IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT 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-4289-0
2015-CA-4980-0

# AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE RESTAURANT LAW CENTER, AND THE FLORIDA RESTAURANT & LODGING ASSOCIATION

On Appeal from a Final Order of the Ninth Judicial Circuit,
In and For Orange County, Florida

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## STATEMENT OF IDENTITY FOR THESE THREE AMICI

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country, including the State of Florida.

The Restaurant Law Center is a public policy organization affiliated with the National Restaurant Association, the largest foodservice trade association in the world. *See* http://www.restaurant.org/restaurantlawcenter This industry is comprised of over one million restaurants and other foodservice outlets employing almost 14.7 million people—approximately 10 percent of the U.S. workforce. In Florida, members of The Florida Restaurant & Lodging Association ("the FRLA") automatically become members of the National Restaurant Association.

The FRLA is Florida's premier non-profit hospitality industry trade association. Its mission is to "Protect, Educate and Promote" Florida's $108.8 billion hospitality industry which represents 1.4 million employees. *See* https://www.frla.org/

## THE INTEREST OF THE AMICI IN THIS CASE

As the property appraiser's attorney explained to the trial judge when describing the legal issue in this case: "You're making history." (S. R. 1386). The Amici agree with that assessment. This will be the first appellate case to address tangible personal property appraisal since the substantial amendments to the relevant statutes in 2009.

All three organizations have a common interest in promoting tax structures that encourage capital investment. When businesses decide where to make a major investment in a corporate headquarters or in facilities like restaurants that have low profit margins and high tangible personal property investments, problems with a state's tangible personal property tax system can influence close decisions. The businesses that the Amici represent are better served if Florida's tangible personal property tax system is fair and competitive with other states. The Amici would submit that Florida is better served by such a system as well.

The Legislature in Florida in recent years has attempted to cure long-standing problems in Florida's property tax system by altering the burden of proof and by requiring proof, in appropriate cases, that the property appraiser's methodologies comply with "professionally accepted appraisal practices." *See* §§ 194.301, 194.3015, Fla. Stat. (2009).

But now there is emerging political pressure to increase a county's tax base by taxing corporate property – not on its market value – but on its special value to its current owner that keeps that owner from wanting to sell the property in the marketplace. This special value, which is always higher than fair market value, is sometimes referred to as "value in use" by professional appraisers who believe it is an inappropriate measure.

The Property Appraiser in this case does not dispute that that he is required to prove his methodology by "professionally accepted appraisal practices" in front of the value adjustment board (VAB). But, if he fails to support his methodology before the VAB, he maintains that he is entitled to prevail before the circuit court without any proof that his assessment is supported by professionally accepted appraisal practices. The trial court accepted this argument. Given that circuit court orders are so often used as persuasive authority in property tax disputes, unless this Court reverses the circuit court and announces a proper application of section 194.301, Florida will return to the days of the "imperial" property appraiser, which the Legislature has properly sought to end. It is this concern that brings the Amici to this Court.

## SUMMARY OF THE ARGUMENT

In its initial brief, Darden has raised specific issues distinct to its own case. The Amici take no position on those specific issues, but encourage this court to announce two holdings presented by this case that are of broad application and of exceptional importance.

For Florida to remain fully competitive in the national marketplace, this court should hold:

1) **After a value adjustment board has ruled in favor of the taxpayer and a property appraiser has commenced an action under section 194.036, Florida Statutes (2009), the taxpayer is entitled pursuant to section 194.301(1), to require the property appraiser to present proof that a disputed appraisal methodology complies with "professionally accepted appraisal practices."**

2) **A property appraiser cannot misuse the "highest and best use" factor contained in section 193.011(2) to increase a tangible personal property tax appraisal from the market-based "just value" to a higher "value in use," by relying on factors personal to the owner that are irrelevant to any buyer.**

The Amici submit that both of these issues are issues of law that the court can determine de novo. At worst, the second issue is a mixed question of law and fact for which the trial court erred by failing to require the Property Appraiser to provide any testimony that his methodology met professionally accepted appraisal practices. The Amici submit that an independent professional appraiser would

never conflate the “fair market value” or “value in exchange,” which is required to establish “just value," with this version of “value in use.”

## ARGUMENT

### I. IN CIRCUIT COURT, A PROPERTY APPRAISER WHO LOST BEFORE THE VAB MUST PRESENT PROOF THAT A DISPUTED APPRAISAL METHODOLOGY COMPLIES WITH “PROFESSIONALLY ACCEPTED APPRAISAL PRACTICES.”

For many years, Florida was regarded as an outlier jurisdiction with “imperial” property appraisers who were little supervised by the courts and were essentially immune from the standards applicable to other professional appraisers. *See* David M. Richardson, *“Just Value” or Just a Value – Florida’s Imperial Property Appraiser*, 48 Fla. L. Rev. 723 (Sept. 1996); Kent Wetherell, *The New Burden of Proof in Ad Valorem Tax Valuation Cases,* 25 Fla. St. U. L. Rev. 185 (Winter 1998). As well explained in the amicus brief filed by the Florida Chamber of Commerce, since the mid-1990s, the Florida Legislature has taken substantial steps to end Florida’s former reputation as a state where the burden of proof and persuasion always seemed to be on the taxpayer and, so long as the appraiser had given a cursory examination of the factors in section 193.011, the appraiser would win in court.

The heart of the Legislature's effort to change Florida's reputation is contained in sections 194.301(1) and 194.3015, Florida Statutes (2009). These two provisions state:

> **194.301 Challenge to ad valorem tax assessment.—**
>
> (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 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.** (emphasis supplied).
>
> **194.3015 Burden of proof.—**
>
> (1) **It is the express intent of the Legislature that a taxpayer shall never have the burden of proving that the property appraiser's assessment is not supported by any reasonable hypothesis of a legal assessment.** All cases establishing the every-reasonable-hypothesis standard were expressly rejected by the Legislature on the adoption of chapter 97-85, Laws of Florida. It is the further intent of the Legislature that any cases published since 1997 citing the every-reasonable-hypothesis standard are expressly rejected to the extent that they are interpretative of legislative intent.

(2) This section is intended to clarify existing law and apply retroactively. (emphasis supplied).

Despite the efforts of the Legislature, this case demonstrates that old habits die hard. As more fully explained in Darden's initial brief, when Darden challenged its 2013 tangible personal property tax appraisal in the VAB, it prevailed. (R. 18 - 20). At the VAB hearing, Darden argued that the Property Appraiser had failed to follow "professionally accepted appraisal standards" in making this appraisal. The VAB correctly concluded that, as a result of the language added by the Legislature in section 194.301(1), a taxpayer is now entitled to a determination by the VAB of the appropriateness of the appraisal methodology used in making the assessment, and that that this examination requires the Property Appraiser to present evidence of professionally accepted appraisal practices when methodologies are in dispute. (R. 18-20). It concluded that the Property Appraiser had failed to present this necessary proof. Accordingly, the VAB ruled in favor of the taxpayer.

When the Property Appraiser filed his action in Circuit Court, he filed the action pursuant to section 194.036(1). (R. 12). In paragraph 15 of his complaint, the Property Appraiser alleged:

In arriving at his 2013 valuation and assessment of the Property, [the Property Appraiser] properly considered the factors set

> forth in section 193.011, *Florida Statutes*, and **professionally accepted appraisal practices**. (R. 14) (emphasis supplied).

However, at trial, the Property Appraiser, abandoned his commitment to demonstrate that his methodology was based on professionally accepted appraisal practices. After claiming that this case was all about "a comparison of methodology and whose is better," and about "appropriate methodology," (S.R. 1064), the Property Appraiser took the position that section 194.301(1) actually had no application in a circuit court proceeding commenced under section 194.036. (S.R. 1211 - 1222) (Appendix A). These pages of the record warrant special examination.

The Property Appraiser made this argument after he attempted to have one of his employees opine that the assessment was the "fair market value" of Darden's tangible personal property as of January 1, 2013. (S.R. 1211). Darden properly objected that the opinion was inadmissible without predicate evidence that the assessment conformed to professionally accepted appraisal practices. At the end of this argument, the trial court overruled Darden's objection and accepted the Property Appraiser's argument. As a result, the court did not require, and the Property Appraiser did not present, any expert evidence – even from his own employees – that the methodologies he used to set the tangible personal property appraisal in this case met "professionally accepted appraisal practices."

The Property Appraiser's argument is a clear end run around the Legislature's efforts to reform property tax appraisal in Florida. He correctly admits that his "appeal" pursuant to section 194.036 is a de novo proceeding in which he has the burden of proof. *See* § 194.036(3). The Property Appraiser does not dispute that when Darden challenged an appraisal in the VAB, the Property Appraiser had the obligation to show that the appraisal was based on professionally accepted appraisal practices. But he claims that in his appeal he has no duty to demonstrate that the VAB was wrong or to support his rejected assessment with evidence that it is backed by professionally accepted appraisal practices. He bases this argument on the opening portion of section 194.301(1), quoted above, which begins with a clause describing an action in which a taxpayer challenges an appraisal.

But then the Property Appraiser explains that he ***lost*** in the VAB and that miraculously he has no obligation to prove that his methods pass professionally accepted appraisal practices if he lost in the VAB. (R. 1218). He argues that, in order to have the presumption of correctness mentioned in the first sentence of section 194.301(1), he must prove that an assessment is backed by professionally accepted appraisal practices. But when he has the burden of proof in the de novo proceeding in circuit court his assessment has no presumption of correctness and

that means he does not need to prove the assessment was derived by professionally accepted appraisal practices.

Instead, the Property Appraiser points to section 195.032, Florida Statutes, which requires the Department of Revenue to establish certain "standards of value." He argues that, if the Property Appraiser does not have the benefit of a presumption of correctness in the preceding, all he is required to do is to present an employee to testify that he satisfied the guidelines in the standards of value, and the trial court can rule in the Property Appraiser's favor. (S.R. 1221)

This argument is little more than a return to the appraisal practices described as "imperial" that made Florida an outlier in the field of property tax appraisal. The Property Appraiser convinced the trial court to accept this reasoning by arguing that Darden had not "shown you a single case" that adopted its reading of section 194.301. (S.R. 1216). These Amici are here because it is critical that this court, as a matter of first impression, write that opinion.

The Property Appraiser's argument to the trial court made short shrift of the second half of section 194.301(1):

> **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.**

A plain and simple reading of this portion of the statute, beginning with the word, "however," demonstrates that it has broader application beyond the property appraiser's efforts to establish an assessment that is presumed correct. Moreover, Darden did challenge the assessment. And it did win in the VAB. The fact that it won does not deprive it of its entitlement to a determination in circuit court concerning the appropriateness of the appraisal methodology. The Legislature clearly intended by the amendment to this statute to end the era in which the taxpayer never had a level playing field when challenging the property appraiser. To read this statute to mean that the taxpayer has a level playing field in the VAB, but that the Property Appraiser can return to the good old days after losing in the VAB is simply absurd. The taxpayer is "challenging" the property appraiser's assessment both in the VAB and in circuit court when the property appraiser is attempting to reinstate its own assessment.

Fortunately, this issue involves an interpretation of the statute and this court is entitled to review the trial court's ruling de novo. *Kemper v. Dep't of Revenue ex rel. Kemper*, 159 So. 3d 303, 304 (Fla. 5th DCA 2015).

Section 194.036 gives a property appraiser the right to appeal the decision of a VAB and it places the burden of proof upon the property appraiser, but that

section does not specify what the property appraiser must prove in the appeal. The Property Appraiser claims that section 195.032 limits his burden of proof, when the right to an appeal is not expressly discussed in that statute and the statute affirmatively states: "The standard measures of value shall assist the property appraiser in the valuation of property and be deemed prima facie correct, but shall not be deemed to establish the just value of any property." Even if there were conflict between section 195.032 and section 194.301, it is well-established that when reconciling statutes that may appear to conflict, a more recently enacted statute will control over older statutes. *See Fla. Carry, Inc. v. Univ. of Fla.*, 180 So. 3d 137, 146 (Fla. 1st DCA 2015) (citing *Fla. Virtual Sch. v. K12, Inc.*, 148 So. 3d 97, 102 (Fla. 2014)). Section 194.301 is the more recent statute.

The proper implementation of section 194.301(1) is vital to assuring that Florida is a state where businesses feel confident they can invest. Section 195.032 has long given the Department of Revenue the ability to promulgate documents it describes as "standard measures of value" that are "deemed prima facie correct" with little practical access for taxpayers to challenge these documents. Under the old case law, limited by the "presumption of correctness" and "any reasonable hypothesis" restrictions, courts were often prevented from conducting any serious judicial review of the standards of value with the aid of testimony from expert appraisers who could either support the standards or explain the flaws within those

standards. The Legislature amended section 194.301 in 2009 to give taxpayers some access to that level of review. Hopefully, the review authorized by section 194.301 will help Florida develop "standard measures of value" that are actually standard and that professional appraisers will regard as true measures of value.

Both Darden's initial brief and the amicus brief of the Florida Chamber criticize the circuit court decision in *Wal-Mart Stores , Inc. v. Crapo*, No. 97-CA-4728 (Fla. 8th Cir. Ct. Feb. 26, 2001). The judge in that case thought that the difficulties associated with an accurate appraisal make appraisal more of an art than a science. This is sometimes also said of medicine. But it is clear that the Legislature by its amendments in 2009 intends to emphasize the science, or at least the profession, of appraisal as a method to level the playing field for taxpayers. The Property Appraiser, in the name of "art," no longer has the discretion to assess property based on methodologies that are not professionally acceptable. This court should hold that the plain language of section 194.301 now gives taxpayers that protection.

## II. A PROPERTY APPRAISER CANNOT MISUSE THE "HIGHEST AND BEST USE" FACTOR CONTAINED IN SECTION 193.011(2) TO INCREASE A TANGIBLE PERSONAL PROPERTY TAX APPRAISAL FROM THE MARKET-BASED "JUST VALUE" TO A HIGHER "VALUE IN USE," BY RELYING ON CONSIDERATIONS PERSONAL TO THE OWNER THAT ARE IRRELEVANT TO ANY BUYER.

Value set by exchange in the marketplace – giving due weight to the buyer's interest as well as the seller's interests – is the proper target for property tax appraisal in Florida. There is no dispute among the parties that "just value" and "fair market value" are equivalent terms, and that the property appraiser's role is to establish the fair market value of the property that is the subject of taxation. The Supreme Court has explained that "the classic formula" is set by " 'a purchaser willing but not obliged to buy, would pay to one willing but not obliged to sell,' " *Walter v. Schuler,* 176 So. 2d 81, 86 **(**quoting *Root v. Wood*, 155 Fla. 613, 21. So. 2d 133 (Fla. 1945)). Thus, the "just value" that is the constitutional test in Florida is economically a market concept. *See ITT Cmty. Dev. Corp. v. Seay*, 347 So. 2d 1024 (Fla. 1977) Economists and appraisers often refer to this as a "value in exchange."

The "willing purchaser" and "willing seller" used to establish a value in exchange are not real people. They are hypothetical constructs, similar to the proverbial "reasonable person." This test exists to assure that a property appraiser does his or her best to establish an objective, neutral valuation. The property

appraiser certainly has some range of discretion and judgment, but this process is intended to be based upon professional standards and the evolving knowledge of the appraisal profession in a world where technology has dramatically changed the marketplace in which exchanges take place.

But the property appraisers who establish taxpayer's obligations in Florida are humans living in a world of politics. Especially in the case of tangible personal property taxation, the many exemptions result in a tax structure in which most individuals and families are not taxed. This is a tax paid by businesses, especially large businesses with sizable capital investments in property located in Florida. It is only human that county property appraisers will have a tendency to place assessments on corporate tangible personal property that is higher than the values that would be obtained by exchange in the marketplace.

The most common way to do this is to shift from a value giving due weight to the buyer's interests to a value influenced by the fact that the property owner is successfully using the property to run its profitable business. The property owner does not wish to interrupt its business to sell its property. The successful business owner places a higher value on its property than would the hypothetical willing seller. This shifts the valuation from one based on "value in exchange" to one that its critics refer to as "value in use," and the Florida Chamber in its brief accurately refers to as "value to the owner."

The most obvious problem that arises from a shift to "value in use" is that it tends not to measure the value intrinsic in the article of property, but rather the value of the article as a portion of the ongoing, successful business. It tends to measure the value of the property owner's business, not merely the value of property that happens to be owned by the business. Thus, it includes a component of the value of the taxpayer's business in each of the items of tangible personal property that the taxpayer does not want to place for exchange in the marketplace. This means that the total assessment of the taxpayer's tangible personal property exceeds the constitutional fair market value of the property established under the definition of fair market value provided in the *Walter* case.

It is not necessarily impermissible for a state to base its taxes on some concept of "value in use." Indeed the state of Indiana constitutionally has a system that is not based purely on the value in exchange. *See Howard Cnty. Assessor v. Kohl's Indiana LP*, 57 N.E.3d 913, 916 (Ind. T.C. 2016), *rev. denied*, 2017 WL 1655319 (Ind. Apr. 27, 2017). But we are not in Indiana; constitutionally Florida is a state in which "just value" cannot be increased by the successful owner's business profits, or for that matter decreased by the unsuccessful owner's losses. The hypothetical willing buyer that establishes value in exchange may be predicting his or her own successful use of the item of tangible personal property,

but will not pay more for the same article merely because it's prior owner was a good businesswoman.

In this case, the record is clear that the Property Appraiser misconstrued the "highest and best use" factor in section 193.011(2) as a justification to shift from a fair market value to a value influenced by the owner's use. This is well-discussed in Darden's initial brief, but perhaps the clearest demonstration of this can be found in the testimony of Brett Thayer. When explaining how he considered the factors in section 193.011, he explained that he considered the use of the property and the fact that it was being used in an "ongoing business." (S.R 1206). He emphasized that the property was not sitting in a warehouse or for sale by a liquidator.

Section 193.011 sets out eight factors to consider when appraising property. The second factor states, in relevant part:

> **(2) The highest and best use to which the property can be expected to be put in the immediate future and the present use of the property, taking into consideration the legally permissible use of the property, including any applicable judicial limitation, local or state land use regulation, or historic preservation ordinance, and any zoning changes, concurrency requirements, and permits necessary to achieve the highest and best use . . . .**

The factors in section 193.011 apply in valuing both real property and tangible personal property, and much of the "highest and best use" factor is obviously directed to real property valuation. The Amici, however, are not arguing

that "highest and best use to which the property can be expected to be put in the immediate future and the present use of the property" is not an appropriate consideration for tangible personal property assessment. This factor simply cannot be used as a justification to place a higher value on property because the current owner's best use of the property makes that owner unwilling to sell the property in the marketplace.

For example, as Darden explains, it owns commercial stoves. Such a stove in the marketplace has greater value to someone who wishes to use it as what it is, a commercial stove. The Amici are not suggesting that the Property Appraiser should be required to value such a stove for the price it would bring in a liquidation sale or the price that someone might pay when they were in the market merely to buy an ordinary stove sufficient for light use. But Mr. Thayer demonstrated his legal error when he explained that the stove would be worth more in use than in a warehouse. The fact that the ongoing business is quite busy and does not want to sell its stove means that the business is currently itself outside the marketplace; it does not establish a value inside the market place. When the property appraiser uses the statutory "present use" as a justification for setting the assessmant of the stove at a value higher than a willing buyer would pay, the Property Appraiser is setting a value higher than the market value. He is setting a "value-in-use," which is unauthorized by law and which is also contrary to professionally accepted

appraisal practices used to appraise individual items of tangible personal property for purposes of taxation in Florida.

The Property Appraiser's use of the cost approach and computer assisted mass appraisal methods, which the Amici agree are permissible methods, does not eliminate the "value in use" problem. A common "value in use" over-assessment is a result of the fact that a current owner may be willing to continue to use a piece of equipment that has extensive "obsolescence." But the Property Appraiser's computer is not programmed to address this problem. The Department of Revenue's Standard Measures of Value instruct a property appraiser to "look to the market" to address this problem, but this case demonstrates that an objective look to the market that would satisfy professionally accepted accounting practices was not occurring in this case. *See Standard Measures of Value: Tangible Personal Property Appraisal Guidelines, p.41*.

*http://floridarevenue.com/dor/property/tpp/ (last visited 10/12/2017)*

While the Amici believe this distinction is a question of law, the Property Appraiser at trial believed it was a question of "methodology." Darden's experts questioned this methodology, but turning to the Amici's first issue, the more important point is that the Property Appraiser presented no evidence that placing a higher value on a stove in use, as compared to a comparable stove in storage, is a professionally accepted appraisal practice.

## CONCLUSION

This court should rule in this case consistent with the Legislature's policy designed to help build business in Florida and hold that: (1) section 194.301(1) requires the property appraiser in circuit court to present proof that a disputed appraisal methodology complies with "professionally accepted appraisal practices," and (2) a property appraiser cannot misuse the "highest and best use" factor contained in section 193.011(2) to increase a tangible personal property tax appraisal from the market-based "just value" to a higher "value in use."

Respectfully submitted,

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## CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed through the eDCA portal and served via e-mail this 13th day of October, 2017 to:

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**CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.

/s/ Chris W. Altenbernd
Attorney