changed section 194.171 in 1983 to make it a statute of non-claim. *Bankunited* cited *Lake Worth Towers* for the proposition that a "void" assessment could be challenged outside the 60-day period of section 194.171. This Court in *Neptune Hollywood Beach Club*, however, expressly repudiated *Lake Worth Towers* and its reliance on the "void/voidable" distinction after the 1983 legislative changes. *Bankunited* relied on this overruled case law and is therefore invalid as a precedent.

The Department of Revenue has a rule confirming that the removal or denial of an exemption is a matter of judgment, not an error of omission or commission. Rule 12D-8.021(2)(d), Florida Administrative Code, specifically provides that a property appraiser's act of "removing an exemption" is an act involving the "judgment of the property appraiser." Similarly, in the Attorney General Opinion 91-031, the Attorney General found: "Once the property appraiser has certified the tax rolls . . . no subsequent changes may be made by the property appraiser . . . which result from a change in judgment. While the property appraiser and the tax collector each have the authority to correct errors of omission or commission at any time, **this authority is limited to the correction of clerical or administrative errors."** The Attorney General confirmed that the provisions of section 197.182 were limited to such clerical or administrative errors, and its provisions were inapplicable to errors of judgment.

The Petitioners suggest that this Court should follow *Department of Revenue and Tedder v. Pepperidge Farm, Inc.*, 847 So.2d 575 (Fla. 2nd DCA 2003). Yet, the *Pepperidge Farm* also involved a refund action brought under section 197.182, Florida Statutes. Moreover, that decision involved the issue of whether software was tangible or intangible property. In stark contrast, this case involves the issue of whether improvements and buildings, which are indisputably real property, are owned by the Petitioners or the government. This is a case of identifying the owner

of a building, not a question of classifying a type of property. Although the cases are not analogous, the *Pepperidge Farm* decision is wrongly decided in purporting to discern a separate statute of limitations for "classification" questions, when there is no statutory basis for doing so. As this Court held in *Neptune Hollywood Beach Club*, and the Fourth District Court held in *Stafford*, there is only one statute that provides a period of non-claim for real property tax assessments. That statute is section 194.171, Florida Statutes, which applies to all property tax challenges, whether directed to value or to whether property tax even applies to the property at issue. The First District correctly concluded that the Petitioners' effort to add plaintiffs after the 60-day period had expired was barred by section 194.171, Florida Statutes.

II. THE PETITIONERS DID NOT RAISE THE ISSUE OF "ACCESS TO COURTS" IN THE TRIAL COURT OR IN THE FIRST DISTRICT COURT OF APPEAL; THEREFORE, THAT ISSUE IS NOT PROPERLY PRESERVED FOR APPEAL.

The Petitioners' suggestion that a 60-day period is too short to allow constitutional access to courts and due process was not briefed or raised in any manner in the trial court or the First District Court of Appeal. The opinion under review does not address the issue. Therefore, this issue has not been preserved for appeal.

Generally, an argument must be raised in the lower tribunal in order to preserve an issue for appeal. The only exception relates to "fundamental error." For an error to be fundamental error, it must relate to the merits of the cause of action. *Sanford v. Rubin*, 237 So.2d 134 (Fla. 1970). This new argument of the Petitioners does not relate to the merits of the action, but instead to the Petitioners' ability to convert their case into a class action. This Court has previously ruled that the failure to raise an issue of "access to courts" was waived when raised for the first time on appeal. *Henderson v. Singletary*, 617 So.2d 313 (Fla.), *cert. denied*, 113 S.Ct. 1891 (1993).

In any event, the Petitioners' argument that 60 days is too short of a period is grossly misleading, because the 60 days does not run from the time that a taxpayer first receives notice of the assessment, but from the time of the formal certification of the countywide tax roll by the Property Appraiser. In the summer of each year, long before the tax roll is certified, each taxpayer is notified of the fact that their property has been assessed. §200.069, Fla. Stat. (2003). After this initial notice, each taxpayer has an opportunity to proceed to the Value Adjustment Board ("VAB") to contest the assessment. After the VAB process is completed, the Property Appraiser certifies the tax rolls for the first time. If the taxpayer does not proceed to the VAB, he or she has 60 days from the time of the certification of the tax rolls to contest the assessment. The final resolution of the VAB process can go beyond the time for

certifying the tax rolls. After the VAB process is complete, the adjustments are noticed and the tax rolls are re-certified. The period to challenge an assessment, therefore, is extended even further if the taxpayer challenges the assessment at the VAB. If such challenge is made, the taxpayer has 60 days from the date the VAB renders its decision to challenge such assessment. §194.171, Fla. Stat. (2003). Thus, the Petitioners' argument is erroneous in suggesting that a taxpayer has only 60 days of notice to make a decision to challenge an assessment.

The Attorney General of Florida has addressed the policy rationale for the period of non-claim in section 194.171, Florida Statutes, as follows: "The statutory procedures established for swiftly challenging assessments are essential for the effective operation of the various governmental entities which rely on the receipt of taxes." Attorney General Opinion 91-31. Finality is desired in order to allow school districts and local governments to budget for the upcoming year. As noted by the Attorney General, corrections to the tax roll after the statutory deadline of section 194.171 are limited to the "correction of clerical or administrative errors." *Id.*

In the case at bar, the First District also noted this policy of encouraging prompt challenges in order for local government to be able to determine on a timely basis what revenues will be available in the coming year. This policy applies whether one is challenging a valuation or challenging the legal basis for placing the property in question on the tax rolls. In all events, the Legislature has a sound policy

rationale for requiring taxpayers to challenge assessments swiftly to allow local government the ability to provide essential governmental services.

CONCLUSION

The First District Court of Appeal correctly concluded that the 60-day period of non-claim in section 194.171, Florida Statutes, applied to the Petitioners' effort to add plaintiffs after the expiration of that period. The Legislature has directed that all tax assessment challenges involving the judgment of the property appraiser are subject to a 60-day period of non-claim. In *Neptune Hollywood Beach Club*, this Court firmly held that even those taxpayers who claim that their properties are not subject to the tax assessed are subject to the 60-day period of non-claim. The legislative policy of encouraging swift resolution of real property tax disputes is necessary to permit local governments the ability to plan and budget with a firm understanding of what tax revenues may be at risk through taxpayer litigation. This policy rationale applies equally to all assessment challenges, whether based on valuation, "classification" or the denial of exemptions or immunities. The First District Court of Appeal's opinion was correct in every aspect and should be affirmed.

Respectfully submitted,

Elliott Messer, Esq.
Florida Bar No. 054461
Thomas M. Findley, Esq.
Florida Bar No. 0797855
Messer, Caparello & Self, P.A.
215 S. Monroe, Suite 701
Tallahassee, Florida 32301
Telephone: (850) 222-0720

Roy Andrews, Esq.
Florida Bar No. 228291
Lindsay, Andrews & Leonard
P.O. Box 586
Milton, Florida 32572
Telephone (850) 623-3200
Counsel for Gregory Brown

CERTIFICATE OF SERVICE

I certify a true and correct copy of the foregoing brief was mailed to: Donald H. Partington, Clark, Partington, Hart, Larry, Bond & Stackhouse, P.O. Box 13010, Pensacola, Florida 32591-3010; and hand-delivered to Joseph Mellichamp, III, Carlton Fields, P.A., 215 S. Monroe Street, Suite 500, Tallahassee, Florida 32302; and to Benjamin K. Phipps, The Phipps Firm, 215 S. Monroe Street, Suite 802, Tallahassee, Florida 32302 on this _____ day of August, 2003.

_____
Thomas M. Findley

CERTIFICATE OF COMPLIANCE

I hereby certify that the font requirements of Rule 9.210(a), Florida Rules of Appellate Procedure, have been complied with in this Brief and the size and style of type used in this brief is Times New Roman 14 point.

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Thomas M. Findley