

IN THE SUPREME COURT OF THE  
STATE OF FLORIDA

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CASE NO. 96-182

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**THE MIAMI BEACH OCEAN RESORT, INC.  
AND LAWRENCE FUCHS, AS THE EXECUTIVE DIRECTOR  
OF THE DEPARTMENT OF REVENUE, STATE OF FLORIDA,**

**Appellants,**

**v.**

**JOEL W. ROBBINS, AS PROPERTY APPRAISER OF  
DADE COUNTY, FLORIDA,**

Appellee.

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**APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA  
THIRD DISTRICT**

**CASE NO. 98-275**

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**BRIEF OF U.S. HOME CORP., PULTE HOMES CORP., CENTEX  
REAL ESTATE CORP., AND LANDSTAR DEVELOPMENT CORP., AS  
*AMICI CURIAE* IN SUPPORT OF APPELLANTS**

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## **INTEREST OF THE AMICI CURIAE**

*Amici curiae* U.S. Home Corporation; Pulte Homes Corporation; Centex Real Estate Corporation; and Landstar Homes, Inc. are home builders and developers of real property in Florida. These companies are among the largest home builders in the United States and are leaders in this industry. Collectively, the *amici* conduct a significant amount of new home construction activity within the State of Florida.

Each of these companies, and many other similarly situated home builders and developers, have a strong interest in the outcome of this litigation. A determination that the Florida Substantial Completion Statute, Florida Statute § 192.042(1), is unconstitutional would have a significant financial impact on home builders as well as other real estate developers. New projects, not substantially complete, would be assessed—contrary to the expressed legislative will and the practice for many years—based on a determination of market value in their inchoate state. Higher assessments, of course, lead to higher taxes, which will affect the economic attractiveness of new construction projects and renovations. To the extent these higher taxes are passed on in the form of higher prices for new construction, as well as a higher initial property tax bill to be pro-rated and shared by builders and buyers at closings, home-buyers throughout Florida also will be adversely affected.

Finally, assessing improvements to real property before they are substantially complete will lead to increased subjectivity and arbitrariness in the assessment process. “Fair market value” has been defined as “the amount a purchaser willing but not obliged to buy will pay to one willing but not obliged to sell.” Markham v. Yankee Clipper Hotel, Inc., 427 So. 2d 383, 386 (Fla. 4th DCA) rev. denied, 434 So. 2d 888 (Fla. 1983) (citation omitted). The existence of a market, with actual sales that reflect what willing sellers and buyers believe a property is worth, is an essential underlying

foundation of fair and equitable assessments. There being no established market for improvements before they are substantially complete, the process of ascribing value to such construction in progress is fraught with subjectivity and inequity. Such concerns may be one of the reasons that the Florida Legislature rationally has decided that assessments should occur only when improvements are substantially complete for the purpose for which they are being built.

For these reasons, the *amici*, as members and representatives of the Florida home building and real estate development industry, are very interested in defending the constitutionality of the Substantial Completion Statute and desire to participate in these proceedings.

### **SUMMARY OF ARGUMENT**

Florida's Substantial Completion Statute, Florida Statute § 192.042(1), far from violating Article VII, Section 4 of the Florida Constitution, actually effectuates the constitutional directive that the Legislature prescribe, by general law, regulations which shall secure a just valuation of all property for ad valorem taxation. The Florida Legislature enacted just such a measure when it required that an improvement to real property be "substantially complete" so that "it can be used for the purpose for which it was constructed" before being assessed.

The Substantial Completion Statute previously has been held constitutional by this Court. Contrary to the holding of the District Court below, the Florida Constitution of 1968 did not remove the authority of the Florida Legislature to provide direction as to when and how just valuation of property is to be determined. Article VII, Section 4 of the 1968 Constitution, like Article IX, Section 1 of the 1885 Constitution, authorizes the Legislature to provide regulations which shall secure just valuation of all

property. The District Court unfortunately misunderstood other Florida decisions forbidding the disparate treatment of types of real property as vitiating the Legislature’s power to make any determinations as to how just valuation is to be calculated, even one so clearly reasonable as to require improvements to be built before they are taxed. Due to this misunderstanding, the District Court departed from this Court’s earlier decision, as well as decisions of the Fourth and Fifth District Courts of Appeal, all upholding the statute against constitutional challenge.

The District Court also erred in finding that the Dade County Property Appraiser (the “Property Appraiser” or the “Appraiser”) had standing to attack the validity of the statute. The District Court reached this conclusion by indulging the fiction that this lawsuit, brought by the Appraiser to challenge an assessment clearly proper under the Substantial Completion Statute was not, in fact, a test case to raise the constitutionality of the statute, which a municipal officer may not do, but instead was merely a “defensive” raising of the statute’s constitutionality.

## **ARGUMENT**

### **I. THE SUBSTANTIAL COMPLETION STATUTE IS A CONSTITUTIONAL REGULATION OF “JUST VALUATION” FOR THE PURPOSES OF ASSESSING AD VALOREM TAXES**

#### **A. The 1968 Florida Constitution Continues To Authorize Legislative Regulation, Such As The Substantial Completion Statute, To Determine “Just Valuation.”**

“Just valuation,” the touchstone of ad valorem taxation, is not defined in the Florida Constitution. Recognizing the need to provide further guidance as to how and when “just valuation” is to be achieved, the framers of the Florida Constitution not only invited, but directed, the Legislature to provide the required assistance.

Article VII, Section 4 states: “By general law regulations shall be prescribed which shall secure a just valuation of all property for ad valorem taxation. . .” Art. VII, § 4, Fla. Const. (1968).

<sup>1</sup> Section 4 then proceeds to provide for specific treatment of certain classes of land, such as agricultural land, land used exclusively for non-commercial recreational purposes, tangible personal property held for sale as stock in trade, and livestock. Section 4 now also provides certain limitations on the assessment of homestead property, including a ceiling on increases in the assessment of such property.

Section 4 echoes the language in the earlier Florida Constitution of 1885. Section 1 of Article IX, insofar as here relevant, provided that “The legislature . . . shall prescribe such regulations as shall secure a just valuation of all property, both real and personal . . .” Art. IX, § 1, Fla. Const. (1885).

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<sup>1</sup> Article VII, Section 4 of the 1968 Florida Constitution provided:

SECTION 4. Taxation; assessments. - By general law regulations shall be prescribed which shall secure the just valuation of all property for ad valorem taxation, provides:

(a) Agricultural land or land used exclusively for non-commercial recreational purposes may be classified by general law and assessed solely on the basis of character or use.

(b) Pursuant to general law tangible personal property held for sale as stock in trade and live stock may be valued for taxation at a specified percentage of its value.

Art. VII, § 4, Fla. Const. (1968).

<sup>2</sup> Article IX, § 1 of the 1885 Florida Constitution provided:

SECTION 1. Uniform and equal rate of taxation; special rates—The Legislature shall provide for a uniform and equal rate of taxation, except that it may provide for special rate or rates on intangible property, but such special rate or rates shall not exceed two mills on the dollar of the assessed

Based upon this authorization of legislative regulation to secure “just valuation,” this Court in Culbertson v. Seacoast Towers East, Inc., 212 So. 2d 646 (Fla. 1968), held that Florida Statute § 193.11, the predecessor to § 192.042(1), was constitutional under the 1885 Florida Constitution.

<sup>3</sup> In Culbertson, this Court found that the Legislature had the authority to enact regulations which were reasonably related to the determination of just valuation of property for taxation purposes. This Court reiterated its holding in Culbertson in Markham v. Sherwood Park Ltd., 244 So. 2d 129 (Fla. 1971), affirming the lower court’s determination that the Substantial Completion Statute was constitutional.

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valuation of such intangible property; provided, that as to any obligations secured by mortgage, deed of trust, or other lien, the Legislature may prescribe an intangible tax of not more than two (2) mills on the dollar, which shall be payable at the time such mortgage, deed of trust, or other lien is presented for recordation, said tax to be in lieu of all other intangible assessments on such obligations. The special rate or rates, or the taxes collected therefrom, may be apportioned by the Legislature, and shall be exclusive of all other State, County, District and municipal taxes; and 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.

Art. IX, § 1, Fla. Const. (1885).

<sup>3</sup> Florida Statute § 192.042(1) provides:

All property shall be assessed according to its just value as follows:

(1) Real property, in January 2 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.

Fla. Stat. § 192.042(1).

The issue has also been faced by two District Courts of Appeal, both of which agreed that the constitutionality of the Substantial Completion Statute was a settled matter. In Markham v. Yankee Clipper Hotel, Inc., 427 So. 2d 383 (Fla. 4<sup>th</sup> DCA) rev. denied, 434 So. 2d 888 (Fla. 1983), the Fourth District Court of Appeal held that Florida Statute § 192.042(1) was not violative of Article VII, section 4 of the current Florida Constitution. The court relied upon Culbertson, and found the changes between the 1968 and 1885 Constitutions on this point to be “insignificant.” Id. at 384, n.3. The Fifth District Court of Appeal also has held Florida Statute § 192.042(1) constitutional based on Yankee Clipper and Culbertson. See Hausman v. Bayrock Investment Co., 530 So. 2d 938 (Fla. 5<sup>th</sup> DCA 1988).

The District Court below, disregarded these cases on the grounds that the 1968 Florida Constitution, contrary to its predecessor, prohibits the Legislature from requiring that assessment of an improvement should occur only at the time the improvement is substantially complete for the purpose intended. The District Court did so notwithstanding the fact that the current Florida Constitution, like the 1885 Constitution, far from prohibiting legislative action in this field, expressly authorizes the Legislature to enact regulations to secure just valuation.

The District Court’s error arises from not recognizing that the pertinent Constitutional language authorizing legislative action has remained intact. Instead, the District Court focused on the fact that the 1968 Constitution, by prescribing specific treatment for several specific types of property, by implication forbids other classifications of property. The District Court has confused laws favoring certain classes of property over others, which are impermissible, with entirely proper regulations defining how and when assessments should be made so as to result in just

valuation.

It was on this basis that the District Court found the Substantial Completion Statute inconsistent with this Court's decision in Interlachen Lake Estates, Inc. v. Snyder, 304 So. 2d 433 (Fla. 1973). In Interlachen, this Court held that the 1968 amendments to Article VII, section 4, enumerating certain classifications of property, eliminated the Legislature's authority to establish additional classes of property entitled to disparate ad valorem tax treatment. Interlachen, 304 So. 2d at 434. However, in Interlachen, this Court emphasized that the 1968 Florida Constitution did not abrogate the Legislature's authority to enact regulations to ensure just valuation, as long as the regulations apply equally to all property. Id. at 435 (emphasis added).

The differences between the Substantial Completion Statute and the law struck down in Interlachen are readily apparent. The statute in Interlachen provided that "platted lands unsold as lots shall be valued for tax assessment purposes on the same basis as any unplatted acreage of similar character until 60 percent of such lands included in one plat shall have been sold as individual lots." Interlachen, 304 So. 2d at 434. This classification had the effect of taxing two identical lots--one held by the developer who has not sold 60 percent of his lots; the other by an individual home buyer--at different levels based on ownership, a criteria extrinsic to the land and improvements themselves. Id. at 435. In striking down this disparate treatment of property based on ownership, this Court recognized that the Constitution granted the Legislature the authority to enact regulations "which establish the criteria for valuing property." Id. at 435.

Similarly, in Valencia Center, Inc. v. Bystrom, 543 So. 2d 214 (Fla. 1989) (Valencia III), this Court found unconstitutional a statute which required the property

appraiser, in situations where the property was subject to a lease entered into prior to 1965, to assess the property only as to the highest and best use permitted by the lease. Again, this impermissible classification had the effect of taxing two identical lots, one with a lease entered into prior to 1965 and the other without a lease or with a lease entered into after 1965, at different rates based on the extrinsic characteristic of use. Once more, this Court recognized that the Legislature has the authority to “establish the just valuation criteria that are to be applied to all property.” Id. at 216, 217.

In contrast, Florida Statute § 192.042(1) does not create a classification which requires different taxes to be imposed on identical property. The Substantial Completion Statute requires that all improvements be substantially complete for the purpose for which they are built before being assessed and given a value. Or, conversely, all improvements to real property shall be assessed at zero until “substantially complete.” Thus, in enacting § 192.042, the Legislature established just valuation criteria to be applied to all property equally.

Furthermore, in dealing with this issue, the District Court again failed to make the crucial distinction between a “classification,” as defined in Interlachen, which seeks to tax identical property differently based on a characteristic extrinsic to the property itself, and a valuation statute in which the legislature fulfills its constitutional mandate to enact regulations to ensure just valuation. As § 194.042(1) does not result in disparate treatment of identical property, it is a valuation statute and as such does not violate Article VII, § 4 of the Florida Constitution.

The District Court’s failure to make this crucial distinction highlights the Appraiser’s error in relying on the doctrine of “expressio unius est exclusio alterius.” The Appraiser, relying on Interlachen, argues that, by enumerating the specific classes

in Article VII, Section 4, the people of the State of Florida “have removed from the legislature the power to make” any other classifications of property for ad valorem assessment purposes. Interlachen, 304 So. 2d at 434. However, a close analysis of Article VII, § 4, shows that each subsection creates a class based on a characteristic extrinsic to the property itself – use in the case of agricultural or historic property and livestock and ownership for homestead property. In short, these constitutional classifications allow identical property to be taxed differently based on characteristics outside the property. Therefore, this Court was correct in holding that the statutes in Interlachen and Valencia III violated the Constitution by impermissibly attempting to create additional such classes of property.

In contrast, as discussed above, the Substantial Completion Statute treats identical property the same. As such, it creates a fundamentally different type of category than the classes set forth in the Constitution or found impermissible in Interlachen and Valencia III and the doctrine of “expressio unius est exclusio alterius” is inapplicable.

As recognized by Interlachen and Valencia III, the organic language of the Florida Constitution explicitly empowers the Legislature to enact such a valuation statute. Because regulations such as the Substantial Completion Statute are not improper classifications in the sense of Interlachen and Valencia III, the District Court erred in holding the statute unconstitutional.

**B. The Substantial Completion Statute Is A Reasonable Regulation Within The Legislative Prerogative To Secure “Just Valuation”**

Once it is recognized that the Legislature is authorized to make regulations which define and implement the concept of just valuation and that the Substantial Completion

Statute is just such a regulation, it remains only to determine whether the Substantial Completion Statute is so unreasonable as to be unconstitutional.

The starting point of the analysis should be the general presumption that legislative enactments are constitutional. The courts will presume in favor of the constitutionality of a statute and will be inclined to a construction favorable to its validity. Scarborough v. Webb's Cut Rate Drug Co., 8 So. 2d 913 (Fla. 1942). Whenever reasonably possible, a court is obligated to interpret statutes in such a manner as to uphold their constitutionality. Capital City Country Club, Inc. v. Tucker, 613 So. 2d 448 (Fla. 1993). See also State v. Sobieck, 701 So. 2d 96 (Fla. 5<sup>th</sup> DCA 1997) (a statute is presumed to be constitutional until shown otherwise). The same presumption applies when the issue is the correctness of the Legislature's interpretation of its constitutional authority. See Agency for Health Care Administration v. Associated Industries of Florida, Inc., 678 So. 2d 1239, 1247 (Fla. 1996) cert. denied, 117 S. Ct. 1245 (1997) (the court is deferential when reviewing a legislative determination as to the meaning of a constitutional provision; the court's role is to determine whether the legislature has adopted a rational construction of the constitutional limitation).

The presumption of constitutionality is even stronger when taxation statutes are at issue. While federal constitutional precedents are not directly pertinent, it should be noted that the United States Supreme Court repeatedly has recognized that state legislatures should enjoy particular deference in enacting tax statutes. See, e.g., Kahn v. Shevin, 416 U.S. 351 (1974) (where taxation is concerned, if no specific federal right, other than equal protection is imperiled, states have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems

of taxation; courts should not substitute their social and economic beliefs for the judgment of legislative bodies who are elected to pass laws); Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) (same).

Even without a presumption of constitutionality, the Substantial Completion Statute easily passes constitutional muster. The statute reflects, as was recognized in Culbertson, a reasonable judgment that improvements to real property should be built, at least to the point of “substantial completion,” before they are taxed. See Sherwood Park, 244 So. 2d at 130 (it was the intent of the legislature not to tax the property other than unimproved unless it was complete to the point where it could be used for the purposes intended); Hausman v. Bayrock Investment Co., 530 So. 2d 938 (Fla. 5<sup>th</sup> DCA 1988) (an improvement is substantially completed under § 192.042(1) if it can be put to the use for which it was intended, even though it is lacking some minor items). Whether or not this Court agrees with that determination as a matter of tax policy is not the issue. The Legislature is charged with making that judgment, and its determination is clearly within the bounds of reasonable choices as to when assessments should be made.

As discussed above, the Florida Constitution, in Article VII, section 4, specifically grants the Legislature the authority to make policy determinations concerning the computation of just value for the purpose of ad valorem taxes. To read the constitutional provision otherwise, as the District Court has done, is to render it meaningless. Under the District Court interpretation, the Dade County tax assessor’s determination that a particular uncompleted improvement has value is entitled to more weight than the Legislature’s policy determination that improvements should not be assessed until substantially completed.

The reasonableness of this legislative judgment is further supported by two factors. First, to the extent “just valuation” requires determination of “fair market value,” the Legislature could easily find that that determination cannot normally be made until structures are “substantially complete.” “Fair market value” has been defined as “the amount a purchaser willing but not obliged to buy will pay to one willing but not obliged to sell.” Yankee Clipper, 427 So. 2d at 386 (citation omitted). The Legislature reasonably could conclude that the lack of an established market for properties not yet substantially complete justifies conducting assessments at the time of substantial completion. Without an established market for the uncompleted improvements, the appraisal of a construction in progress is uniquely vulnerable to abuse and inequity. See Yankee Clipper, 427 So. 2d at 386 (“[i]t 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.”).

This approach is consistent with the well-established principle that, in valuing property, an appraiser is limited to considering the immediate use of the property. See Bystrom v. Valencia Center, Inc., 432 So. 2d 108, 111 (Fla. 1983) (Valencia II) (to be considered by a property appraiser, the use must be expected, not merely potential or a “reasonable susceptible” type of use; it must be expected immediately, not at some vague uncertain time in the future); Dade County Taxing Authorities v. Cedars of Lebanon Hospital Corp., Inc., 355 So. 2d 1202, 1204 (Fla. 1978) (“[t]he Care Center which, as of January 1, 1974, was designed for and restricted to hospital usage, but was not in actual use for hospital purposes, was not entitled to exemption from ad valorem taxation for the year 1974) (emphasis added); Lanier v. Overstreet, 175 So. 2d 521

(Fla. 1965) (tax assessors cannot consider potential uses to which property is reasonably susceptible and to which it might possibly be put in some future tax year or even the current tax year; the only use considered must be expected immediately); Security Management Corp. v. Markham, 516 So. 2d 959 (Fla. 4<sup>th</sup> DCA) rev. denied, 518 So. 2d 1276 (Fla. 1987) (in determining value under the general appraisal statute, the appraiser must consider the present use of the property and its highest and best use in the immediate future; “immediate future” means “expected immediately.”). Improvements which are not substantially completed are, by definition, improvements which are not actually in use and cannot be used in the immediate future.

Second, the Legislature could properly consider the potential value of structures under construction to be reflected in the assessment of the underlying land. The effect of § 192.042(1) is to tax land with incomplete improvements as if it was unimproved. Florida Statute § 193.011 sets forth the factors an assessor must consider in arriving at just value; including, the present cash value, the highest and best use, the condition of the property and the income from the property. See Fla. Stat. § 193.011. The appraiser considers the potential development of unimproved land, if that potential has increased the just value, or fair market value, of the land. See Florida Rock Industries, Inc. v. Bystrom, 485 So. 2d 442, 448 (Fla. 3d DCA) rev. denied, 492 So. 2d 1332 (Fla. 1986) (“present market sales of unimproved land which may be based on the buyers’ expectations of ‘future potential use’ are evidence of present market value. . . [a] present demand for property generated by a future potential does increase its market value”).

## **The Substantial Completion Statute Is Not An Unconstitutional Conclusive Presumption**

The Property Appraiser argues that Florida Statute § 192.042(1) is unconstitutional as it creates an irrebuttable presumption. This is incorrect. As mandated by Article VII, section 4, the Legislature has promulgated a regulation that the assessment of new construction should await substantial completion of the improvement. Section 192.042(1) does not impose a factual determination on the appraiser. The appraiser still has the discretion to make the factual findings required to determine whether an improvement is substantially completed. The Legislature regularly makes policy decisions and issues regulations which are conclusive. It is only when the Legislature makes an irrebuttable factual presumption of an issue committed to adjudication that constitutional concerns are raised.

The cases relied on by the Appraiser concern statutes which create such an irrebuttable presumption of fact. See Agency for Health Care Admin. v. Associated Industries of Florida, Inc., 678 So. 2d 1239, 1254 (Fla. 1996) cert. denied, 117 S. Ct. 1245 (1997) (statute creating presumption that every Medicaid payment is proper and necessitated by the defendant's product); Straughn v. K & K Land Management, Inc., 326 So. 2d 421, 424 (Fla. 1976) (concerning statute which creates a presumption that land purchased for three or more times its assessed agricultural value is not intended to be put to good faith commercial agricultural use). No such concerns are present here.

**THE PROPERTY APPRAISER LACKS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF A STATE STATUTE WHICH WAS DULY ENACTED BY THE LEGISLATURE**

A public office, such as the office of property appraiser, is a creature of the State. The people, acting through their legislature, pass statutes to regulate how the holder of such offices are to perform their duties. Under such circumstances, public officers, whose role is regulated by the Legislature, may not challenge the wisdom of that legislature in defining that role. Thus, as the court in Green v. City of Pensacola, 108 So. 2d 897 (Fla. 1<sup>st</sup> DCA 1959) explained:

[E]very law duly enacted by the Legislature is presumptively constitutional until declared otherwise by a court of competent jurisdiction, and . . . ministerial officers must obey such until the constitutionality thereof is judicially passed upon in a proper proceeding. The attempt by a ministerial officer of the executive department to nullify an enactment of the legislature under the guise of observing his [or her] oath of office to support the Constitution, has been consistently rejected by an unbroken line of decisions rendered by our Supreme Court.

Green, 108 So. 2d at 900. See also Department of Revenue v. Markham, 396 So. 2d 1120, 1121 (Fla. 1981) (“For important policy reasons, courts have developed special rules concerning the standing of governmental officials to bring a declaratory judgment action questioning a law those officials are duty-bound to apply. . . . Disagreement with a constitutional or statutory duty, or the means by which it is to be carried out, does not create a justiciable controversy or provide an occasion to give an advisory judicial opinion.”); Brazilian Court Hotel Condominium Owner’s Association, Inc. v. Walker, 584 So. 2d 609, 611 (Fla. 4<sup>th</sup> DCA 1991) (“Furthermore, the property

appraiser, as a constitutional officer, lacks standing to challenge the amendment.”).

This Court has long warned of the very real mischief which could be created without such a limitation on the standing of public officers to challenge the constitutionality of the very statutes which they are charged to enforce. In Barr v. Watts, 70 So. 2d 347 (Fla. 1953), this Court explained:

And, indeed, the chaos and confusion which would result from the application [of a rule allowing officers of the executive branch of government to declare legislative acts unconstitutional] would be immediately apparent. We now have in this state to carry on the state's business almost 100 state agencies, boards and commissions, most of whose members hold office by virtue of executive appointment. The people of this state have the right to expect that each and every such state agency will promptly carry out and put into effect the will of the people as expressed in the legislative acts of their duly elected representatives. The state's business cannot come to a stand-still while the validity of any particular statute is contested by the very board or agency charged with the responsibility of administering it and to whom the people must look for such administration.

Barr, 70 So. 2d at 351.

This very real concern, expressed by this Court in Barr, is readily apparent in the instant action. Every county of the state has its own property tax assessor. Utter chaos and vast inequity would result if each county tax assessor, in order to maximize tax revenues for his or her own county, was at liberty to determine which of the Legislature's tax statutes to enforce, against which particular types of property.

Notwithstanding the salutary purposes of the standing rule, it is not totally inflexible. The courts have noted exceptions to the general rule, into which the

Property Appraiser, in the instant action, has attempted to uncomfortably shoehorn himself. However, while these exceptions may have merit in a different context, they are wholly inapplicable in the context of a property appraiser challenging a duly enacted tax statute of the Legislature.

**A. The “Defensive Posture” Exception To The Standing Rule Is Inapplicable To The Property Appraiser**

As noted above, state officers generally do not have standing to challenge the constitutionality of duly enacted statutes. “If, on the other hand, the operation of a statute is brought into issue in litigation brought by another against a state agency or officer, the agency or officer may defensively raise the question of the law’s constitutionality.” Department of Education v. Lewis, 416 So. 2d 455, 458 (Fla. 1982). See also Markham v. Yankee Clipper Hotel, Inc., 427 So. 2d 383, 384, n.3 (Fla. 4th DCA 1983) (recognizing the standing of a tax assessor, sued as defendant, to challenge the validity of the Substantial Completion Statute). This “defensive posture” exception to the rule is not applicable to the Property Appraiser in this case.

The Property Appraiser and Judge Sorondo’s concurrence to the District Court opinion contend that the “defensive” posture arose not at the circuit court level, but during the prior proceedings, in which the taxpayer challenged the Property Appraiser’s assessment before the Dade County Value Adjustment Board. This entire line of reasoning is circular. Under this logic, government officials would be free to simply ignore whatever statutes with which they happen to personally disagree. When an aggrieved citizen points out that the official is not permitted by statute to engage in a particular conduct, the official could then freely challenge the constitutionality of the statute, in this new “defensive” posture. Such an argument is merely a thinly-veiled

attempt by government officials to challenge the very laws which they are charged to uphold; a posture which this Court has repeatedly and firmly held is impermissible. See, e.g., Barr 70 So. 2d at 351. To accept the Property Appraiser's reasoning, would, for all practical purposes, overturn the rule laid down by this Court in repeated opinions going back to Barr. This argument should be rejected to assure that the Property Appraiser, like all government officials, faithfully upholds the law which he is charged to execute.

Indeed, recently the Second District Court of Appeal took issue with Judge Sorondo's concurrence and certified to this Court a conflict regarding the standing issue. That court stated:

In a concurring opinion, Judge Sorondo explains that the litigation should be viewed as beginning not when the property appraiser filed suit in circuit court, but when the taxpayer challenged the property appraiser's assessment by petition to the VAB. Thus, he reasons, the property appraiser became a plaintiff only by a procedural requirement of the statute. We believe this analysis overlooks the fact that if the property appraiser had followed the law initially, as State ex rel. Atlantic Coast Line Railway Co. dictates he is obligated to do, the taxpayer would not have been forced to petition the VAB and set the litigation in motion. It both defies logic and violates the rule of State ex rel. Atlantic Coast Line Railway Co. to suggest that [the property appraiser] can ignore the law by denying an exemption based on his belief that it is unconstitutional and then be allowed to ask the court to approve his disobedience by upholding his denial.

Turner v. Hillsborough County Aviation Authority, 24 Fla. L. Weekly, D2034, D2036 (Fla. 2d DCA Sept. 3, 1999).

Further, the Property Appraiser's "defensive" standing argument is undercut by

his own pleadings. In the Property Appraiser's Memorandum of Law in Support of his Constitutional Challenge to Florida Statute § 192.042(1), he admits that the constitutional challenge to the state statute was raised by him in his complaint. Furthermore, the trial brief prepared by the Appraiser, and served by him on the Taxpayer, before the trial court hearing in this matter, also affirmatively raised the constitutional challenge. Thus, having taken great pains to demonstrate that he, as plaintiff, pled the constitutional challenge in his complaint and initial trial brief, it is wholly disingenuous for the Property Appraiser to now claim that he only raised the constitutional issue defensively.

**The Property Appraiser Is Not Covered By The “Public Funds” Exception To The Standing Rule, Because The Substantial Completion Statute Requires No Disbursement Of Public Funds**

“It has long been held that the general rule that a ministerial officer cannot in a judicial proceeding attack the validity of a law imposing duties on him [or her] is subject to the exception that such a law may be challenged where it involves the disbursement of public funds.” Kaulakis v. Boyd, 138 So. 2d 505, 507 (Fla. 1962) (emphasis added). The Property Appraiser's attempt to bring himself within this “public funds” exception to the standing rule is misplaced because the Substantial Completion Statute requires no disbursement of public funds.

Apparently aware of this obvious flaw in his argument, the Property Appraiser argues that because he is involved in the process of collecting tax revenues he has a sufficient nexus with public funds in order to come under the “public funds” exception, despite the fact that the Substantial Completion Statute requires no disbursement of public funds. The concurrence in the District Court emphasized its agreement with this

position. In support of this position the Property Appraiser cites to City of Pensacola v. King, 47 So. 2d 317, 319 (Fla. 1950) and State ex rel Harrell v. Cone, 177 So. 854 (Fla. 1938). As demonstrated below, the Property Appraiser's argument is unfounded and his reliance on King and Cone is misplaced.

As noted above, the "public funds" exception gives a public officer standing to challenge the validity of a law that would require the disbursement or expenditure of public funds. Kaulakis, 138 So. 2d at 507. The Property Appraiser argues that there is language in King and Cone that appears to broaden the "public funds" exception. However, the Appraiser fails to note that this Court has rejected any such broad interpretation, and specifically disapproved of any contrary language in King and Cone.

In Barr, state officers attempted to challenge the validity of a state law arguing that they could not enforce a law they believed to be unconstitutional. Just as the Property Appraiser does in the instant action, the state officers in Barr cited to King and Cone in support of their argument. The Supreme Court rejected their reading of those cases, stating:

It is true, as contended by the respondents, that there is dictum in the cases of City of Pensacola v. King, Fla., 47 So. 2d 317, and State ex. rel. Harrell v. Cone, 130 Fla. 158, 177 So. 854, which might be construed as an approval of the respondents' theory; but a careful reading of those cases will reveal that, in each such case, there was involved a disbursement

<sup>4</sup> of the public funds in the administration of the Act in question - so that these cases

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<sup>4</sup> The District Court concurrence at note 24 erroneously states that this Court in Barr did not limit the public funds exception to disbursements. However, the concurrence appears to have overlooked the language quoted above in the text in which this Court did note that the exception applies only in the case of disbursements. Indeed, this Court's

could have turned on this one point alone.

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Under the circumstances, we do not feel bound by the dictum in the cited cases relied on by respondents, and re-affirm the rule. . . that the right to declare an act unconstitutional. . . cannot be exercised by the officers of the executive department under the guise of the observance of their oath of office to support the Constitution.

Barr, 70 So. 2d at 350, 351 (emphasis added) (citations omitted).

The Property Appraiser’s attempts to broaden the “public funds” exception to include situations that do not involve the disbursement of public funds, is wholly unsupported by King and Cone, as limited and construed by this Court in Barr.

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pronouncement on this issue is even more explicit. Thus, in Barr, this Court also stated:

[A] ministerial officer, charged with the duty of administering a legislative enactment, cannot raise the question of its unconstitutionality without showing that he [or she] will be injured in his [or her] person, property, or rights by its enforcement, (citation omitted) or that his [or her] administration of the Act in question will require the expenditure of public funds (citation omitted).

Barr, 70 So. 2d 350(emphasis added).

<sup>5</sup> The Property Appraiser also relies on Green v. City of Pensacola, 108 So. 2d 897, 901 (Fla. 1st DCA 1959) wherein the court quoted this Court, stating: “ When the public may be affected in a very important particular, [i.e.] its pocket-book. . . the necessity of protecting the public funds is of paramount importance and the rule denying to ministerial officers the right to question the validity of the Act must give way to a matter of more urgent and vital public interest.” (emphasis in original). The Property Appraiser’s reliance on Green is also misplaced.

Green relies upon, and quotes this Court’s opinion in Barr. See Green, 108 So. 2d at 901 n.11. Thus, when the Green court discussed the necessity of protecting public funds, it was in the context of the holding in Barr, which as discussed above, reaffirmed this Court’s limitation on the “public funds” exception to include only those cases involving the disbursement of public funds.

The distinction between collection and disbursement is a very important one. Disbursement involves the spending of funds which the Legislature has defined as belonging to the public. Collection involves taking funds away from individuals in order to fill the public coffers. Where the Legislature has concluded that a particular source of revenue should not be tapped, that money belongs to individuals, not the state. The Property Appraiser should not have the power to attempt to confiscate funds from individuals when the Legislature has made a prior determination that such persons are entitled to keep their money. Thus, the “public funds” exception, by being limited to disbursements of public funds, makes a clear distinction between disbursing funds that rightfully belong to the public, and attempting to collect funds to which, the Legislature has determined, the State has no entitlement.

<sup>6</sup> Accordingly, because no disbursement of funds is implicated in the instant action, the “public funds” exception to the standing rule has no application to the Property Appraiser and his duty-bound enforcement of the Substantial Completion Statute.

**C. The “Interference With Duty” Exception Is Inapplicable Because The Duty To Interpret “Just Valuation” Is Committed To The Florida Legislature, Not The Dade County Property Appraiser**

The Property Appraiser argues that he has standing to challenge the constitutionality of a statute where he is willing to perform his duties but is prevented from doing so by others. In essence, the Property Appraiser argues that the Substantial Completion Statute prevents him from carrying out the constitutional mandate that

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<sup>6</sup> “The conflict of interest between being responsible for determining fair market value and being interested in maximizing revenue is palpable.” David M. Richardson, “Just Value” or Just a Value - Florida’s Imperial Property Appraiser, 48 Fla. L. Rev. 723, 734 (1996).

property be appraised at “just valuation.” The Property Appraiser’s argument is without merit because the Substantial Completion Statute is a constitutionally authorized exercise of legislative power.

Article VII, Section 4 of the Florida Constitution states, in pertinent part: “By general law regulation shall be prescribed which shall secure a just valuation of all property for ad valorem taxation,. . . .” Art. VII, § 4, Fla. Const. (1968). There is only one entity in the State of Florida with the power and authority to prescribe “general laws,” applicable throughout the state. That entity is the Legislature. No local county tax assessor has the right to promulgate general laws. Thus, the duty, which the Property Appraiser attempts to usurp for himself, to prescribe general laws to secure just valuation of property, rightfully belongs only to the Legislature.

The Legislature in carrying out its constitutional mandate is authorized to prescribe regulations which are to be used by local county tax assessors in determining the appropriate valuation of any given piece of property. Thus, for example, the Legislature has promulgated Florida Statutes, § 193.011 which sets out a number of factors which local county tax appraisers are to consider in assessing the tax valuation of property. Similarly, as discussed above, the Substantial Completion Statute is a determination of how just valuation should be measured which the Legislature is constitutionally authorized to prescribe. See Section I B., supra. Accordingly, it is the Legislature that has the constitutional duty to secure “just valuation.” The Property Appraiser’s duty is to follow the instructions of the Legislature. To accept the Property Appraiser’s contrary view, would give rise to the very morass envisioned by the Florida Supreme Court in Barr, in which the state’s business grinds to a halt as a myriad number of local officials challenge the Legislature’s actions because the local officials

looked into the Constitution and there, discovered for themselves, a higher duty. As such, this Court should find the Property Appraiser has no standing to challenge the Substantial Completion Statute.

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<sup>7</sup> The Property Appraiser also argues, incorrectly, that if he has no standing to challenge the Substantial Completion Statute, no one would be in a position to mount such a challenge. The fact is that any citizen or taxpayer has standing to raise a constitutional challenge. See Lewis, 416 So. 2d at 459 (“As ordinary citizens and taxpayers, however, appellants . . . have standing to challenge the constitutionality of the proviso.”); Department of Revenue v. Markham, 396 So. 2d 1120, 1121 (Fla. 1981) (noting that only “in the absence of a constitutional challenge,” will a taxpayer’s standing be limited to situations involving special injury). Furthermore, the Attorney General of the State, as a representative of all the people of Florida (rather than only the people of a particular county) has standing to challenge the constitutional validity of state laws. See Barr, 70 So. 2d at 351 (“[T]he, public interest will be best served by channeling all such attacks on the validity of statutes through the duly-elected public officer whose duty it is to protect the public interest in this respect - the attorney general of this state.”).

**C.CONCLUSION**

For these reasons, the judgment of the District Court should be reversed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to ARNALDO VELEZ, ESQ., 255 University Drive, Coral Gables, Florida 33134, JAY W. WILLIAMS, Assistant County Attorney, Stephen P. Clark Center, Metro-Dade Center, 111 N.W. 1<sup>st</sup> Street, Suite 2810, Miami, Florida 33128-1993, and JOSEPH MELLICHAMP, Assistant Attorney General, Office of the Attorney General, Tax Section, The Capitol, Tallahassee, Florida, 32399-1050, on this 17th day of September, 1999.

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Stuart H. Singer