IN THE SUPREME COURT OF FLORIDA

THE CROSSINGS AT FLEMING ISLAND COMMUNITY DEVELOPMENT DISTRICT,

Petitioner,

v.

LISA ECHEVERRI, as Executive Director of the Florida Department of Revenue, and WAYNE WEEKS, as Property Appraiser of Clay County, Florida.

Respondents.
_____/

CASE NO.: SC07-1556

First District Court of Appeal
Case No.: 1D06-2026 and
1D06-2158

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL
TALLAHASSEE, FLORIDA

BRIEF OF AMICUS CURIAE FLORIDA ASSOCIATION OF PROPERTY APPRAISERS, INC. IN SUPPORT OF RESPONDENTS

SHERRI L. JOHNSON
Florida Bar No. 0134775
DENT & JOHNSON, CHARTERED
3415 Magic Oak Lane
Post Office Box 3259
Sarasota, Florida 34230
Phone: (941) 952-1070
Fax: (941) 952-1094
E-mail: sjohnson@dentjohnson.com
Attorney for Amicus Curiae
Florida Association of Property Appraisers, Inc.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

OTHER AUTHORITIES

STATEMENT OF IDENTITY AND INTEREST

Amicus Curiae Florida Association of Property Appraisers, Inc. ["FAPA"] is an organization comprised of the duly-elected Property Appraisers of 26 counties in the State of Florida, representing 80% of the total taxable real estate value in the State of Florida. The mission of FAPA is to promote fair and equitable assessment of property within and between counties in the State of Florida. The question of whether property appraisers should be permitted to challenge the constitutionality of statutes as a defense is an important issue that will affect all of FAPA's members in the performance of their duties and their ability to assure fair and equitable assessments within and between their respective counties.

SUMMARY OF ARGUMENT

Historically, county property appraisers have played an important role in safeguarding taxpayers' rights to fair and equitable taxation by challenging the authority of the legislature to enact statutes that either disregard the fundamental requirement of just valuation of all property, or that purport to give preferential, unconstitutional tax treatment to a particular taxpayer or group of taxpayers. If the property appraisers are prohibited from challenging the constitutionality of such acts, even as a defense, then the legislature will not be subjected to any checks and balances with regard to property tax and exemption statutes, and the taxpayers as a whole will suffer as a result.

Prior cases limiting public officials' ability to challenge the validity of statutes have been geared toward preventing the officials, in defending a mandamus action, from challenging the validity of statutes that impose ministerial duties. However, where the statute in question does not involve a ministerial duty, but rather requires the property appraiser to use his discretion in applying the statute to various properties, the property appraiser should not be prevented from challenging the statute, especially where the validity of the statute is a matter of public interest. Allowing a property appraiser to represent the interests of taxpayers generally by challenging the validity of a statute that purports to give an unconstitutional tax exemption to a particular taxpayer or class of taxpayers at the

expense of taxpayers generally is a far cry from allowing public officials to evade their ministerial duties in mandamus actions. This Court should acknowledge the distinction and allow property appraisers to challenge property tax statutes when the public interest is at stake, or, at a minimum, should allow property appraisers to raise constitutional issues as a defense to an ad valorem tax case.

ARGUMENT

I. THE ABILITY OF FLORIDA PROPERTY APPRAISERS TO CHALLENGE THE CONSTITUTIONALITY OF PROPERTY TAX STATUTES IS ESSENTIAL TO THE JUDICIAL BRANCH'S ABILITY TO ACT AS A CHECK ON THE AUTHORITY OF THE LEGISLATURE TO GIVE UNAUTHORIZED PREFERENTIAL TAX TREATMENT TO INDIVIDUAL TAXPAYERS OR CLASSES OF TAXPAYERS.

The separation of powers doctrine requires the judiciary to act as a check on the legislature, by reviewing the constitutionality of legislative enactments. *See Sebring Airport Auth. v. McIntyre,* 783 So.2d 238, 245 (Fla. 2001). Simply put, the judiciary is charged with reviewing the constitutional validity of acts of the state legislature, including property tax statutes. However, if the Property Appraiser, as the public official charged with assuring a just and equitable valuation of all property within his county, is prohibited from questioning the validity of property tax statutes that give unauthorized preferential tax treatment to particular taxpayers, then the legislature's ability to grant unauthorized exemptions and favorable treatment to individual taxpayers will not be subject to the requisite checks and balances.

Property appraisers have successfully challenged unconstitutional tax statutes in the past. One of the earliest such cases was *ITT Community Development Corp. v. Seay*, 347 So.2d 1024, 1026 (Fla. 1977), in which the legislature enacted "Pope's Law," which allowed a taxpayer to challenge its tax

assessment by putting its property up for auction at the assessed value. When the property appraiser refused to follow the procedure for using Pope's Law, the taxpayer brought a mandamus action, and the property appraiser raised several affirmative defenses. *See id.* The trial court struck Pope's Law down as unconstitutional, and that decision was upheld by this Court. *See id*. at 1028.

Later, in *Valencia Center, Inc. v. Bystrom*, 526 So.2d 707, 708 (Fla. 3d DCA 1988), a taxpayer based its challenge to the property appraiser's assessment on section 193.023(6), Fla. Stat. (1987), which required the property appraiser to assess property based on the use permitted by a restrictive lease, rather than the property's highest and best use. The trial court found the statute unconstitutional. *See id.* This Court affirmed and noted that the legislature cannot establish different classes of property for tax purposes, other than those classes recognized by the Florida Constitution. *See Valencia Center, Inc. v. Bystrom*, 543 So.2d 214, 216 (Fla. 1989). It is precisely this type of legislative enactment – special tax treatment for a particular class of taxpayers that is not sanctioned by the Florida Constitution – that property appraisers have frequently found themselves challenging, and which would otherwise go unchallenged.

A perfect example of the type of legislative enactment that will go unchallenged if property appraisers are not permitted to challenge the constitutionality of property tax statutes is the statute at issue in *Sebring Airport*

Authority v. McIntyre, 718 So.2d 296 (Fla. 2d DCA 1998). In that case, the Sebring International Raceway had previously applied for a governmental exemption and its application was denied by the property appraiser. *See id.* at 297. The appellate courts agreed with the property appraiser's application of the governmental exemption provision and his denial of Sebring's exemption application. *See Sebring Airport Auth. v. McIntyre*, 523 So.2d 541 (Fla. 2d DCA 1993), *aff'd*, 642 So.2d 1072 (Fla. 1994).

In response to this Court's determination that the raceway was not entitled to a governmental exemption under the Florida Constitution, the legislature enacted a statute which purported to define property used by a lessee as a convention center, visitor center, sports facility, concert hall, arena, stadium, park or beach as being used for a governmental purpose. *See* §196.012(6), Fla. Stat. (1994). Sebring applied for a governmental exemption from property taxes based on this statute, and the property appraiser denied its application. *See Sebring*, 718 So.2d at 297. Sebring then filed an action against the property appraiser and the Florida Department of Revenue, and the trial court upheld the property appraiser's denial of the exemption, finding that the newly-enacted statute was unconstitutional. *See id.* On appeal, the property appraiser was the only party arguing that the statute was unconstitutional, as the Department of Revenue contended that the statute was

constitutional, and thus sided with the taxpayer in the appeal. *See id.* at 297 n.1. In the end, this Court agreed with the property appraiser and struck the statute down because it purported to create a property tax exemption not authorized by the Florida Constitution. *See Sebring Airport Auth. v. McIntyre*, 783 So.2d 238, 241 (Fla. 2001).

Regrettably, the legislature's penchant for passing unconstitutional tax exemptions for single taxpayers or classes of taxpayers has not abated. The very length of the statutory definition of "governmental, municipal, or public purpose or function" speaks for itself, s*ee* §196.012(6), Fla. Stat., and the number of new and questionable exemptions in Chapter 196 expands every year. An example can be found in section 196.1987, Fla. Stat., which purports to define commercial Biblical history displays as property used for religious purposes. This statute was enacted in 2006 in response to a property appraiser's determination that The Holy Land Experience Theme Park was not entitled to a religious use exemption. *See* In Brief: Tax Exemption for Florida Bible Park, WASHINGTON POST, June 24, 2006, at B09; Alexandra Alter, "Holy Land" Park Combines Entertainment, Evangelism, BILLINGS GAZETTE, September 23, 2006. This statute basically gives a single-taxpayer exemption to a commercial theme park. Unfortunately, given the strict

restrictions on who has standing to challenge property tax statutes,[1] this statute and many more remain unchallenged, effectively giving individual taxpayers special tax treatment at the expense of other similar taxpayers in their county.

This Court has previously acknowledged the importance of ensuring that some person or entity will have standing to challenge taxing statutes. In *Department of Administration v. Horne*, 269 So.2d 659, 660 (Fla. 1972), individual taxpayers challenged various portions of the 1971 General Appropriations Act. In response to questions about the taxpayers' standing, this Court recognized an exception to the "special injury" standing requirement for taxpayer actions challenging the expenditure of public funds. *See id.* at 662. In doing so, this Court noted that "if the taxpayer does not launch an assault, it is not likely that there will be an attack from any other source." *Id.* at 660. The Court noted that the Attorney General could bring such a suit, but that, if the Attorney General declines to do so, "it is only the taxpayer's attack which preserves the public treasure." *Id.* at 661. The Court also considered the fact that the ordinary citizen is sometimes "the only champion of the people in an unpopular cause."

[1] *See, e.g., Wiccan Religious Coop. of Fla., Inc. v. Zingale*, 898 So.2d 134, 135 (Fla. 1st DCA 2005) (holding that the plaintiff organization did not have standing to challenge the constitutionality of sales tax exemptions for religious publications, bibles, hymn books, etc.).

Challenging property tax statutes is also generally not a popular cause, and is a cause that individual taxpayers cannot be expected to champion. While individual taxpayers have occasionally challenged the constitutionality of widely-known exemptions, such as the homestead exemption, *see Reinish v. Clark*, 756 So.2d 197 (Fla. 1st DCA 2000), usually the only party with the knowledge and means to challenge the constitutionality of lesser-known laws giving unconstitutional preferential tax treatment to one taxpayer or class of taxpayers is the county property appraiser. By doing so, the property appraiser does not evade his constitutional duties; rather, as with the citizen-plaintiffs in *Horne*, the property appraiser is acting as a litigant of last resort in an attempt to ensure that the taxpayers within his county are treated equitably and taxed in accordance with the Florida Constitution. Such attentiveness to the requirements of our constitution should be encouraged, not prohibited, by this Court.

II. AS PUBLIC OFFICIALS CHARGED WITH UPHOLDING THE CONSTITUTION, PROPERTY APPRAISERS SHOULD BE PERMITTED TO CHALLENGE THE CONSTITUTIONALITY OF TAX STATUTES WHEN THE ISSUE AFFECTS THE PUBLIC INTEREST AND DOES NOT INVOLVE A PURELY MINISTERIAL DUTY.

Florida cases that have concluded that public officials do not have standing to challenge the constitutionality of statutes have generally been based on the common law maxim that public officials should not be able to avoid performing a ministerial duty by claiming that the statute directing them to perform that duty is

unconstitutional. *See, e.g.*, *Fuchs v. Robbins*, 818 So.2d 460 (Fla. 2002) (noting that, under the general common law, ministerial officers are not authorized to challenge the constitutionality of statutes). The root of this line of cases seems to be this Court's decision in *State ex rel. Atlantic Coast Line R. Co. v. State Board of Equalizer*, 94 So. 681 (Fla. 1922). However, this case was only a 3-2 decision, and the majority was apparently concerned that a decision allowing ministerial officers to challenge statutes would "give impetus to the movement to abrogate or limit this power of the courts." *See id.* at 595. Thus, this decision needs to be viewed in the context of what was facing the courts at the time.[2]

While it would make sense to prohibit a property appraiser from refusing to perform a ministerial duty, such as his duty to assess all property in the county or to prepare and maintain the required maps and records, the statutes discussed above that have been challenged by county property appraisers required the property appraiser to exercise their judgment in determining whether the property was exempt or entitled to special tax treatment. Statutes that create new exemptions or classifications impose discretionary, not ministerial, duties on the property appraisers.

[2] The Court's discussion of the "well-organized movement" to take power away from the courts and the 60 congressional candidates who had pledged themselves to abrogate or modify the doctrine set forth in *Marbury v. Madison* is quite revealing about the majority's state of mind when this decision was issued. *See id.*

The dissent in *Atlantic Coast Line* understood this distinction. The dissenting judges acknowledged that, if a public official's duties are merely of a ministerial nature, the official should not be entitled to question the constitutionality of the statutes that set forth their duties. *See id.* at 614 (J. Whitfield, dissenting). However, where a public officer acts on their own responsibility and would jeopardize the interests of the public by following a questionable law, they should be entitled to challenge the constitutionality of the questionable statute as a defense. *See id.* The dissent explained that the duties of the Board of Equalizers in that case were not ministerial, but were functions involving power and discretion. *See id.* at 691. The dissent also noted that, "in many cases, unless the validity of a statute is challenged by [a public] officer, the question cannot be presented to or decided by the courts, and the state suffers in consequence." *Id.* at 689.

Other states have also differentiated between standing in mandamus proceedings and the general rules regarding standing. In *Wooden v. Louisiana Tax Commission*, 650 So.2d 1157, 1158 (La. 1995), the Louisiana legislature passed a statute purporting to treat a buyer under a contract for deed as the owner of the property for homestead purposes. The Louisiana Constitution, like the Florida Constitution, limits homestead exemptions to those who both own and occupy the homestead. *See id.* The tax assessor filed a declaratory judgment action

challenging the constitutionality of the statute. *See id.* In holding that the tax assessor had standing to challenge the statute in a declaratory judgment action, the Supreme Court of Louisiana acknowledged that a public official cannot raise the constitutionality of a statute as a defense to a mandamus action, but reasoned that the law does not prohibit a tax assessor who is presently performing the duties required by the statute in question from bringing a declaratory judgment action to challenge the statute's validity. *See id.* at 1159. The court noted that the tax assessor clearly had standing to bring an action to challenge the constitutionality of a statute that operated to reduce the ad valorem taxes collected in his jurisdiction. *See id.* at 1160.

In *Elwell v. County of Hennepin*, 221 N.W. 2d 538, 543 (Minn. 1974), the Supreme Court of Minnesota distinguished between a property appraiser's duty to comply with ministerial duties imposed by statute and a property appraiser's duty to interpret and apply discretionary statutes. In that case, the county assessor had challenged the constitutionality of Minnesota's "green acres" statute which, as with the comparable statute in Florida, provides for agricultural property to be assessed at its value for agricultural use, rather than its fair market value. *See id.* at 541. The court acknowledged the line of cases holding that public officials do not have authority to challenge the constitutionality of a law as an excuse for their own failure or refusal to act under a statute clearly imposing only ministerial

obligations. *Id.* at 543. However, the court noted that the green acres statute imposed more than a ministerial duty in that it required the property appraiser to make many factual determinations and to then interpret and apply the statute to particular property. *See id.*

The Minnesota Supreme Court also acknowledged a well-recognized "public interest" exception to the rule prohibiting public officials from challenging the validity of statutes. *See id.* The court found that the validity of the green acres statute was an issue of substantial public interest since it affected the equitable distribution of the tax burden. *See id.* Thus, the court found that, because of the public interest involved and the fact that the assessor's functions were not purely ministerial, the assessor could properly challenge the statute. *See id.* at 543-44.

Likewise, in *Barr v. Watts*, 70 So.2d 347, 351 (Fla. 1954), this Court noted that the necessity of protecting public funds is an issue that affects the public in such an important way that the rule denying ministerial officers standing to challenge a statute must give way to the more urgent and vital public interest in public funds. This exception can and should be applied and, if necessary, extended to give property appraisers standing to challenge tax statutes in order to protect the interest of the public. Examples would include challenges to statutes that, as discussed above, purport to give preferential tax treatment to individual taxpayers or classes of taxpayers at the expense of taxpayers generally. Such a rule would

not be inconsistent with prior rulings of this Court and would allow the property appraiser to protect the public interest by enforcing the constitutional requirements of just valuation and fair and equitable taxation.

III. PROPERTY APPRAISERS SHOULD BE PERMITTED TO RAISE THE CONSTITUTIONALITY OF A STATUTE AS A DEFENSE, SUCH AS WHEN A TAXPAYER CHALLENGES THE PROPERTY APPRAISER'S INTERPRETATION OR APPLICATION OF A STATUTE TO A PARTICULAR PROPERTY.

The Petitioner and Amicus Curiae Florida Chamber of Commerce would have the Court believe that a Property Appraiser can only raise the constitutionality of a statute as an affirmative defense if he refuses to obey the statute. Essentially, they suggest that, if permitted to raise the constitutionality of a statute as an affirmative defense, property appraisers will refuse to apply the law, thereby forcing taxpayers to sue them and put them in a defensive posture. Not so. In actuality, constitutional issues more frequently arise in tax cases when a property appraiser applies a questionable statute in good faith, and the taxpayer challenges the property appraiser's application of the statute.

An example of this would be where the legislature purports to "define" obviously-taxable property as falling into an exempt category. If a property appraiser applies a questionable tax statute, but determines that it is not applicable to a particular taxpayer's property, and that taxpayer sues, the property appraiser cannot be said to have ignored the law in order to be put into a defensive posture

that would allow him to challenge the statute. The property appraiser would simply be raising the validity of the statute as an alternative defense.

For example, in *Sunset Harbor North Condo. Ass'n v. Robbins*, 837 So.2d 1181, 1181 (Fla. 3d DCA 2003), the taxpayer sued to challenge the Property Appraiser's determination that the taxpayer's improvements were substantially completed, and thus taxable under section 192.042(1), Fla. Stat. The Property Appraiser had thus applied the statute in good faith. However, the Property Appraiser raised the constitutionality of the statute a defense. Thus, contrary to the Petitioner's argument, a property appraiser need not ignore the law in order to challenge its validity as a defense. In these situations, the property appraiser should certainly be allowed to defend their decision by any legal means, including a challenge to the constitutionality of the statute at issue.

CONCLUSION

WHEREFORE, Amicus Curiae Florida Association of Property Appraisers, Inc. respectfully requests that this Court affirm the opinion of the First District Court of Appeal, finding that Property Appraisers have standing to challenge the constitutionality of a statute as a defense to a property tax case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to:

Party	**Attorney**
The Crossings at Fleming Island Community Development District, Petitioner	Don H. Lester, Esq. Lester & Mitchell, P.A. 1035 LaSalle Street Jacksonville, Florida 32207 Robert Milner Bradley, Esq. Kepelousos & Bradley, P.A. P.O. Box 562 Orange Park, Florida 32067
Lisa Echeverri, as Executive Director of the Florida Department of Revenue, Respondent	Bill McCollum Attorney General Scott Makar Solicitor General Louis F. Hubener Chief Deputy Solicitor General Office of the Attorney General PL-01-The Capitol Tallahassee, Florida 32399-1050
Wayne Weeks, as Property Appraiser of Clay County, Florida, Respondent	Larry E. Levy, Esq. Loren E. Levy, Esq. The Levy Law Firm 1828 Riggins Road Tallahassee, Florida 32308

Party	**Attorney**
Amicus Curiae Florida Chamber of Commerce	Ron C. Young, Esq. Young van Assenderp, P.A. Gallie's Hall 225 South Adams Street Post Office Box 1833 Tallahassee, FL 32302-1833 Victoria L. Weber, Esq. Sarah M. Doar, Esq. Hopping Green & Sams 123 South Calhoun Street Post Office Box 6526 Tallahassee, FL 32314
Amicus Curiae Property Appraisers, Abe Skinner, Kristina Kupla, Alvin Mazourek, Ed Havill, Francis Akins, Laurel Kelly, Sharon Outland, David Johnson, Ronnie Hawkins, and Morgan Gilreath	Gaylord A. Wood, Jr. Wood & Stuart, P.A. P.O. Box 1987 Bunnell, FL 32110

on this 6th day of March, 2008.

DENT & JOHNSON, CHARTERED
3415 Magic Oak Lane
Post Office Box 3259
Sarasota, Florida 34230
Phone: (941) 952-1070
Fax: (941) 952-1094
Attorney for Amicus Curiae
Florida Association of Property Appraisers, Inc.

SHERRI L. JOHNSON
Florida Bar No. 0134775

CERTIFICATE OF COMPLIANCE

Counsel for the Florida Association of Property Appraiser's, Inc. certifies that Amicus Curiae Brief is typed in 14 point (proportionately spaced) Times New Roman font.

DENT & JOHNSON, CHARTERED
3415 Magic Oak Lane
Post Office Box 3259
Sarasota, Florida 34230
Phone: (941) 952-1070
Fax: (941) 952-1094
Attorney for Amicus Curiae
Florida Association of Property Appraisers, Inc.

SHERRI L. JOHNSON
Florida Bar No. 0134775

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