IN THE SUPREME COURT OF FLORIDA

JIM SMITH, PROPERTY APPRAISER,
PINELLAS COUNTY, FLORIDA, AND
JAMES ZINGALE AS THE EXECUTIVE
DIRECTOR OF THE DEPARTMENT OF
REVENUE, STATE OF FLORIDA,

Petitioners,

vs. Case No. SC05-488

STEPHEN KROSSCHELL,

Respondent.

_____/

SUPPLEMENTAL BRIEF OF RESPONDENT ON THE MERITS

Stephen Krosschell
2907 Cedar Trace
Tarpon Springs, FL 34688
(727) 937-5329

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SUMMARY OF THE ARGUMENT

I. The Appraiser waived any contention that section 197.122, Florida Statutes, should apply in this case, because he failed to raise it in his briefs in this Court or at any level in the proceedings below.

II. Section 193.155 applies in this case because it is a specific statute that controls over the general provisions of section 197.122(1). The legislature referred in section 193.155 to a concept from one portion of section 197.122(3) without referring to section 197.122(1), which suggests that the legislature did not intend section 197.122(1) to apply to homestead property. Section 193.155 is a newer statute that is inconsistent with section 197.122; in such cases, the more recent statute controls. To the extent of ambiguity regarding which statutes to apply, Respondent is entitled to a liberal construction of the statutes in his favor. Allowing correction of clerical errors under section 197.122(1) would require this Court improperly to add words to the Constitution that are not present in the text.

III. Under this Court's precedents, mathematical errors of the sort that allegedly occurred in this case are not merely ministerial that can be corrected under section 197.122(1). Instead, they involve the process by which the appraiser's exercise of judgment is recorded on the tax rolls and communicated to taxpayers. Section 193.092, Florida Statutes, does not apply, because Respondent's house was in fact recorded on the tax rolls, albeit at a zero square

footage. Accordingly, Respondent's house did not "escape" taxation under section 193.092.

ARGUMENT

I. THE APPRAISER FAILED TO RAISE § 197.122, FLA. STAT. AT ANY POINT IN THE PROCEEDINGS BELOW OR IN HIS BRIEFS IN THIS COURT, AND HE THEREFORE WAIVED ANY RELIANCE ON THIS STATUTE.

On December 7, 2005, this Court directed the parties to file supplemental briefs on the application, relationship, and impact, if any, of section 197.122, Florida Statutes, (2000), with regard to the present case and controversy. Petitioners Jim Smith ("Appraiser") and James Zingale have always been aware of section 197.122, because Respondent told them about it and discussed it in his Memorandum of Law in Support of his Motion for Summary Judgment in the trial court. (R49-52) The Appraiser, however, failed to rely on or even mention this statute to the trial judge or to the Second District Court of Appeal. The Appraiser also failed to mention it in his briefs in this court. When this Court *sua sponte* asked about the statute at oral arguments, the Appraiser's counsel was unfamiliar with it.

Under these circumstances, the Appraiser is disentitled to rely on section 197.122 in this Court, because he has never made a specific objection based on this statute. The only appropriate conclusion is that the Appraiser agreed with the Respondent's argument in his summary judgment memorandum that this statute did not apply.

> As a general rule, it is not appropriate for a party to raise an issue for the first time on appeal. Dade County Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638 (Fla. 1999) (a claim not raised in the trial court will not be considered on appeal); Dober v. Worrell, 401 So. 2d 1322 (Fla. 1981) (appellate court will not consider issues not presented to the trial judge on appeal from final judgment on the merits). "In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved." Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985). Because an objection to the availability of this affirmative defense to the property appraiser was not made at the trial court or the district court, we hold that any objection to the defense was waived.

Sunset Harbour Condominium Ass'n v. Robbins, ____ So. 2d ____, 2005 WL 1577040, at *2 (Fla. July 7, 2005).

> At oral argument, Harbor Bay claimed that the court had jurisdiction to amend the judgment under Florida Rule of Civil Procedure 1.540. This claim was not raised at the trial level or briefed for appellate review. Thus, we refuse to entertain this new, alternative argument.

Harbor Bay Condominiums, Inc. v. Basabe, 856 So. 2d 1067, 1069 n.4 (Fla. 3d DCA 2003).

This Court should decline to afford any relief to the Appraiser on the basis of section 197.122, Florida Statutes, because the Appraiser failed to preserve the applicability of this statute for appellate review.

II. SECTION 193.155, NOT SECTION 197.122, CONTROLS THIS CASE.

Even if the Appraiser had preserved the issue for review, several reasons compel the conclusion that section 197.122 does not apply in this case. Although section 197.122(3) provides for corrections of material mistakes of fact, this provision is limited to corrections of errors that "reduce" an assessment, and this provision is therefore obviously inapplicable here. Only the fourth sentence of section 197.122(1) could arguably justify the Appraiser's actions, because it allows "any acts of omission or commission [by property appraisers and others to] be corrected at any time . . . and when so corrected they shall be construed as valid ab initio."

Section 197.122(1), however, is a general statute which does not specifically address homestead property and instead generally addresses several subjects, including errors not only by property appraisers but also by tax collectors, county commissioners, clerks of the court, and county comptrollers. By contrast, section 193.155 is a specific statute directly addressing homestead property and providing for correction of errors relating to homestead property. Section 193.155 therefore controls this proceeding.

Section 193.155 was enacted in 1994 to implement the 1993 constitutional amendment to Section 4(c), Article VII, of the Florida Constitution, which

imposed substantial restrictions on the ability of property appraisers to increase property assessments. Smith v. Welton, 729 So. 2d 371, 373 (Fla. 1999). In the same Act that enacted section 193.155, the legislature made numerous other changes to the homestead tax laws, including an amendment to section 192.001(2), Florida Statutes (2000), to include the section 4(c) constitutional limitation in the definition of property assessed value. "'Assessed value of property' means an annual determination of the just or fair market value of an item or property or the value of the homestead property as limited pursuant to s. 4(c), Art. VII of the State Constitution . . ." Ch. 1994-353, § 61, Laws of Fla. (amended text indicated by underlining–section 193.155 was added in the next section, § 62, of this Act). The legislature intended in this Act comprehensively to address the taxation of homestead property and to conform homestead property taxation to constitutional requirements.

Section 193.155 provides a detailed list of the actions which appraisers are allowed to take for homestead property and then, in subdivision (8), identifies specifically what errors can be corrected.

> (8) Erroneous assessments of homestead property assessed under this section may be corrected in the following manner:
>
> (a) If errors are made in arriving at any annual assessment under this section due to a material mistake of fact concerning an essential characteristic of the property, the assessment must be recalculated for every such year.

> (b) If changes, additions, or improvements are not assessed at just value as of the first January 1 after they were substantially completed, the property appraiser shall determine just value for such changes, additions, or improvements for the year they were substantially completed. Assessments for subsequent years shall be corrected, applying this section as applicable.

Here, the Appraiser claims that he erroneously inputted zero rather than 3,746 for the base square footage of the house on Respondent's homestead property during the course of determining the initial assessed value of the property. (R26) This error was "a material mistake of fact concerning an essential characteristic of the property," as referenced in subdivision (8)(a) for annual assessments. See § 193.1142(c), Fla. Stat. (2005) ("'[M]aterial mistakes of fact' means any and all mistakes of fact relating to physical characteristics of property that, if included in the assessment of property, would result in a deviation or change in assessed value of the parcel of property."). Nevertheless, the specific provisions of subdivision (8) do not provide any mechanism to correct this error in the initial valuation.

Under the doctrine of "expressio unius est exclusio alterius," the legislature therefore excluded correction of the alleged error in this case, because this error is not expressly identified in the list of correctable errors. In Butterworth v. Caggiano, 605 So. 2d 56 (Fla. 1992), this Court applied this principle to the homestead protection in Article X, section 4, of the Florida Constitution. "Under

the rule 'expressio unius est exclusio alterius'–the expression of one thing is the exclusion of another–forfeitures are not excluded from the homestead exemption because they are not mentioned, either expressly or by reasonable implication, in the three exceptions that are expressly stated." Id. at 60. See also Young v. Progressive Southeastern Ins. Co., 753 So. 2d 80, 85 (Fla. 2000) ("'Under the principle of statutory construction, expressio unius est exclusio alterius, the mention of one thing implies the exclusion of another.'").

Without any discussion of section 197.122, this Court concluded that a property appraiser could not correct an error in the initial valuation in Welton. Because the nature of the error was not relevant, this Court in Welton did not identify the exact error that occurred, stating merely that improvements on the property were "under-assessed." 729 So. 2d at 371. Any error, clerical or otherwise, that was not identified in the specific provisions of section 193.155(8) could not be corrected.

This Court's decision in Maggio v. Florida Dep't of Labor and Employment Security, 899 So. 2d 1074, 1079-80 (Fla. 2005) (citation omitted), in which this Court considered whether specific notice requirements in one statute controlled over more general notice requirements in another statute, is also closely on point.

> Given these specific presuit requirements [in section 760.11(1)], we see no basis for concluding that the Legislature also intended a civil rights claimant to be bound by the notice provisions of section

> 768.28(6), which is a broader provision applying to tort actions that requires notice within three years of the date the claim accrues. Moreover, a "'specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms.'" Although the two statutory notice requirements do not expressly conflict, we conclude that the existence of the detailed notice requirements in the Act, which apply to a specific cause of action, should control over the general notice provisions in section 768.28(6).

See also McKendry v. State, 641 So. 2d 45, 46 (Fla. 1994) ("[A] specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms."); St. Joe Paper Co. v. Ray, 172 So. 2d 646, 648 (Fla. 1st DCA 1965) ("[T]he statute construed is a general statute relating to all taxes. A more recent statute which specifically deals with personal property taxes, § 200.02, . . . [is] controlling in this case . . . ."). The specific provision of section 193.155(8) therefore applies in this case over the general provision of section 197.122(1).

Further supporting the conclusion that section 193.155(8) controls is the specific reference to corrections of material mistakes of fact in subdivision (8)(a). To Respondent's knowledge, the phrase "material mistake[s] of fact" appears only two other times in the tax statutes–in sections 193.1142 and 197.122(3), Florida Statutes (2005). The reference in section 193.1142 is itself a reference to the reduction procedure that occurs under section 197.122(3)(b). By referring in section 193.155(8)(a) to a concept based on section 197.122(3) without making

any express reference to section 197.122(1), the legislature can properly be presumed to have considered that section 197.122(1) did not apply to the subject covered by section 193.155(8).

Here again, Maggio is closely on point.

> [I]t is clear from the express reference to section 768.28(5) that the Legislature was aware of the provisions of section 768.28 when it drafted the Florida Civil Rights Act. . . .
>
> If the Legislature intended all the provisions of section 768.28 to apply to the Florida Civil Rights Act, there would have been no reason to refer only to subsection (5). . . .
>
> The express reference to section 768.28(5) in the Act, considered together with the Legislature's failure to refer to section 768.28(6), . . . and the detailed presuit requirements contained in the Act, support a construction that section 768.28(6) does not apply to actions brought under the Act.

Id. at 1080.

In this connection, Respondent also observes that section 193.155(8)(a) allows corrections of material mistakes of fact in annual assessments and therefore allows correction of errors of judgment. See § 197.122(3) ("A property appraiser may . . . correct a material mistake of fact . . . to reduce an assessment if to do so requires . . . the exercise of judgment . . . ."). Section 197.122(1), however, does not permit correction of errors of judgment. See Allen v. Dickinson, 223 So. 2d 310, 310 (Fla. 1969) ("The alterations here attempted by the Tax Assessor were not of the purely ministerial or administrative type subject to correction under [the

predecessor to section 197.122(1)]"); Homer v. Connecticut General Life Ins. Co., 211 So. 2d 250, 253 (Fla. 3d DCA 1968) ("The errors capable of correction [under the predecessor to section 197.122(1)] are oversights of a clerical or ministerial variety, not . . . errors in judgment."). Sections 193.155(8) and 197.122(1) therefore conflict because the former allows corrections of errors of judgment for annual homestead assessments while the latter does not. When two statutory schemes conflict, the specific statute controls over the general. See State v. J.M., 824 So. 2d 105, 112 (Fla. 2002) ("[T]he long-recognized principle of statutory construction [is] that where two statutory provisions are in conflict, the specific statute controls over the general statute.").

This Court should also keep in mind that section 193.155 was enacted in 1994, while the text of the fourth sentence in section 197.122 was enacted at least by 1925. See Ch. 10040, Laws of Fla. (1925).[1] "[W]hen two statutes are in conflict, the later promulgated statute should prevail as the last expression of legislative intent." McKendry v. State, 641 So. 2d 45, 46 (Fla. 1994).

In determining that the specific statute controlled over the general statute, Maggio emphasized that the plaintiff was entitled to a liberal construction of the pertinent statutes. 899 So. 2d at 1080. Here, the statutes are at least ambiguous

[1] Since 1925, the legislature moved the pertinent text to several other statutes, including, at various times, sections 192.21, 197.011, 197.056, and 197.142.

about whether sections 193.155 or 197.122 control. This Court is required under governing law to resolve any ambiguities in favor of Respondent.

> [T]he taxing authority [does not] stand in a favored position before the Court. . . . It is a fundamental rule of construction that tax laws are to be construed strongly in favor of the taxpayer and against the government, and that all ambiguities or doubts are to be resolved in favor of the taxpayer. This salutary principle is found in the reason that the duty to pay taxes, while necessary to the business of the sovereign, is still a duty of pure statutory creation and taxes may be collected only within the clear definite boundaries recited by statute.

Maas Bros., Inc. v. Dickinson, 195 So. 2d 193, 198 (Fla. 1967). See also Harbor Ventures, Inc. v. Hutches, 366 So. 2d 1173, 1174 (Fla. 1979) ("[O]ur duty [is] to construe tax statutes in favor of taxpayers where an ambiguity may exist."); State ex rel. Independent Life & Accident Ins. Co. v. Dickinson, 212 So. 2d 293, 295 (Fla. 1968) ("[I]f the [tax] statute were unclear or dubious in its applicability, it must be construed most liberally in favor of the taxpayer.") Lewis v. Mosley, 204 So. 2d 197, 201 (Fla. 1967) ("[L]aws providing for taxation must be construed most strongly against the government and liberally in favor of the taxpayer.").

The legislature, when it amended section 193.155 in 2001 to allow correction of errors, agreed that the prior version of section 193.155 in effect in the

year 2000 did not allow errors to be corrected.[2] According to the Senate Staff analysis for this amendment, the legislature made this change because the prior law did not allow property appraisers to correct errors.

> Section 193.155, F.S., provides that if an error is made in the annual assessment of homestead property subject to subsection (c) of s. 4 of Art. VII of the Florida Constitution, the annual assessment must be recalculated for every year, but the base year assessment for such properties cannot be changed, even if it is discovered that the base year assessment contains a material mistake of fact concerning the property.

(R76)

Finally, permitting section 197.122(1) to control this issue, coupled with a conclusion that section 197.122(1) did permit the Appraiser to correct the alleged error in this case, would cause the statutory scheme to become unconstitutional. The legislature intended section 193.155 to be interpreted in accordance with the

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[2] Of course, as Respondent has previously argued to this Court, the 2001 amendment does not apply to this case. See, in addition to the cases previously cited, Rio Vista Hotel & Imp. Co. v. Belle Mead Development Corp., 132 Fla. 88, 100, 182 So. 417, 422 (1938) ("[T]he Acts of 1929 could have no effect on the tax rolls or the method of assessment and collection for the years 1925, 1926, 1927, and 1928, which are those under attack here. The portion of the answer setting up these inapplicable statutes was properly stricken."); Overstreet v. Gordon, 121 Fla. 180, 184, 163 So. 477, 478 (1935) ("This is so, because the rights of tax certificate purchasers, being vested according to the valid statutes in effect at the time of sale, cannot be thereafter lawfully impaired by subsequently enacted legislation operating to the prejudice of such purchasers or their assignees."); State v. Bradshaw, 35 Fla. 313, 315-16, 17 So. 642, 643 (1895) ("The issuance of the tax deed had been demanded before the act of 1891 went into operation, and at the time the demand was made that act could have no bearing on the subject.").

constitution, because it defined property assessments to include the constitutional limitation. "'Assessed value of property' means an annual determination of the just or fair market value of an item or property or the value of the homestead property as limited pursuant to s. 4(c), Art. VII of the State Constitution . . . ." § 192.001(2), Fla. Stat. Moreover, even the Appraiser presumably would agree that errors of judgment cannot be corrected under section 4(c), Article VII. Otherwise, error correction could completely swallow the constitutional limitation in section 4(c), because appraisers could always argue that they erroneously failed to recognize that future increases in value would occur and thereby failed to assess the property properly.

Accordingly, to maintain a constitutional prohibition on correcting errors of judgment while simultaneously allowing clerical errors to be corrected under section 197.122(1), this Court would be required to add a distinction between errors of judgment and clerical errors to section 4(c) that is not presently in the constitutional provision's text. Nowhere in section 4(c) is error correction mentioned, whether correction of errors of judgment or correction of clerical errors. If this Court decided to add words to the text to articulate this distinction, then it would violate every canon of constitutional and statutory interpretation. "The Department's interpretation would require the court to add the word 'amended' to [the tax statute], and it is axiomatic that the court is not free to add

words to steer a statute to a meaning which its plain wording does not supply." St. Joe Paper Co. v. Department of Revenue, 460 So. 2d 399, 402 (Fla. 1st DCA 1984).

Moreover, it would violate the long-standing interpretation of this Court to construe constitutional homestead provisions broadly and liberally in favor of homeowners. "[T]he homestead provision is to be liberally construed in favor of maintaining the homestead property. As a matter of policy as well as construction, our homestead protections have been interpreted broadly. Snyder v. Davis, 699 So. 2d 999, 1002 (Fla. 1997) (citations omitted).

For all of these reasons, this Court should determine that section 193.155(8), not section 197.122(1), controls the issues in this case.

III. THE ALLEGED ERROR IN THIS CASE WAS NOT A MINISTERIAL ERROR SUBJECT TO CORRECTION UNDER SECTION 197.122(1) NOR DID RESPONDENT'S PROPERTY ESCAPE TAXATION UNDER SECTION 193.092.

Even if this Court determines that section 197.122 applies in this case, this Court should nevertheless find in favor of Respondent, because the alleged error in this case was not subject to correction under section 197.122. Although some district courts may have allowed errors like the alleged error in this case to be corrected under section 197.122, any such cases are not consistent with this Court's decisions.

The Appraiser's affidavit filed below states that "a data entry error occurred which caused the loss of 3,746 square feet of base living area." (R26) In consequence, the base size living area of the house on the property was changed from 3,746 to zero square feet. (R26) The underlying Certificate of Correction of Tax Roll states that the assessment was changed to "CORRECT KEYPUNCH ERROR BASE SQ FT WAS KEYED AS OPF." (R30) The record does not reflect what "OPF" means, and Respondent does not in fact know what it means.[3] It might mean that the square footage was directly changed, or it might mean that some other code was entered which caused the square footage to change, such as a code reflecting that the house had been torn down and was being reconstructed while the owner lived in a tent. In any event, the Appraiser knew about the house but performed some action which changed its square footage; this is not a case in which the Appraiser made a correction because he was unaware of improvements or buildings on the property.

In Dickinson v. Allen, 215 So. 2d 747 (Fla. 2d DCA 1968), the appraiser made two mathematical errors in the assessment and sought to correct them under a predecessor statute to section 197.122. The appraiser first failed "to include a portion of the value of the improvements to said property in the mathematical

[3] Because the Appraiser never raised section 197.122 as an issue at any level in this case, Respondent had no reason to address the point further below.

computation, said value having been on the records, but excluded, as a mathematical error" and, second, made a "miscalculation in applying the established formula for this type of structure to the remainder of the building." Id. at 749.

The Second District permitted these changes, but this Court reversed. "The alterations here attempted by the Tax Assessor were not of the purely ministerial or administrative type subject to correction under [a predecessor to section 197.122(1)]. They involved much more." Allen v. Dickinson, 223 So. 2d 310, 310 (Fla. 1969).

This Court in Allen expressly approved the Third District's decision in Dade County v. Budd, 219 So. 2d 63 (Fla. 3d DCA 1968), in which the appraiser prepared data sheets to increase a property's valuation after it was sold for a higher price. The appraiser, however, failed to make this change in the actual assessment and attempted to correct it after the tax roll was certified.

> [T]he appellant points out there is evidence that the figures for the increased valuation of the buildings were at hand but were mislaid and not used in the tax roll because the employee who had charge of them was on vacation; that the assessor had started making the change before certification of the roll; but that delays in data processing prevented it from being completed before certification.

Id. at 64. Despite this evidence, The Third District found that this correction was unauthorized under the predecessor statute to section 197.122(1).

In this instance, no significant difference exists between (1) the omitted figures in Allen and Budd that were contained in the appraisers' records but mistakenly not included in the assessments and (2) the figures in this case that allegedly were not accurately included in the certified assessment of Respondent's property. In Allen, Budd, and the present case, the errors were not merely ministerial or administrative but instead involved the process by which the appraisers' exercise of judgment was placed on the tax rolls and communicated to the taxpayer. These errors are not merely clerical, because they are part of the process by which the appraisers' judgment is exercised. Section 197.122(1) therefore does not apply.

Section 197.122(1) does not permit "reassessment after the tax rolls have been certified and the tax paid 'even if the appraiser mistakenly, inadvertently, or negligently assessed the property.'" Scripps Howard Cable Co. v. Havill, 665 So. 2d 1071, 1079 (Fla. 5th DCA 1995) (citation omitted). "There must be a time for the cessation of the relation of the levying and assessing officers to the tax of each year, and there can be no better time than when the possession of the tax rolls pass to other parties." State v. Thursby, 104 Fla. 103, 114, 139 So. 372, 376 (1932).

Finally, this Court in Korash v. Mills, 263 So. 2d 579 (Fla. 1972), considered an assessment which completely omitted a motel that had been built on the property during the year in question. This Court found that the predecessor to

section 197.122 did not apply. The "back assessment Sub judice is not viewed merely as 'clerical' under the [predecessor to section 197.122], for it is more serious than that. The types of clerical corrections under this statute are rather limited." Id. at 581. This Court also explained that corrections to "valuation[s] which had in fact already been assigned and entered on the tax roll" could not be made. Id. This Court continued to cite with approval cases such as Allen and Budd, in which the assessments in fact were made on the tax rolls and certified. In Budd, there "was an increase of [an] existing improvement assessment," which was impermissible. Id. at 581 n.3. "[A]fter certification of the tax roll, a change 'reevaluating' the amount will not be allowed." Id. at 581. In the present case, the house on Respondent's property was in fact included on the assessment, albeit with a change to zero square footage.[4] Under the reasoning of Korash, this assessment could not later be changed after the tax roll had been certified.

Korash did find that the assessment for the motel could be corrected under a different statute, section 193.092, Florida Statutes, which allowed assessments for property that had "escaped" taxation. Respondent's property, however, did not "escape" taxation under section 193.092, because the Appraiser knew about it and it was included on the tax roll. "We must keep in mind the distinction between

[4] Certainly, whether the house was erroneously assessed at zero or 1000 square feet, rather than 3746 square feet, should not make any difference to the

changes and ‘miscalculations' by the assessor which ‘up’ the amount previously assessed after tax roll certification, and the situation here where there has been no billing at all on the improvement . . . which has been completely excluded from the tax roll.” Id. at 581. There has been no reevaluation, no recalculation and no reassessment of the property in this sense.” Id. at 581. By contrast, in the present case, Respondent’s house was not “completely excluded” from the tax roll. Like Section 197.122, section 193.092 therefore does not apply.

CONCLUSION

This Court should affirm.

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result of this case.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been delivered by U.S. mail this 31st day of December, 2005, to Christina LeBlanc, Pinellas County Attorney's Office, 315 Court Street, Clearwater, FL 33756, and to Mark T. Aliff and Eric J. Taylor, Office of the Attorney General, Revenue Litigation Section, PL-01 Capitol Bldg., Tallahassee, FL 32399-1050.

_____

Stephen Krosschell
2907 Cedar Trace
Tarpon Springs, FL 34688
(727) 937-5329

CERTIFICATE OF COMPLIANCE

I certify that the font size and type used in this Brief is 14-point Times New Roman.

_____

Stephen Krosschell
2907 Cedar Trace
Tarpon Springs, FL 34688
(727) 937-5329