IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT, STATE OF FLORIDA

DARDEN RESTAURANTS, INC.
and GMRI, INC.,

Appellants,

v.

RICK SINGH, as ORANGE COUNTY
PROPERTY APPRAISER,

Appellee.
_____/

CASE NO. 5D16-4049
L.T. NOS. 2014-CA-4289-O
2015-CA-4980-O

BRIEF OF *AMICUS CURIAE* FLORIDA CHAMBER OF COMMERCE, INC. IN SUPPORT OF APPELLANTS

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Identity and Interest of the Florida Chamber of Commerce

The Florida Chamber of Commerce ("Florida Chamber") is a not-for-profit corporation that serves as Florida's business advocate. It is the largest federation of businesses, local Chambers of Commerce, and business associations in Florida. This federation represents in excess of 139,900 member businesses with more than three million employees across Florida. Members operating businesses throughout Florida own tangible personal property similar to that of Darden, and they have a vital interest in ensuring that the ad valorem tax process substantively and procedurally complies with the Florida Constitution and Florida Statutes. The order appealed ("Order") appears to misapprehend these requirements and, if not overturned, will place the property of Florida Chamber members at risk of excessive assessment with a corresponding dilution of their statutory remedy.

Summary of Argument

This is the first appellate case involving application of the Florida Legislature's 2009 property tax reform, embodied in section 194.301, Florida Statutes. The 2009 legislation resulted from hard-fought efforts spanning more than a decade, and was strongly supported by the Florida Chamber. It eliminated vestiges of an anachronistic burden of proof; established a requirement of adherence to professionally accepted appraisal practices; and directed consideration of assessment methodology in disputes. The Property Appraiser

("OCPA") did not comply with this statute, and the trial court erred in not enforcing it.

A second important issue arises from OCPA's concept of the value standard that applies in Florida property tax cases. The constitutional standard is just value, which is legally synonymous with fair market value. A property appraiser who applies a different value standard has chosen the wrong assessment goal as a matter of law. In this case OCPA maintains that the business needs of the existing owner preclude reliance on the market for similar property. This is an attempt to redefine the constitutional value standard. The trial court's approval of this thesis is error, threatens all Florida taxpayers, and must be rejected.

Argument

I. The burden of proof and professionally accepted appraisal practices

A brief history leading to the 2009 amendments to section 194.301, Florida Statutes will aid in understanding their importance in this case and beyond.

A. "Every reasonable hypothesis" test; origin and early application

Historically, a taxpayer seeking relief from a property tax assessment was required to negate "every reasonable hypothesis" of its legality. This requirement first appeared in *Roberts v. American Nat'l Bank*, 115 So. 261 (Fla. 1927), where a bank challenged an assessment of its shares on the ground that the capital of other

competing businesses, although taxable, was deliberately not assessed. In holding that the bank had adequately pleaded intentional discrimination, the Court stated:

> [w]here equity may properly be invoked to restrain the collection of state taxes on the ground of the invalidity of the assessment, the complainant must make a complete case for equitable relief by *excluding every reasonable hypothesis of a legal assessment against him.*

Id. at 263-265 (emphasis added) (citations omitted). Like *Roberts,* most of the early property tax litigation involved claims of discrimination, and the "every reasonable hypothesis" test was often repeated. *See, e.g., Folsom v. Bank of Greenwood,*120 So. 317 (Fla. 1929); *Louisville & N.R. Co. v. Amos,* 123 So. 745 (Fla. 1929); *West Virginia Hotel Corp. v. W.C. Foster Co.,* 132 So. 842 (Fla. 1931). The few cases involving claims of overvaluation were unlike contemporary litigation, as they were grounded in discrimination and fraud upon the taxpayer, *See, e.g., Camp Phosphate Co. v. Allen,* 81 So. 503, 511 (Fla. 1919). As in *Roberts,* the limited scope of equity jurisdiction was also a prominent element in the cases.

The "every reasonable hypothesis" test thus proceeded directly from a legal environment in which the courts had limited jurisdiction and exercised it rarely. Although the Supreme Court eventually recognized that overvaluation without discrimination warranted judicial relief, *Schleman v. Connecticut Gen. Life Ins. Co.*, 9 So. 2d 197 (Fla. 1942), it did not consider whether the "every reasonable hypothesis" test was suited to pure valuation disputes.

In 1963 the Legislature enacted the predecessor to section 193.011, Florida Statutes, prescribing seven factors (now eight) to be *considered* in deriving just valuation. Shortly thereafter, the Supreme Court held that "just valuation" is "legally synonymous" with "fair market value," *Walter v. Schuler,* 176 So. 2d 81, 85 (Fla. 1965). The Court also noted that the statute was enacted "to pin the assessors more firmly to the Constitutional mandate" of just valuation. *Id.* What remained missing was any statutory direction as to what an assessor should do with the information "considered." This omission was to become a serious problem.

B. Modern applications of the "every reasonable hypothesis" test

Thereafter, different courts applied "every reasonable hypothesis" and section 193.011 differently, until *Blake v. Xerox Corp.,* 447 So. 2d 1348 (Fla. 1984). The assessment of Xerox's leased copiers was derived by applying depreciation to their list sales prices, a method Xerox's expert eschewed because sales were rare. Reversing a judgment for the property appraiser, the district court found that Xerox had "excluded every reasonable hypothesis of legality," and that the income capitalization method was "the only method which would assure a just valuation." *Xerox Corp. v. Blake,* 415 So. 2d 1308, 1311 (Fla. 3d DCA 1982).

On review, the Supreme Court applied the "reasonable hypothesis" test differently, according virtually conclusive weight to the trial court's finding that the property appraiser had "properly considered" the factors in section 193.011:

> The trial court's determination that the appraiser properly considered the statutory factors as mandated was supported by competent, substantial evidence. Thus the only remaining question was whether the appraiser, following the law, could conceivably and reasonably have arrived at the appraisal value being challenged. Although the trial court appears to have grounded its judgment on the finding that Xerox had failed to prove that its method was superior, this finding was unnecessary to the judgment. *Regardless of which method was theoretically superior,* the trial court was bound to uphold the appraiser's determination if it was lawfully arrived at and *within the range of reasonable appraisals, that is, if it was supported by any reasonable hypothesis of legality.*

Blake v. Xerox Corp., 447 So. 2d at 1350 (emphasis added). As discussed subsequently, an examination of methodology is essential to enforcement of the just value standard. And although a "range" in the opinions of appraisers is common, the range between the parties in *Xerox* was $15M to $28M. To reject inquiry into methodology and accept such a difference as reasonable is to leave no real remedy for overassessment, and to prioritize protecting a property appraiser's discretion at the expense of the just value mandate. Art. VII, §4, Fla. Const.

Bound by *Blake v. Xerox Corp.,* appellate courts thereafter reversed decisions that found a taxpayer's evidence more probative of just value than the property appraiser's. *See, e.g., Havill v. Lake Port Prop.,* 729 So. 2d 467 (Fla. 5th DCA 1999); *Walker v. Smathers,* 507 So. 2d 1207 (Fla. 4th DCA 1987); *Mastroianni v. Barnett Banks,* 664 So. 2d 284 (Fla. 1st DCA 1995), *review denied,* 673 So. 2d 29 (Fla. 1996); *Daniel v. Canterbury Towers*, 462 So. 2d 497 (Fla. 2d DCA 1985). In *Canterbury Towers*, the district court explained the test this way:

> The reason for the "no reasonable hypothesis" doctrine with respect to the judicial review of property appraiser decisions, is that there are numerous, and sometimes conflicting, appraisal theories or techniques for establishing an opinion as to real estate value. All of these theories and approaches have general recognition, and none are necessarily more appropriate than others for all cases.
>
> It is because there are so many well recognized approaches and techniques for arriving at an appraisal decision that the property appraiser's decision may be overturned only if there is no reasonable hypothesis to support it.

462 So. 2d at 502. This is a modern-day rationale for a test that originated at a different time, in a different type of case, for different reasons.

The nature of appraisal is that there is nowhere to look to confirm a value determination, that is, no answer to be found in the "back of the book." The only way to test the credibility of an appraisal is to examine the method used in deriving it. To say, as in *Xerox,* that the "theoretical superiority" of a methodology is irrelevant in a valuation dispute is, ironically, to discard the only tool available to decide if just value has been achieved. The post-*Xerox* cases thus focused on whether and how all the factors of section 193.011 were "considered," "used," and "weighted." *See Canterbury Towers,* 462 So. 2d at 501 ("the principal argument between the taxpayer and the property appraiser occurs over the extent of the consideration the property appraiser must afford each of the factors"); *Lake Port Prop.,* 729 So. 2d at 470-71; *Mastroianni,* 664 So. 2d at 288.

Regarding the new rationale for the old test: (1) one valuation method often *is* demonstrably better than another; (2) *Canterbury Towers* overstated the subjectivity of appraisal. The modern discipline is supported by a robust body of standards and acceptable practices;[1] (3) just valuation is a Florida constitutional mandate, but the property appraiser's discretion is not; (4) the limits of equity jurisdiction that engendered the "every reasonable hypothesis test" test are long gone. §194.171(1), Fla. Stat.; (5) allowing assessors virtually unlimited discretion is inconsistent with the way Florida courts decide disputes over other taxes; (6) Florida courts routinely decide between competing valuation methodologies in non-tax cases; and (7) the courts of other states, where valuation is no less subjective than in Florida, routinely do so in property tax cases.

C. Reform

In 1995 the Florida Legislature enacted House Bill 577 to replace "every reasonable hypothesis" with a preponderance of the evidence test. Governor

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[1]The federal Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) mandated the development of Uniform Standards of Professional Appraisal Practice, and state level certification and licensure requirements for real estate appraisers, *see* Part II of Chapter 475, Florida Statutes. More generally, the appraisal profession has evolved substantially since the "every reasonable hypothesis" test appeared in 1927. In 1951 the Appraisal Institute first published *The Appraisal of Real Estate*, now in its 14th edition, and it offers a wide variety of courses and rigorous requirements for the MAI designation. The International Association of Assessing Officers has its own body of instructional programs and designation. The American Society of Appraisers (ASA), which focuses largely on tangible personal property, has a similar history, curriculum, and designation.

Chiles vetoed this measure, but created a study task force, whose recommendations were substantially enacted in chapter 97-85, Laws of Florida, and codified as section 194.301, Florida Statutes. This law established different burdens of proof for overcoming the property appraiser's presumption of correctness and for proving overvaluation where the presumption was not overcome. It also prohibited arbitrary differences in appraisal practices with respect to comparable properties.[2]

However, the 1997 legislation set no requirements for appraisal practices in deriving assessments. The burden of proof was changed, but the type of proof required was not addressed. Property appraisers were still required to consider the factors in section 193.011, but still lacked direction as to the use of the information considered. Value Adjustment Boards ("VABs") and courts continued to lack guidance for judging whether an assessment met the just valuation requirement.

In 2009 the Legislature acted comprehensively, amending section 194.301, Florida Statutes and supplying the missing elements. *See* section 1, Chapter 2009-121, Laws of Florida. The amended statute provides in pertinent part:

> (1) In any administrative or judicial action in which a taxpayer challenges an ad valorem tax assessment of value, the property appraiser's assessment is presumed correct if the appraiser proves by a preponderance of the evidence that the assessment was arrived at by complying with s. 193.011, any other applicable statutory requirements relating to classified use

[2] For an academic discussion of the property tax system and legislative attempts to address it in 1995 and 1996, *see* Richardson, *"Just Value" or Just a Value--Florida's Imperial Property Appraiser,* 48 Fla. L. Rev. 723 (1996).

> values or assessment caps, and *professionally accepted appraisal practices*, including mass appraisal standards, if appropriate. However, *a taxpayer who challenges an assessment is entitled to a determination by the value adjustment board or court of the appropriateness of the appraisal methodology used in making the assessment.* The value of property must be determined by an appraisal methodology that complies with the criteria of s. 193.011 and *professionally accepted appraisal practices.* The provisions of this subsection preempt any prior case law that is inconsistent with this subsection.
>
> (2) In an administrative or judicial action in which an ad valorem tax assessment is challenged, the burden of proof is on the party initiating the challenge.
>
> (a) If the challenge is to the assessed value of the property, the party initiating the challenge has the burden of proving by a preponderance of the evidence that the assessed value:
>
> 1. Does not represent the just value of the property after taking into account any applicable limits on annual increases in the value of the property;
>
> ***
>
> (b) If the party challenging the assessment satisfies the requirements of paragraph (a), the presumption provided in subsection (1) is overcome, and the value adjustment board or the court shall establish the assessment if there is competent, substantial evidence of value in the record which cumulatively meets the criteria of s. 193.011 and *professionally accepted appraisal practices*. If the record lacks such evidence, the matter must be remanded to the property appraiser with appropriate directions ****from the value adjustment board or the court, and the property appraiser must comply with those directions.

§194.301, Fla. Stat. (emphasis added). In addition, the legislation repudiated the "every reasonable hypothesis" test and "any cases published since 1997 citing the

every-reasonable hypothesis standard … to the extent that they are interpretive of legislative intent." §194.3015, Fla. Stat.[3]

The 2009 amendments represent a radical change in direction for the Florida property tax system. The required adherence to professionally accepted appraisal practices, mentioned in three locations, is of special importance. The third sentence in subsection (1) could not be clearer:

> The value of property must be determined by an appraisal methodology that complies with the criteria of s. 193.011 and professionally accepted appraisal practices.

The same paragraph directs the court to consider the appropriateness of the property appraiser's methodology, an explicit departure from *Xerox.*[4]

Section 194.301 cannot eliminate subjectivity or differences of opinion in valuation. However, it provides guidance for resolving those differences and allocates the burden a proof in a way that balances the need to accord discretion to property appraisers with taxpayers' right to just valuation of their property.

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[3]The Legislature's authority in this domain is prescribed in article VII, section 4 of the Florida Constitution, which directs that "[b]y general law regulations shall be prescribed which shall secure a just valuation of all property…." Moreover, although property appraisers are constitutional officers, they are county officers whose duties are fixed by law. Art. VIII, §1(d), art. II, §5(c), Fla. Const.

[4]The new law does not make methodology the "core issue" or alter the principle that an assessor may reach the right result for the wrong reason, *Bystrom v. Whitman,* 488 So. 2d 520 (Fla. 1986). If a sound methodology reveals that an assessor stumbled into the correct result, the assessment would not be reduced.

D. Section 194.301 was not applied in this case

In this case, an independent, designated appraiser, sitting as a VAB Special Magistrate, found OCPA's assessments excessive. Therefore, OCPA had the burden of proof below, including proof of compliance with professionally accepted appraisal practices. He did not adduce such proof, but insisted, after pleading otherwise [R14, ¶ 15], that he was not required to do so. His argument conflicts with the statute's text and purpose and makes no sense. The requirement that he adhere to the standards of his profession applies in the daily discharge of his duties; it does not spring to life only when an assessment is challenged.[5] The Order makes no reference to section 194.301 and resembles a throwback to the prior law. Instead of critical scrutiny of OCPA's case, one finds deference. For example:

- Paragraph 10 of the Order states: "[t]he particular method of valuation…is left to the discretion of the property appraiser," citing *Valencia Center v. Bystrom,* 534 So. 2d 214 (Fla. 1989). That is no longer correct; section 194.301, Florida Statutes now requires scrutiny of assessment methodology.
- Although section 195.032, Florida Statutes, provides the Department of Revenue's standard measures of value "shall not be deemed to establish the just

[5] OCPA focused below on section 195.032, Florida Statutes, which provides that Department of Revenue "standard measures of value" are prima facie correct. He argued that he followed DOR guidelines and need not adhere to professionally accepted appraisal practices. However, section 195.032 provides that the standard measures of value do not establish the just value of any property. In other words, more is required than adherence to the standard measures of value.

value of any property," the Order accords that effect to the tables OCPA relied upon as "standard measures." However, the tables cannot capture all functional obsolescence, or any economic obsolescence. These forms of depreciation must be accounted for in the cost approach [Tr 145, 762].

- Deference to OCPA is evident in the trial court's unbalanced treatment of the parties' market research. OCPA's "market studies" were discredited but were only "approximately 10% of OCPA's efforts to look to, and analyze the market" [Order ¶17]. For the other 90 percent, he identified no market or market transactions. Instead, he testified in general to conversations with his staff and taxpayers, and review of other taxpayers' VAB submissions. If this type of "market research" to support a valuation satisfies appraisal standards, OCPA adduced no evidence of it. However, he suffers no criticism for this in the Order, which found the assessments "very reliable and credible" [Order ¶ 20].
- In contrast, the work of Darden's appraiser (Mr. Seijo), who relied on a market and on transactions he could actually describe and identify, is excoriated [Order ¶¶ 24-28]. The point here is not that Mr. Seijo's work should be insulated from scrutiny; it is that the trial court required so much of him, and so little of OCPA. With only his tables and lip service to the market, OCPA prevailed. This is not placing the burden of proof on OCPA; it is old-fashioned deference.

The Legislature has directed that property appraisers adhere to professional standards and that the prior judicial deference to their assessments be replaced with a balanced inquiry. That did not happen here and will likely not happen in future cases unless this Court makes clear that the statute cannot be ignored or diluted. OCPA's failure to adduce evidence of compliance with professionally accepted appraisal practices is fatal and requires reversal of the Order. *See CVS EGL Fruitville Sarasota v. Todora,* 124 So. 3d 289 (Fla 2d DCA 2013) (reversing trial court for not applying burden of proof under original version of section 194.301).

II. OCPA and the trial court used an incorrect value standard

OCPA used a computer-assisted mass appraisal ("CAMA") system to generate the assessments of Darden's furniture, fixtures, and equipment ("FF&E") and maintained that this satisfied the constitutional just (fair market) value standard. Darden's Mr. Seijo, a designated appraiser, relied upon the market for used FF&E and his values were substantially lower than OCPA's. The VAB Special Magistrate, also a designated appraiser, agreed with Mr. Seijo.[6]

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[6]OCPA initially described his value standard as "fair market value in continued use" [R 3621, 3850]. If properly applied, this means that once fair market value is determined, the business earnings are considered (or assumed) to discern if they support an investment in the property at its fair market value. *See, Valuing Machinery and Equipment: The Fundamentals of Appraising Machinery and Technical Assets,* at 10-11 (American Society of Appraisers, 3d Ed. 2011). There was no consideration below of Darden's earnings in relation to its investment in FF&E [Tr 1543]. Darden's appraisal was "fair market value installed," meaning that it included the costs of delivery, sales tax, and installation [Tr 1259, 1287].

In the trial court OCPA was critical, not just of Mr. Seijo's work, but of the very idea of consulting the market for used FF&E in valuing used FF&E. Despite all his generalized testimony about "looking to" the market, he forcefully insisted that reliance on the market reflecting the actions of actual market participants was improper. His support for this thesis was a prior trial court decision (an outlier) that misapprehended the market value standard. Lest this faulty reasoning spread further, the Florida Chamber submits the following analysis of OCPA's objections to the use of data from the market for used FF&E.

Those objections are described and sustained in paragraph 26 of the Order:

> Mr. Seijo also testified that Darden's use of the Subject TPP to operate its business on the Valuation Dates was irrelevant to his valuation methodology. His methodology is, therefore, contrary to 193.011(2), which expressly lists "the present use of the property" as a relevant consideration for valuing TPP for ad valorem tax purposes. In this regard, the Final Judgment in *Wal-Mart Stores, Inc. v. Crapo* explains the inherent defects of a methodology like Mr. Seijo's, which attempts to value TPP the taxpayer is using to operate its business with sales listings (internet or otherwise) that offer TPP for firesale prices because it is dormant and not in "present use" by a business:
>
> > Quite obviously, there would be no willing seller that would sell relatively new property for ten cents on the dollar, especially when it had recently been installed in an ongoing business. The fact that there is a "market" in used equipment totally fails to take into consideration the reality of the way businesses are run. Ongoing operations such as Wal-Mart simply do not sell equipment that has a remaining useful life to the owner.

[Order ¶ 26], citing *Wal-Mart Stores, Inc. v. Crapo,* No. 97-CA-4728 (Fla. 8th. Cir. Ct. February 26, 2001). In short, an appraiser seeking to determine the market value of used FF&E should not consult the market for used FF&E, because: (1) the sales are at "firesale prices;" and (2) the property on the market is not in "present use by a business" but is "dormant." These views are considered separately below.

A. "Firesale prices"

Transactions at "firesale" prices should not be considered because they do not satisfy the conditions of the market value standard (due, for example, to duress or inadequate exposure time). With the burden of proof on OCPA, the trial court erroneously accepted this characterization of the used FF&E market without evidence. Lower prices should not be impugned merely for being lower. The market is an objective reality that cannot be ignored to satisfy a preference for higher values. *McArthur Jersey Farm Dairy v. Dade County,* 240 So. 2d 844 (Fla. 3d DCA 1970) is on point, rejecting assessments of equipment at original cost less [physical] depreciation in favor of lower values from the used equipment market.

B. "Present use" and "dormancy"

Mr. Seijo is said to have violated section 193.011(2), Florida Statutes because the FF&E on the market was "dormant" whereas Darden was using its FF&E and would not be a willing seller. This misunderstands both the statute and the valuation standard. Value to the current owner (referred to as "value in use"

below) is different than value on the market. A home is not worth more because its owner has no plans to sell it or would demand more than a market price. Market value is what a property would likely sell for if the owner *did* choose to sell.

Florida courts have consistently rejected this "value to the owner" theory. *See, e.g., Gulf Coast Recycling, Inc. v. Turner,* 753 So. 2d 712 (Fla. 2d DCA 2000) (striking assessment based on current use as apartments where the market value was zero due to contamination); *McArthur Jersey Farm Dairy,* 240 So. 2d 844 (approving valuation of equipment that was in "use" in taxpayer's business based on the market, although the equipment on the used market was no less "dormant" than in this case). The market value standard is unconcerned with the willingness of the existing owner to sell, or whether property on the market is "dormant."

The trial court decision in *Wal-Mart Stores v. Crapo,* quoted above, focused on why Wal-Mart would not be a willing market participant and would not accept the prices reflected on the used FF&E market.[7] At trial, OCPA tried similarly to set up "hypotheticals" to suggest that Darden also would not accept market prices. This is sophistry. Whatever Darden might be willing to accept, the prices in market transactions do not depend on whether Darden chooses to participate in the market or the prices it would demand. No buyer would pay more for Darden's

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[7]Contra to *Crapo*: *Loral Data Systems v. Mikos,* No. 93-2848-CA-01 (Fla. 12th Cir Ct. December 12, 1994), *affirmed,* 665 So. 2d 225 (Fla. 2d DCA 1995); *Wal-Mart Stores, Inc. v. Turner,* 7 Fla. L. Weekly Supp. 38b (Fla. 13th Cir Ct. July 13, 1999).

property than the price for which he could acquire comparable property from willing sellers on the used market. The *market* defines the market price [Tr 824].

Section 193.011(2), Florida Statutes was misapplied below, and is best understood in the real property context, where land may be subject to different uses. *See, generally, The Appraisal of Real Estate,* Chapter 12 (Appraisal Institute 14th ed. 2013). The purpose of the statutory reference to present use and the expectation of use in the immediate future is to prevent speculation about future land uses, as explained in *Lanier v. Overstreet,* 175 So. 2d 521 (Fla. 1965).

Tangible personal property is typically designed for a specific use, so present use and highest and best use are unlikely issues. Land might be used for a hotel or shopping mall, but the expected use of a chair is as a chair. The Order does not suggest that the present or highest use of Darden's chairs is not as chairs, or that Darden's expert assumed another use. Mr. Seijo complied with section 193.011(2), and would have violated that statute and the market value standard had he based his appraisal on what OCPA's witness referred to as Darden's "going concern" [Tr 705]. As designated appraisers, Mr. Seijo and the independent VAB Magistrate who agreed with him understand that "use" does not mean "user."

C. Additional aspects of "value to the owner"

OCPA's value theory must be consistently applied. Consider that real property generally increases in market value over time, and OCPA presumably

follows the market. He is interested in whether the highest use of a land parcel is for residential development, an office building, or a mall, but not with whether the existing owner wants to sell or its business needs. In valuing the parcel, he relies on the generally increasing selling prices of similar property, and would properly resist an argument for a lower assessment based on the circumstances of the owner.

Tangible personal property, however, typically does not appreciate, but loses market value rapidly (*e.g.*, automobiles, computers, furniture). Here, OCPA focuses on whether the existing owner would be likely to sell; expounds on why this owner would not accept what the market says the property is worth; advances an erroneous concept of "present use;" and insists that the prices in the market cannot be trusted because they are too low. His "value to the owner" theory thus appears to apply selectively, where it can support increased assessments.[8]

The subject of an ad valorem tax is property, and is measured by the property's market value. OCPA adds a premium over market value when the owner is a going concern. The property tax becomes a tax in part on the activity of being in business. As this Court observed in another context, a property tax cannot be imposed on business value. *Scripps Howard Cable Co. v. Havill,* 665 So. 2d

[8] Selectivity also exists in OCPA's "dormancy" thesis, which he invokes to justify disregarding the used market because the property there is "dormant," yet his assessments are based on the retail prices Darden paid to its vendors when the property was also "dormant."

1071 (Fla. 5th DCA 1995), *approved,* 742 So. 2d 210 (Fla. 1998). OCPA defends his computer-generated assessments on the basis of a prohibited criterion.

CAMA systems and the tables they employ can produce acceptable results when property does not lose market value faster than the rate of physical depreciation applied by the system tables. But such systems are only tools and cannot be conclusive when the actions of market participants reveal different values. To claim otherwise on the basis of a specious "value to the owner" theory is to abandon market value as the goal of assessments. OCPA's preference for computerizing his process is understandable, but his foremost duty is to comply with the constitutional just value standard.

Although critical of Mr. Seijo's appraisal, the Order does not find that there is no market for used FF&E that could be useful in valuing Darden's property. Had OCPA been open to considering the market, he might not have relied upon the same data as Mr. Seijo or reached the same conclusion. He retains the discretion to apply rational thought to the appraisal process. But his categorical rejection of the market, on the pretext that it does not account for Darden's needs, was unlawful.

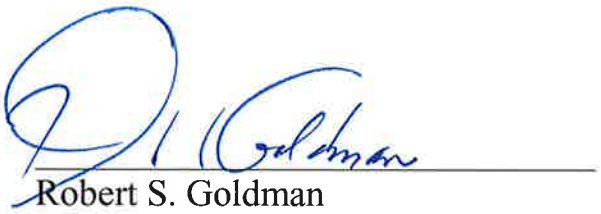
This discussion underscores the significance of OCPA's failure to prove that his assessments (or his value theory) conform to professionally accepted appraisal practices. §194.301, Fla. Stat. The Legislature has prioritized adherence to the just value standard, but OCPA's priority is unhampered reliance on his computer. His

office exists to determine market value, but he renounces the market and its values. His computer and its tables are not his means to the end of deriving market value assessments; they *are* the end, and market value is redefined to make it work. This position and the Order endorsing it conflict with the statute and the Constitution.

Conclusion

The Florida Chamber has no position regarding the value of Darden's FF&E, but the decision below is deeply flawed and has major implications for all Florida businesses. This Court should confirm that assessments must be derived in accordance with professionally accepted appraisal practices; that the burden of proof imposed on a property appraiser who lost at the VAB must be genuinely applied; and that the valuation standard is market value, not "value to the owner."

Respectfully submitted,



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Certificate of Service

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Certificate of Compliance

I hereby certify that the foregoing brief complies with the font requirements of Rule 9.210(a), Florida Rules of Appellate Procedure.

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