Department of Environmental Protection

Jeb Bush
Governor

Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, Florida 32399-2400

David B. Struhs
Secretary

July 27, 2000

Gary M. Carman, Esq.
Broad and Cassel
Miami Center, Suite 3000
201 south Biscayne Blvd.
Miami, Florida 33131

Re: Wheelabrator - Broward County Tax Assessment

Dear Mr. Carman:

Enclosed please find copies of slides and materials from the seminar put on by the Florida Chapter of International Association of Assessing Officers. These are all the materials I have found to date.

Sincerely,

Hamilton S. Oven

Hamilton S. Oven, P.E.

Encl:

cc: Gaylord A. Wood, Jr., Esq.
Michael W. Moskowitz, Esq.

ELIGIBLE POLLUTION CONTROL DEVICES

193.621, FLORIDA STATUTES - ANY DEVICE, FIXTURE, EQUIPMENT, OR MACHINERY USED PRIMARILY FOR CONTROL OR ABATEMENT OF POLLUTION OR CONTAMINANTS FROM MANUFACTURING OR INDUSTRIAL PLANTS OR INSTALLATIONS, BUT SHALL NOT INCLUDE ANY PUBLIC OR PRIVATE DOMESTIC SEWERAGE SYSTEM OR TREATMENT WORKS.

62-8, FLORIDA ADMINISTRATIVE CODE

USED PRIMARILY - USE IN CONTROL OR ABATEMENT OUTWEIGHS ITS USE FOR ANY OTHER PURPOSE.

SALVAGE VALUE - ESTIMATED FAIR MARKET VALUE WHEN IT CAN NO LONGER BE USED FOR THE PURPOSE FOR WHICH DESIGNED

FACILITIES - DEVICES FIXTURES OR MACHINERY WHICH REMOVE, DECREASE, STOP, OR MITIGATE, BY PHYSICAL OR CHEMICAL ACTION WHICH ARE LIQUID, SOLID OR GASES RELEASED TO AMBIENT AIR OR WATER

SCRUBBERS BAG FILTERS CYCLONES

ELECTROSTATIC PRECIPITATORS

FLUE GAS DESULFURIZATION DEVICES

VAPOR RECOVERY SYSTEMS

SELECTIVE CATALYST REDUCTION SYSTEMS

LOW NOx BURNERS

WASTE WATER TREATMENT PLANTS

OIL/WATER SEPARATORS COOLING TOWERS

SPECIAL MONITORING/CONTROL SYSTEMS

193.621 Assessment of pollution control devices.—

(1) If it becomes necessary for any person, firm or corporation owning or operating a manufacturing or industrial plant or installation to construct or install a facility, as is hereinafter defined, in order to eliminate or reduce industrial air or water pollution, any such facility or facilities shall be deemed to have value for purposes of assessment for ad valorem property taxes no greater than its market value as salvage. Any facility as herein defined heretofore constructed shall be assessed in accordance with this section.

(2) If the owner of any manufacturing or industrial plant or installation shall find it necessary in the control of industrial contaminants to demolish and reconstruct that plant or installation in whole or part and the property appraiser determines that such demolition or reconstruction does not substantially increase the capacity or efficiency of such plant or installation or decrease the unit cost of production, then in that event, such demolition or reconstruction shall not be deemed to increase the value of such plant or installation for ad valorem tax assessment purposes.

(3) Notwithstanding the foregoing provisions, nothing in this section shall prevent an increase in the assessment of the plant or installation:

(a) In any year where the taxable property in the county is being reassessed or revalued; or

(b) If the assessed value of such plant or installation or parts thereof, during the year preceding the removal, was less than its just value as required by s. 4, Art. VII of the State Constitution, and s. 193.011; or

(c) In the 10th year after the completion of the reconstruction and replacement and thereafter.

The provisions of this subsection shall apply only if the demolition or removal shall commence prior to September 1, 1969, and if the reconstruction and replacements, in lieu thereof are completed and installed prior to September 1, 1971.

(4) The terms "facility" or "facilities" as used in this section shall be deemed to include any device, fixture, equipment, or machinery used primarily for the control or abatement of pollution or contaminants from manufacturing or industrial plants or installations, but shall not include any public or private domestic sewerage system or treatment works.

(5) Any taxpayer claiming the right of assessments for ad valorem taxes under the provisions of this law shall so state in a return filed as provided by law giving a brief description of the facility. The property appraiser may require the taxpayer to produce such additional evidence as may be necessary to establish taxpayer's right to have such properties classified hereunder for assessments.

(6) If a property appraiser is in doubt whether a taxpayer is entitled, in whole or in part, to an assessment under this section, he or she may refer the matter to the Department of Environmental Protection for a recommendation. If the property appraiser so refers the matter, he or she shall notify the taxpayer of such action. The Department of Environmental Protection shall immediately consider whether or not such taxpayer is so entitled and certify its recommendation to the property appraiser.

(7) The Department of Environmental Protection shall promulgate rules and regulations regarding the application of the tax assessment provisions of this section for the consideration of the several county property appraisers of this state. Such rules and regulations shall be distributed to the several county property appraisers of this state.

History.—s. 25, ch. 67-436; ss. 1, 2, ch. 69-55; ss. 21, 26, 35, ch. 69-106; s. 13, ch. 69-216; s. 2, ch. 71-137; s. 33, ch. 71-355; s. 1, ch. 77-102; s. 47, ch. 77-104; s. 4, ch. 79-65; s. 44, ch. 94-356; s. 1469, ch. 95-147.

Note.—Former s. 403.241.

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

(a) Agricultural land, land producing high water recharge to Florida's aquifers 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 livestock may be valued for taxation at a specified percentage of its value, may be classified for tax purposes, or may be exempted from taxation.

(c) All persons entitled to a homestead exemption under Section 6 of this Article shall have their homestead assessed at just value as of January 1 of the year following the effective date of this amendment. This assessment shall change only as provided herein.

1. Assessments subject to this provision shall be changed annually on January 1st of each year; but those changes in assessments shall not exceed the lower of the following:

(A) three percent (3%) of the assessment for the prior year.

(B) the percent change in the Consumer Price Index for all urban consumers, U.S. City Average, all items 1967=100, or successor reports for the preceding calendar year as initially reported by the United States Department of Labor, Bureau of Labor Statistics.

2. No assessment shall exceed just value.

3. After any change of ownership, as provided by general law, homestead property shall be assessed at just value as of January 1 of the following year. Thereafter, the homestead shall be assessed as provided herein.

4. New homestead property shall be assessed at just value as of January 1st of the year following the establishment of the homestead. That assessment shall only change as provided herein.

CHAPTER 67-436

Committee Substitute for Senate Bill No. 520

AN ACT relating to air and water pollution control; repealing chapter 403, and section 381.031(1)g(7), Florida Statutes, and the rule-making jurisdiction of all other state agencies with respect to pollution control; declaring legislative intent; defining terms; establishing and assigning duties to the Florida air and water pollution control commission; enumerating powers of the commission; establishing hearing procedure; providing for a director; providing for enforcement procedure and injunctive relief; imposing additional civil liability and providing for the assessment of damages; making pollution of the air and water unlawful and establishing penalties therefor; providing for local pollution control programs; validating regulations; providing for variances; classifying certain pollution control devices for tax purposes, exemptions and assessments; and providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Chapter 403, Florida Statutes, and section 381.031(1)g(7), Florida Statutes, are hereby repealed. All rule-making jurisdiction over air and water pollution matters now held by other agencies within the state of Florida is hereby repealed including, but without limitation, such jurisdiction held by the Florida state board of health, the Florida game and fresh water fish commission, the Florida state board of conservation and the several water mangement districts within the state.

Section 2. Short title.—This act shall be known and cited as the Florida air and water pollution control act.

Section 3. Legislative declaration.—The pollution of the air and waters of this state constitutes a menace to public health and welfare, creates public nuisances, is harmful to wildlife, fish and other aquatic life, and impairs domestic, agricultural, industrial, recreational, and other beneficial uses of air and water.

It is declared to be the public policy of this state to conserve the waters of the state and to protect, maintain, and improve the quality thereof for public water supplies, for the propagation of wildlife, fish and other aquatic life, and for domestic, agricultural, industrial, recreational, and other beneficial uses, hundreds of millions of dollars for the installation of machinery, equipment, and facilities for the treatment of industrial wastes which are not productive assets and increased operating expenses to owners without any financial return and should be separately classified for assessment purposes;

(b) Industry should be encouraged to install new machinery, equipment and facilities as technology in environmental matters advances, thereby improving the quality of the air and waters of the state and benefiting the citizens of the state without pecuniary benefit to the owners of industries, and the legislature should prescribe methods whereby just valuation may be secured to such owners and exemptions from certain excise taxes should be offered with respect to such installations;

(c) Facilities as herein defined should be classified separately from other real and personal property of any manufacturing or processing plant or installation, as such facilities contribute only to general welfare and health and are assets producing no profit return to owners; and

(d) In existing manufacturing or processing plants it is more difficult to obtain satisfactory results in treating industrial wastes than in new plants being now planned or constructed and that with respect to existing plants in many instances it will be necessary to demolish and remove substantial portions thereof and replace the same with new and more modern equipment in order to more effectively treat, eliminate or reduce the objectional characteristics of any industrial wastes and that such replacements should be classified and assessed differently from replacements made in the ordinary course of business.

Section 4. Definitions.—In construing this chapter, or rules and regulations adopted pursuant thereto, the words, phrases or terms, unless the context otherwise indicates, shall have the following meanings:

(1) "Commission" is the Florida air and water pollution control commission.

(2) "Director" is the director of the commission.

(3) "Pollution" is the presence in the outdoor atmosphere or waters of the state of any one or more substances or con-

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IN THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT, IN AND
FOR CITRUS COUNTY, FLORIDA

FLORIDA POWER CORPORATION,
a Florida Corporation, and
SEMINOLE ELECTRIC COOPERATIVE, INC.,
a Florida corporation

Plaintiffs,

vs.

CASE NO. 97-3383-CA
FL Bar Id #0229407

RONALD J. SCHULTZ, as
Property Appraiser of Citrus County,
Florida, and NORINE S. GILSTRAP,
as Tax Collector of Citrus County, Florida

Defendants.

_______________________________________/

**MEMORANDUM OF FLORIDA POWER
IN OPPOSITION TO PROPERTY APPRAISER'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Introduction

This suit is a challenge to property tax assessments rendered by Citrus County Property Appraiser Ronald J. Schultz for tax year 1997. The Plaintiffs are Florida Power Corporation and Seminole Electric Cooperative. The action arises as a result of the Property Appraiser's refusal to assess Plaintiffs' pollution control facilities in accordance with section

Florida Power is engaged in the generation, transmission, and distribution of electricity to customers in 32 Florida counties, including Citrus County. Its generating facilities in Citrus County are located at Crystal River, and include four fossil fuel generating plants (known as CR 1, 2, 4, and 5), and a 90% ownership interest in a nuclear generating plant (CR 3). Seminole Electric and several municipalities own the remaining interests in the nuclear plant.[2] Florida Power also owns generating facilities in nine other Florida counties. [Keith Affidavit ¶ 3,4]

After adoption of the 1967 Act, Florida Power installed several hundred million dollars in pollution control facilities in Citrus County and the other nine Florida counties where it has plants. As of January 1, 1997 the original cost of such facilities in Citrus County was in excess of $426 million, approximately $205 million of which was financed through the issuance by the County of Pollution Control Revenue Bonds pursuant to Chapter 159, Part II, Florida Statutes [Keith Affidavit ¶ 4, 5].

Each year Florida Power files tangible personal property tax returns with the property appraisers in counties where it has plants, including Citrus County. These returns are accompanied by separate Returns of Pollution Control Devices (hereafter "pollution control returns"). The function of the latter form is to facilitate application of section 193.621 to the pollution control property. Historically, the property appraisers in all the counties in which

[2] Additional background concerning the municipal interests and their property tax treatment can be found in *Schultz v. Crystal River 3 Participants*, 686 So. 2d 1391 (Fla. 5th DCA 1997), *review denied*, 697 So. 2d 512 (Fla. 1997).

Protection, or "DEP"), are in the record [Keith Affidavit, Exhibits III and IV]. The Property Appraiser has not sought recommendations from DER or DEP since 1992 [Schultz depo. p. 22-26]; substantially all the property which the Company listed as pollution control facilities in 1992 is still in service [Keith Affidavit ¶ 10].

After receiving the Property Appraiser's letter of June 27, 1997, Florida Power and Seminole Electric brought this action challenging the Property Appraiser's decision. The Property Appraiser thereupon served his Answer and Defenses, and his Motion for Partial Summary Judgment followed shortly thereafter.

The Pollution Control Property Tax Statute

Section 193.621(1), Florida Statutes, provides as follows:

> If it becomes necessary for any person, firm or corporation owning or operating a manufacturing or industrial plant or installation to construct or install a facility, as is hereinafter defined, in order to eliminate or reduce industrial air or water pollution, any such facility or facilities shall be deemed to have value for purposes of assessment for ad valorem property taxes no greater than its market value as salvage. Any facility as herein defined heretofore constructed shall be assessed in accordance with this section.

Subsection (4) of the same statute defines the property that qualifies for assessment under subsection (1):

> The terms "facility" or "facilities" as used in this section shall be deemed to include any device, fixture, equipment, or machinery used primarily for the control or abatement of pollution or contaminants from manufacturing or industrial plants or

In keeping with the normal preference of courts to consider statutory issues before constitutional claims, Florida Power will begin with a discussion of the quoted contentions.[3]

A. Section 212.08(5)(c)

Since 1980, the Florida sales tax law has contained the following provision in section 212.08(5)(c), Florida Statutes:

> (c) *Machinery and equipment used in production of electrical or steam energy.*--
> 1. The purchase of machinery and equipment for use at a fixed location which machinery and equipment are necessary in the production of electrical or steam energy resulting from the burning of boiler fuels other than residual oil is exempt from the tax imposed by this chapter. Such electrical or steam energy must be primarily for use in manufacturing, processing, compounding, or producing for sale items of tangible personal property in this state. * * *

This statute applies to equipment used at electric generating plants, *Jacksonville Electric Authority v. Department of Revenue*, 486 So. 2d 1350 (Fla. 1st DCA 1986) (hereafter *JEA*).

The Property Appraiser's contention that the availability of a sales tax exemption under this statute has some bearing on the property tax treatment is without any basis. Neither section 193.621 nor section 212.08(5)(c) refers to the other statute or to the other type of tax. One is a state tax, the other a local tax. They are administered completely

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[3] It may also be useful to identify that which is *not* at issue in connection with the pending Motion. The Motion presents no issue as to the eligibility of any individual item for assessment under section 193.621, or the value of any such item. The Property Appraiser has made no determinations regarding the eligibility of specific assets. [Schultz depo. p. 33-34] An additional issue not presented now is the effect on this litigation of his failure to do so.

or steam energy" in section 212.08(5)(c) required denial of the sales tax exemption for pollution control equipment because it is physically possible to generate steam or electricity without such equipment.

The court rejected this contention. Acknowledging that a plant could "theoretically produce electrical or steam energy without legally mandated pollution control equipment," the court nevertheless concluded:

> No matter how theoretical the physics of producing steam or electrical energy, in reality no equipment or machinery in Florida is going to produce electricity without the mandated pollution control equipment.

486 So. 2d at 1355. In other words, the word "necessary" in section 212.08(5)(c) does not restrict the sales tax exemption to equipment that actually generates steam or power. Equipment that does *not* generate steam or power, but which is legally required to control pollution, is also exempt.

At no point in the opinion does the court suggest that the sales tax exemption somehow converts property with a pollution control function into property with a generation function. The property retains its character and function, regardless of what taxes are applied. There is no inconsistency in applying both sections 193.621 and 212.08(5)(c) to the same property. The "chicken/duck" analogy is not on point.

To comply with the *JEA* decision, the Department thereafter allowed the sales tax exemption for pollution control equipment. An example of a ruling on the point (called a

There are several fallacies in this thesis. First, there is no "definition" in section 403.021(7)(c). The definition of "facility" is in section 193.621(4), which is repeated here for convenience:

> The terms "facility" or "facilities" *as used in this section* shall be deemed to include any device, fixture, equipment, or machinery used primarily for the control or abatement of pollution or contaminants from manufacturing or industrial plants or installations, but shall not include any public or private domestic sewerage system or treatment works.

(emphasis added). "This section" is now section 193.621; in the 1967 session law it was section 25. Chapter 67-436, Laws of Florida. The provisions now appearing in section 403.021(7)(c) were also enacted as part of that session law. The "as herein defined," in section 403.021(7)(c) can only refer to the definition contained in the same legislation, that is, in section 25.

As discussed above, section 193.621(4) prescribes a *functional* test for application of the statute. If the item is "used primarily for the control or abatement of pollution or contaminants," it qualifies. Subsection (4) contains the *operative* definition of the property subject to the statute. None of the operative provisions makes any reference to financial return, regulation, or the Public Service Commission. The Legislature's 1967 declarations in section 403.021(7) that pollution control facilities produce no financial return do not vary the unambiguous definition established in section 193.621(4). Where the language of a

One might reasonably inquire how the Property Appraiser would administer this restriction he now finds in section 193.621. What must a taxpayer do to qualify under his "no profit" test? Is it necessary to demonstrate that the business is losing money? Does *any* return on investment disqualify a taxpayer, or is there some threshold of profitability, below which the Property Appraiser would deem a taxpayer eligible under the statute? Are his profitability determinations to be made for each individual plant, or for the enterprise as a whole, including facilities outside Citrus County? Is the profitability test to be applied each year, or is property disqualified if the taxpayer has *ever* been profitable?

Although he relies upon the references to financial return in section 403.021(7), the Property Appraiser's Defenses and Motion suggest that the test in his view is not profitability, but whether an entity is regulated by the PSC. However, the provisions upon which he relies, make no mention of utilities, regulation, or the PSC. Moreover, engrafting such language onto the statute would create an artificial distinction. If one posits two businesses, one regulated and the other unregulated, with each earning an identical return on an identical amount invested (including pollution control facilities), does the Property Appraiser contend that only the utility is earning a return on the pollution control facilities?

If the Legislature had intended to include profitability (or the absence of regulation) as part of the test for qualification under section 193.621, it would have said so, and would have provided the mechanics of applying the test. It would not have left those mechanics to the unfettered discretion of 67 property appraisers.

Although there is no ambiguity here so as to occasion any "construction" of section 193.621(4), a principle expressed in the tax case of *Miller v. Agrico Chemical Co.*, 383 So. 2d 1137 (Fla. 1st DCA 1980) merits recitation:

> [T]he interpretation by an agency charged with administering a statute is to be given substantial weight. This rule has an even greater application when the agency attempts to change its administrative interpretation of the statute without any known or readily discernible reason for doing so. In this instance, we give greater weight to the first administrative interpretation, and reject its later unsolicited revision.

383 So. 2d at 1137. *See also Ervin v. Capital Weekly Post, Inc.*, 97 So. 2d 464, 468 (Fla. 1957) (a statutory definition of a word will be followed by the courts, especially "one which has been a part of our statute law for more than forty years, and one with which the Court must assume the members of the Legislature are familiar").

The Property Appraiser enjoys no presumption of correctness when he has misapplied the law, *Love PGI Partners v. Schultz*. 23 Fla. L.W. D417, 420 (Fla. 5th DCA 1998).

Property Appraiser's Constitutional Claims[5]

The seven separate paragraphs of the Property Appraiser's attacks on the constitutionality of section 193.621 are all based upon the same faulty premise: that the

[5] The Answer and Defenses of the Property Appraiser claim standing to attack the constitutionality of a statute based upon *Department of Education v. Lewis*, 416 So. 2d 455 (Fla. 1982). Because of dictum in that decision, Florida Power will not argue the standing issue at this time. However, Florida Power does not concede the point, but reserves it.

418 So. 2d at 1205 (emphasis added).

Thus, the burden is upon the Property Appraiser to demonstrate that section 193.621 conflicts with some constitutional provision "beyond all reasonable doubt," and that there is no state of fact, known or to be assumed, which supports the legislation. With these principles in mind, we turn to the Property Appraiser's contentions.

The centerpiece of all the constitutional claims is the assertion that section 193.621 directs assessment of pollution control facilities at less than "just valuation" because it limits assessments of pollution control facilities to their "market value as salvage." The relevant constitutional provision is Article VII, Section 4, Fla. Const., which provides in pertinent part:

> By general law regulations shall be prescribed which shall secure a just valuation of all property for taxation, provided
> ****

The proviso enumerates authorized exceptions from the just valuation standard. Among the exceptions are agricultural land, land producing high water recharge to aquifers, stock in trade, and homestead property. Pollution control facilities are not within the authorized exceptions. Therefore, the Property Appraiser, contends, the statute is unconstitutional. The difficulty with his argument is that it *assumes* that section 193.621 creates an exception from the just value standard. However, he does not support the assumption, and it is erroneous.

assets are situated, and then allocating that value to individual taxing jurisdictions. This "unit" method is not legally required for electric utility property, but it is used in assessing Florida Power's property in Citrus County. [Keith Affidavit ¶ 13; Schultz depo. p. 56-7] The vast majority of those assets are tangible personal property. [Keith Affidavit ¶ 4] The focus for appraisal purposes is thus on the entire utility system, rather than on individual components. If the utility owns property that by law must be treated differently than other property in the system for tax purposes, the unit value must be adjusted at some point so that the legal requirements are observed. Examples include motor vehicles and fuel, which are not taxable. [Schultz depo. p. 122-4, 159-60]

Section 193.621 provides that a pollution control facility shall be assessed at no greater than its market value as salvage. The language relating to value is one important feature of the statute. Another important feature is that it necessarily requires that a separate assessed value be determined for pollution control facilities. Thus, if a "unit" method is used for the other property, the pollution control facilities must be appraised separately from the unit. And the statute specifically prescribes a *market value* standard. These features are evident not only from the language of the statute, but also from record evidence. As the statute provides an appraisal instruction, an appraiser's reading of it is also relevant.

Florida Power has filed an affidavit of John C. Goodman, an experienced appraiser who specializes in electric utility valuation. Mr. Goodman confirms that the statute cannot be read otherwise than to call for separate appraisal of pollution control facilities. In addition, Appraiser finds so compelling in arguing his "profit return" theory also recite a purpose to "prescribe methods whereby *just valuation* may be secured" to owners of pollution control facilities. Section 403.021(7)(b), Florida Statutes. The Legislature obviously was not attempting to create a valuation standard different from just value.

In enacting the provisions at issue in 1967, the Legislature must be presumed to have known the meaning of "just valuation" as it had been defined two years earlier in *Walter v. Schuler*. *See, e.g.*, *Williams v. Jones*, 326 So. 2d 425 (Fla. 1975) (Legislature is presumed to have known the prior judicial construction of the constitution when it enacted a statute). The language of section 193.621 specifies a *market value*, which is precisely what *Walter v. Schuler* requires. By its very terms the statute evinces a purpose to apply that standard, and the foregoing discussion demonstrates that the Legislature achieved its purpose. One might reasonably infer widespread acceptance of this view from the absence of any challenge to the statute until 1996.[8] Moreover, it would be odd indeed to conclude that having enacted the statute in 1967, the Legislature intended for the new constitution it placed on the ballot less than one year later to render the statute invalid.

What has been said disposes of virtually all the constitutional theories advanced by the Property Appraiser. None of the decisions he cites holds that the Legislature cannot direct separate assessment of an item of property; none holds that market value must be

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[8] The only other known attack on the constitutionality of the statute was advanced by the St. Lucie County Property Appraiser beginning in 1996, in *Florida Power & Light Company v. Putnam*, Case No. 96-947 (Nineteenth Cir.). That case remains pending.

Other decisions offered to show that the Legislature cannot "classify" on a basis other than just value are not probative of any issue in this case because the Legislature has not done so here. *See, Valencia Center, Inc. v Bystrom*, 543 So. 2d 214 (Fla. 1989) (rejecting preferential treatment of property subject to leases entered prior to a specified date). *Williams v. Jones*, 326 So. 2d 425 (Fla.1975) upheld a "classification" of certain leaseholds as real property under the 1968 Constitution.[9] Even where value is involved, the prohibition on classification is not absolute, *see Markham v Yankee Clipper Hotel, Inc.*, 427 So. 2d 383 (Fla. 4th DCA 1983), *review denied*, 434 So. 2d 888 (Fla. 1983) (upholding constitutionality of law providing that realty improvements shall have no value assigned to them until they are substantially completed).

The Property Appraiser next invokes the "irrebuttable presumption" doctrine, asserting that "The Legislature may not create an irrebutttable presumption of value of pollution control equipment as salvage." This again confuses the valuation standard with the applicable market. It also overlooks the essential nature of the irrebuttable presumption doctrine. As is evident from the authorities upon which the Property Appraiser relies, the doctrine arises from the Due Process Clause, *Bass v. General Development Corporation*, 374

[9] *Williams v. Jones* also illustrates that the words "class" and "classify" are used in different ways in the property tax law. *See also, Day v. High Point Condominium Resorts*, 521 So. 2d 1064 (Fla. 1988) (a property tax case referring to the Legislature's "great freedom in classification"); section 195.073, Florida Statutes (prescribing classification of property based upon use for tax roll preparation). It appears that only deviations from the just value requirement engender constitutional scrutiny of a "classification" under the cases.

On one point the parties agree. An early resolution of these statutory and constitutional issues is desirable, and despite the arcane nature of the subject matter, the issues raised by the Property Appraiser's Motion are ripe for disposition. The Court should enter an order denying the Property Appraiser's Motion upon the grounds that the functional test in section 193.621(4) determines the applicability of section 193.621, and that the statute is constitutional.

Respectfully submitted,

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Attorneys for Plaintiff
Florida Power Corporation

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT IN AND FOR CITRUS COUNTY STATE OF FLORIDA

FLORIDA POWER CORPORATION
a Florida Corporation, and
SEMINOLE ELECTRIC
COOPERATIVE, INC., a Florida
corporation,
Plaintiffs,

Case Number: 97-3383-CA

VS.

RONALD J. SCHULTZ, as Property
Appraiser of Citrus County, Florida, and
NORINE S. GILSTRAP, as Tax Collector of
Citrus County, Florida,
Defendants.
_________________________________/

ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT OF DEFENDANT, RONALD J. SCHULTZ

THIS CAUSE came on to be heard upon the Motion for Partial Summary Judgment of Defendant, Ronald J. Schultz, as Property Appraiser of Citrus County Florida, ("Property Appraiser") and this Court having reviewed the pleadings, depositions, and affidavits in the Court's file, having reviewed the memoranda of law submitted by the Property Appraiser and by Plaintiff, Florida Power Corporation ("Florida Power"), and this Court having considered the arguments of counsel, and being otherwise duly advised, finds as follows:

1. FACTS:

This action arises from a complaint filed on December 15, 1997 by the Plaintiffs to contest the 1997 ad valorem tax assessments levied against the Plaintiffs by Citrus County. Plaintiffs claim that the Property Appraiser failed to properly determine the market value of certain pollution control facilities located on property owned by Florida Power and Seminole Electric Cooperative, Inc., ("Seminole"). The assessments in

The Property Appraiser has now filed a motion for partial summary judgment. Specifically, the grounds raised by the Property Appraiser in his motion are:

A. The provisions of §193.621(1) requiring that pollution control facilities be given a just value "as salvage" violate Art. VII, §4, of the 1968 Florida Constitution;

B. Because Plaintiffs took a sales tax exemption under §212.08(5)(c), Florida Statutes, when they purchased the pollution control equipment, this equipment is actually part of the generating equipment and not entitled to the benefits of 193.621(1); and

C. Given the legislative findings set forth in §403.021(7)(c), Florida Statutes, equipment that is included in the rate base of the Plaintiffs cannot be treated as pollution control facilities under §193.621(1).

Florida Power has filed an opposing memorandum of law, the affidavits of William H. Keith, the property tax manager for Florida Power, and John C. Goodman, a senior vice president of Valuation Services Group of AUS Consultants, and the deposition of the Property Appraiser. Florida Power agrees that the issues raised by the motion for summary judgment are issues of law which need to be decided by the court before any trial and that these issues are ripe for summary judgment.[7]

As this Court finds that §193.621(1) violates Art. VII, §4 of the Florida Constitution, this Court will not address the remaining arguments of the parties.

3. <u>STANDING OF THE PROPERTY APPRAISER TO CHALLENGE THE CONSTITUTIONALITY OF THE STATUTE:</u>

Although not raised directly in opposition to the Property Appraiser's motion for summary judgment, Florida Power refers to the holding in <u>Department of Educ. v. Lewis,</u> 416 So.2d 455 (Fla. 1982) in a footnote to its memorandum. Florida Power indicates that it "reserves" the issue of the Property Appraiser's standing to challenge the statute. However, the issue of standing must be determined in order to proceed with this motion.

Under the decision in <u>Lewis,</u> the Florida Supreme Court dealt with a challenge by the Florida Commissioner of Education to a spending bill passed by the legislature.

> "State officers and agencies must presume legislation affecting their duties to be valid, and do not have standing to initiate litigation for the purpose of determining otherwise. (cites omitted) In such a situation, the public officer or agency does not have a sufficiently substantial interest or special injury to allow the court to hear the challenge.

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[7] See Florida Power's memorandum of law at page 25.

required to so hold. Statutes are presumed to be constitutional and courts must construe them in harmony with the constitution if it is reasonable to do so. See, Florida Dept. of Educ. v. Glasser, 622 So.2d 944 (Fla. 1993)

5. THE CONSTITUTIONALITY OF FLA. STAT. §193.621(1):

In 1967, the Florida legislature enacted §403.241 as part of the Florida Air and Water Pollution Control Act. This statute is now located in Part II of Chapter 193 of the Florida Statutes[8], and has been renumber as §193.621. The statutory provision in question states:

> (1) If it becomes necessary for any person, firm or corporation owning or operating a manufacturing or industrial plant or installation to construct or install a facility, as is hereinafter defined, in order to eliminate or reduce industrial air or water pollution, any such facility or facilities shall be deemed to have value for purposes of assessment for ad valorem property taxes no greater than its market value as salvage. Any facility as herein defined heretofore constructed shall be assessed in accordance with this section.

Shortly thereafter, in 1968, the State of Florida enacted a new constitution. Article VII, §4, of that constitution provides:

> "By general law regulations shall be prescribed which shall secure a just valuation of all property for ad valorem taxation, ...

This section lists the only four categories of property that may be treated differently than "all" property for taxation: agricultural land; land producing high water recharge to Florida's aquifers or land used exclusively for non-commercial recreational purposes; homestead; and property used as "stock in trade" and livestock. There are no other separate classifications of property under Art. VII, §4 (a) and (b).

The Property Appraiser argues that Art. VII, §4 prevents the legislature from specifically classifying pollution control facilities for ad valorem tax assessment outside of the four exempt classes under Art. VII, §4 (a) and (b). According to the Property Appraiser, §193.621(1) improperly allows pollution control facilities to become a class of property to be valued differently than "all" property. Therefore, the statute exceeds the constitutional restrictions placed on the legislature preventing creation of any such special classes of property for ad valorem tax assessment.

[8] This part of Chapter 193 pertains to "Special Classes of Property."

§192.042(1). That court found that the Yankee Clipper court is alone in its decision that classifications of property can exist outside of Article VII, §4. [11]

The provisions of 193.621(1) are also distinguishable from the statute under review by the Yankee Clipper court. The statute in Yankee Clipper did not attempt to limit or prescribe the only market in which the property shall be appraised, but establishes a criteria, applicable to all property, under which the incomplete construction on property is appraised. The other criteria under §193.011 would still apply to the property. With the instant statute, the only criteria available for valuing pollution control facilities is the salvage value of the facilities. While the just value of Plaintiffs' property may still be impacted by the value of their pollution control facilities, this Court finds that §193.621(1) violates Art. VII, §4 of the 1968 constitution by creating a separate classification of property and regulations which do not lead to the just value of all property.

In Interlachen, the statute required that subdivided property owned by a developer be taxed as raw acreage until 60% of the lots had been sold. The supreme court held that the statute failed under Art. VII, §4, as it created a separate class of property to be valued separately than "all" property:

> "It is true that the constitutional provision allows the Legislature to prescribe regulations for the purpose of securing a just valuation of All property, but such regulations must apply to all property and not to any one particular class. The regulations contemplated by the Constitution are those which establish the criteria for valuing property; and all property--save those four classes specifically enumerated in the Constitution--must be measured under the same criteria.
>
> The statute we are examining here is a classification for taxation purposes, which is impermissible under Article VII, Section 4, Florida Constitution.

Interlachen, 304 So.2d at 434-35. The court then went on to hold that the statute there did ". . . . no more than establish a classification of property to be valued on a different standard than all other property". The court also held that the Florida

[11] The decision by the trial court in Dade County, Joel W. Robbins v. The Miami Beach Ocean Resort, Inc., Cir. Court Case Number 93-21009 CA 10 (January 7, 1998) specifically attacks the reasoning in Yankee Clipper as being without sound basis. Specifically, the court found that the decision ignored the Interlachen and ITT cases in favor of a US Supreme Court case on the rationality of classifications.

at just value which was based on a forced sale. In both cases, the supreme court reiterated its belief that the 1968 constitution required "all" property be appraised to determine the just value, unless there is a constitutional exemption or classification. Here, the statutory provisions in §193.621(1) allow a property owner to obtain a different value for certain, separate property. The statute limits the value to the market value "as salvage", without regard to whether the just value of the property is higher, or lower than the salvage value.

From the complaint filed, it is obvious that Plaintiffs have used this statute to lower their prior ad valorem tax assessments. Thus, the statute suppresses the value of the Plaintiffs' property based on the separate valuation for the class of property defined as pollution control equipment.[13] This strict limitation of the market to which a property appraiser must look to determine the value of property does not meet with the constitutional requirements that all property be valued at its just value.

Moreover, if one accepts the reasoning of the Plaintiff, the provisions of 193.621(1) need not be in place. It would make little sense to enact a statute which requires a market value "as salvage" when the only value is the salvage value. However, a general rule of statutory construction is that the legislature will not be presumed to have adopted a statute as mere surplusage. See, Unruh v. State, 669 So.2d 242, 245 (Fla. 1996).

Giving effect to the terms of §193.621(1), this Court finds that the statute means to separately classifies pollution control facilities and then restricts the value to the "salvage" value of the property. Therefore, the statute violates the restrictions of Art. VII, §4 by improperly classifying property and limiting the market value of that property to its salvage value. While the market value of the pollution control property may be its value as salvage, the statute cannot specify a class of property or create a criteria which does not result in the just value of all of the Plaintiffs' property. Interlachen.

[13] See Plaintiffs' complaint at paragraphs 24 and 25 at which the Plaintiffs allege that the assessments for 1997 greatly exceeded those for the prior years as a result of the Property Appraiser's refusal to value the pollution control property separately "as salvage".

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing of this Order on Motion for partial Summary Judgment of Defendant, Ronald J. Schultz, in Case Number 97-3383-CA, has been served on the below-named individuals by United States Mail, first class postage pre-paid, in hand delivery, or courthouse mailbox on the 27 day of April, 1998

BETTY STRIFLER
Clerk of Court

Miriam E. Polak
~~Deputy Clerk~~ / Judicial Assistant

cc:

Attorneys for Plaintiffs:
James A. Neal, Esquire
213 North Apopka Avenue
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Attorney for Defendant, Norine S. Gilstrap:
Jeanette M. Haag, Esquire
452 Pleasant Grove Road
Inverness, Florida 34452

CHAPTER 62-8
AD VALOREM TAX ASSESSMENT RULES — GUIDELINES FOR TAX ASSESSORS

62-8.001 Intent. In accordance with Chapter 193 Florida Statutes, the Board publishes the rules contained herein for the consideration and guidance of the several city and county tax assessors of the State to assist them in making a determination as to what assessment should be made for ad valorem taxes with respect to pollution control devices.

Specific Authority 192.621(8) FS. Law Implemented 403.021(7), 193.621 FS. History—Formerly 28-8.01, 17-8.01, 17-8.001.

62-8.020 Definitions. In construing this chapter, the words, phrases or terms shall have the following meaning:

(1) "used primarily" — that the use of a facility in the control or abatement of pollution or contaminants which outweighs its use for any other purpose;

(2) "salvage value" — the estimated fair market value, if any, which may be realized upon the sale or other disposition of a pollution control facility when it can no longer be used for the purpose for which it was designed;

(3) "pollution control facilities" — devices, fixtures or machinery which are used to remove, decrease, stop or mitigate, by physical or chemical action, pollutants or contaminants which are a part or entirely of liquid, solid or gases released to the ambient air and water.

Specific Authority 193.621(8) FS. Law Implemented 403.021(7), 193.621 FS. History—Formerly 28-8.02, 17-8.02, 17-8.020.

62-8.030 Request for Assistance.

(1) The several tax assessors may, prior to assessing pollution control facilities or devices for ad valorem taxes, request the Florida Pollution Control Board to evaluate applications and advise the assessor as to the validity of the request for an assessment under the provisions of Section 403.241, F.S.

(2) Prior to approving an assessment for ad valorem taxes under the provisions of Section 403.241, F.S., a tax assessor should require the applicant to submit with his applications a detailed list of pollution control devices being utilized by a facility; the cost of these devices; the function of the facility as it relates to pollution control and production. This information should be certified as being correct by a professional engineer registered in the State of Florida.

Specific Authority 193.621(8) FS. Law Implemented 403.021(7), 193.621 FS. History—Formerly 28-8.03, 17-8.03, 17-8.030.

62-8.040 Procedures. In considering an assessment for ad valorem taxes under Section 193.621, Florida Statutes, the tax assessor may utilize the following guidelines in determining whether the facilities claimed are used primarily for pollution control purposes and subject to assessment under Chapter 193, Florida Statutes:

(1) If the person owning or responsible for operation of the facility secured approval of such equipment prior to its installation, in accordance with the rules and regulations of the Board.

(2) Upon written request by a tax assessor, the Florida Pollution Control Board will determine the applicable use of a facility with respect to Subsection 193.621(1), Florida Statutes. For this purpose the applicant must submit to the assessor, for submission to the Department, the following information prepared by a professional engineer registered in the State of Florida:

(a) Plans and specifications and related documents describing the equipment alleged to be used for pollution control. Plans or other information relative to the process which is controlled, adequate in scope to validate the claim for the proposed control equipment.

(b) A list of pollution control equipment which the applicant declares subject to assessment under Chapter 193, Florida Statutes, certified as to its true primary use by the engineer. The assessor may require on the equipment list the salvage value of each item.

(3) Prior to demolition and reconstruction of a plant or installation the owner should have such demolition and reconstruction approved by the Department as necessary for the control of industrial contaminants in order to comply with phrase "in the necessary control of industrial contaminants." Such approval will be given by the Department only after review of information relative to the specific plant submitted by a professional engineer registered in the State of Florida. Such information shall be adequate in scope to determine the necessity for demolition in the control of contaminants, and shall include plans and specifications for the reconstruction. The Florida Pollution Control Board will provide advice and consultation to the several tax assessors upon request concerning the phrases "increase the capacity of efficiency" and "decrease the unit cost of production."

Specific Authority 193.621(8) FS. Law Implemented 403.021(7), 193.621 FS. History—Formerly 28-8.04, 17-8.04, 17-8.040.

[NEXT PAGE IS p. 91]

Department of Environmental Protection

Jeb Bush
Governor

Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, Florida 32399-2400

David B. Struhs
Secretary

May 23, 2000

Mr. Gary M. Carman, Esq.
Broad & Cassel
Miami Center, Suite 3000
201 South Biscayne Boulevard
Miami, Florida 33131

Re: Wheelabrator - Broward County Tax Assessment

Dear Mr. Carman:

I received your letter of May 17, 2000, concerning Wheelabrator's North and South Broward County Resource Recovery Facilities when I returned to the office yesterday. Pursuant to 193.621(6), Florida Statutes, I believe it is proper for the Department of Environmental Protection to respond to a request for certification from the county property appraiser. If the property appraiser is in doubt as to whether the taxpayer is entitled to an assessment under 193.621, F.S., he can refer the matter to this department for a recommendation. Since the property appraiser has not made such a request for a clarification since 1993, it would be presumptuous of me to send him a revised certification.

If the Broward County Property Appraiser should request an updated certification, I will be glad to promptly submit one.

Sincerely,

Hamilton S. Oven

Hamilton S. Oven, P.E.

cc: Gaylord A. Wood, Jr., Esq.
Lee McKee, CFE

"Protect, Conserve and Manage Florida's Environment and Natural Resources"

Printed on recycled paper.

INTEROFFICE MEMORANDUM

Date: 10-May-2000 11:57am
From: David Freedman
Dfreedma@broadandcassel.com
Dept:
Tel No:

Subject: Wheelabrator

hi buck. i am told you are being deposed tomorrow on the broward county plants. it would save some time if yuou could pull together your materials not only on broward but also on polk county (Ridge Generating Facility), where tom fitzpatrick also performed an engineering analysis. thanks.

MALCOLM PIRNIE

MALCOLM PIRNIE, INC.
ENVIRONMENTAL ENGINEERS, SCIENTISTS & PLANNERS

May 11, 1993

Mr. Hamilton Oven, P.E.
Florida Department of
Environmental Regulation
Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, FL 32399-2400

RECEIVED

MAY 14 1993

D. E. R.
SITING COORDINATION

Re: Tax Assessment of the Broward County Resource Recovery Facilities (RRFs)

Dear Mr. Oven:

Thank you for meeting with us at your office on May 6, 1993 to discuss the referenced issue. I am writing to confirm the opinions discussed with respect to "primarily pollution control" equipment at the North and South RRF's, and the rationale for interpretation of various aspects of the Florida Statutes pertaining to this issue. Specifically, the following discussions took place regarding the itemized list of facility components prepared by Wheelabrator:

- We both agree on the definition of "pollution" and that it encompasses contaminants, noise, odors that may be potentially harmful to human, animal or plant life or property.

- Your letter dated April 9, 1993 to Mr. Gaylord Wood, inadvertently omitted Item 1 - Earthwork and Site Improvements, Item 8 - Trash Tipping Enclosure, Item 9 - Concrete Refuse Pit and Item 10 - Refuse Pit Enclosure as items that are "primarily for pollution control" per SS 193.621(4), F.S. During our discussions, you agreed that these items do prevent the escape of odor, noise, litter and other contaminants to the outside environment, and therefore should have been added to the itemized list of qualified facility components.

- With respect to Item 16 - Von Roll Grates & Ram Feed, you believe that the equipment used to feed waste into the furnace is <u>not</u> "primarily for pollution control," but that the equipment used to mix and agitate the waste to ensure proper combustion is "primarily for pollution control." Therefore, the grate system and its anciliary equipment would qualify as "primarily pollution control" equipment.

- With respect to Item 17 - Boiler Aux. Structures and Enclosures, and Item 18 - Boiler Auxiliary Equipment, you believe that the portion of this equipment devoted to providing proper air flow for the combustion process, such as the overfire and underfire air systems, would qualify as "primarily pollution control" equipment whereas all boiler related equipment would not.

- We both agree that the boiler serves a number of purposes including the necessary dissipation and reduction of the heat associated with the combustion process and the recovery of energy for the production of electric power. We disagree as to the primary purpose of this equipment, since you believe it is for the production of electric power. You do agree that some means of reducing the combustion temperatures (i.e., spray system, heat exchanger) is required to control air emissions, but disagree that this is the primary purpose of the boiler.

- With respect to Items 22 - Misc. Equipment & Process Piping, and Item 23 - Misc. Electrical & Instrumentation, you would qualify as "primarily pollution control" miscellaneous equipment that is associated with other items that you have previously classified as "primarily pollution control." For example, miscellaneous electrical and instrumentation associated with monitoring or controlling proper waste combustion conditions, or with the air pollution control equipment would qualify as "primary pollution control" equipment, whereas miscellaneous electrical and instrumentation associated with the boiler and turbine generator would not.

- With respect to Item 25 - Condensers and Cooling Tower, you believe that the portions of the system that are required to dissipate the waste heat to atmosphere rather than to a body of water (i.e. cooling towers) would qualify as "primarily pollution control," as is the case at the North Broward RRF, whereas the portion that condenses the steam for reuse in the boiler (surface condenser) would not. In the event these separate functions are performed by the same piece of equipment, as is the case at the South Broward RRF where an "Air-Cooled" Condenser exists, it was suggested that an estimate of the cost of a "conventional" surface condenser system be subtracted from Item 25, and the remainder would qualify as "primarily pollution control."

- We disagree with respect to Item 35 - Emissions Stack. You do not believe this qualifies since it does not reduce the total quantity of air emissions. I believe it qualifies, since it controls these emissions by dispersing them and reducing their impact on ambient air levels.

- With respect to Item 43 - Bulldozer, Item 47 - Operating Supply Inventory, Item 48 - Mobile Equipment, and Item 51 - Spare Parts, you do not believe they qualify as "primarily pollution control," but you also do not believe they should be assessed for ad valorem taxes since they are not a permanent part of the facilities.

MALCOLM PIRNIE

If I have misunderstood your position on any of the aforementioned items, please contact me as soon as possible. By copy of this letter I am requesting that Wheelabrator further breakdown those items where you believe there is partial (pro-rata) applicability as "primarily pollution control" equipment.

Once again, thank you for your cooperation with this matter.

Very truly yours,

MALCOLM PIRNIE, INC.

Robert J. Schneider

Robert J. Schneider, P.E.
Vice President

c: T. Henderson
D. Freedman
O. Walchuk

pw/224.rjs
0448-122-102

WOOD & STUART, P.A.
ATTORNEYS AT LAW

GAYLORD A. WOOD, JR.
B. JORDAN STUART

304 S.W. 12TH STREET
FORT LAUDERDALE, FLORIDA 33315

(305) 463-4040
FAX (305) 764-5734

April 5, 1993

Hamilton S. Oven, P.E.
Administrator, Siting Coordination Office
Department of Environmental Regulation
Twin Towers Office Building
2600 Blairstone Road
Tallahassee, FL 32399-2400

Re: Wheelabrator North & South RRF Facilities

Dear Mr. Oven:

This office represents William Markham, as Broward County Property Appraiser. As you have doubtless heard, the Special Master employed by the Value Adjustment Board has recommended that essentially all of Wheelabrator's facilities in Broward County be designated as pollution control devices according to § 193.621(4), Florida Statutes.

While your letter of February 16 was most helpful, we do need your final determination of what is and what is not pollution control devices, certified in a form that will be acceptable to the full Value Adjustment Board.

Your co-operation in finalizing this matter is greatly appreciated. Thank you for your continuing co-operation.

Sincerely,

GAYLORD A. WOOD, JR.

GAW/jkf

cc: Hon. William Markham

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APR 08 1993
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WOOD & STUART, P.A.
ATTORNEYS AT LAW

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304 S.W. 12TH STREET
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954
~~(305)~~ 463-4040
FAX (305) 764-5734

May 13, 1993

Hamilton S. Oven
Florida Department of
Environmental Regulation
2600 Blair Stone Road
Tallahassee, Florida 32399-2400

Re: Wheelabrator North & South RRF Facilities

Dear Mr. Oven,

Thank you for your participation in the matter of the Wheelabrator hearing set before the Broward County Value Adjustment Board, on Wednesday, May 19, 1993, at 2:00 p.m. Enclosed is your ticket. I will meet you at the airport, at 11:50 a.m., on that Wednesday. We will first come to Mr. Wood's office, then you and Mr. Wood can proceed to the hearing together.

Thank you again, and if you need any thing further, prior to our hearing date, just let me know.

Sincerely,

Beth Casten

Beth Casten
Legal Assistant

CC: Brenda Ayers, CFE

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MAY 17 1993
D. E. R.
SITING COORDINATION

3022 S.W. 12th St

MALCOLM PIRNIE

MALCOLM PIRNIE, INC.
ENVIRONMENTAL ENGINEERS, SCIENTISTS & PLANNERS

May 11, 1993

Mr. Hamilton Oven, P.E.
Florida Department of
Environmental Regulation
Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, FL 32399-2400

Re: Tax Assessment of the Broward County
Resource Recovery Facilities (RRFs)

Dear Mr. Oven:

Thank you for meeting with us at your office on May 6, 1993 to discuss the referenced issue. I am writing to confirm the opinions discussed with respect to "primarily pollution control" equipment at the North and South RRFs, and the rationale for [illegible] of various aspects of the Florida Statutes pertaining to this issue. Specifically, the following discussion took place regarding the itemized list of facility components [illegible] by Wheelabrator.

- We both agree on the definition of "pollution" and that it encompasses contaminants, noise, odors that may be potentially harmful to human, animal or plant life or property.

- Your letter dated April 9, 1993 to Mr. Gaylord W[illegible] inadvertently omitted Item 1 - Earthwork and Site Improvements, Item 8 - Trash Tipping Enclosure, Item 9 - Concrete Refuse Pit and Item 10 - Refuse Pit Enclosure as items that are "primarily for pollution control" per SS 193.621(1), F.S. During our discussions, you agreed that these items do prevent the escape of odor, noise, litter and other contaminants to the outside environment, and therefore should have been added to the itemized list of qualified facility components.

- With respect to Item 16 - Von Roll Grates & Ram Feed, you believe that the equipment used to feed waste into the furnace is not "primarily for pollution control," but that the equipment used to mix and agitate the waste to ensure proper combustion is "primarily for pollution control." Therefore, the grate system and its ancillary equipment would qualify as "primarily pollution control" equipment.

- With respect to Item 17 - Boiler Auxiliary Structures and [illegible], and Item 18 - Boiler Auxiliary Equipment, you believe that the portion of this equipment devoted to providing proper air flow for the combustion process, such as the

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MALCOLM PIRNIE

overfire and underfire air systems, would qualify as "primarily pollution control" equipment whereas all boiler related equipment would not.

- We both agree that the boiler serves a number of purposes including the necessary dissipation and reduction of the heat associated with the combustion process and the recovery of energy for the production of electric power. We disagree as to the primary purpose of this equipment since you believe it is for the production of electric power. You do agree that some means of reducing the combustion temperature (i.e., spray system, heat exchanger) is required to control air emissions, but disagree that this is the primary purpose of the boiler.

- With respect to Items 22 - Misc. Equipment & Process Piping and Item 23 - Misc. Electrical & Instrumentation, you would qualify as "primarily pollution control" miscellaneous equipment that is associated with other items that you have previously classified as "primarily pollution control." For example, miscellaneous electrical and instrumentation associated with monitoring or controlling proper waste combustion conditions or with the air pollution control equipment would qualify as "primary pollution control" [illegible] whereas miscellaneous electrical and instrumentation associated with the boiler and turbine generator would not.

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- We disagree with respect to Item 35 - [illegible]. You do not believe this qualifies since it does not reduce the total quantity of air emissions. I believe it qualifies, since it controls these emissions by dispersing them and reducing their impact on ambient air levels.

- With respect to Item 43 - Bulldozer, Item 47 - [illegible] Supply [illegible], Item 48 - Mobile Equipment, and Item 51 - Spare Parts, you do not believe they qualify as "primarily pollution control," but you also do not believe they should be assessed for ad valorem taxes since [illegible] of the facilities.

MALCOLM PIRNIE

If I have misunderstood your position on any of the [illegible] me as soon as possible. By copy of this letter I am requesting [illegible] breakdown those items where you believe there [illegible] "primarily pollution control" equipment.

Once again, thank you for your cooperation with this matter.

Very truly yours,

MALCOLM PIRNIE, INC.

Robert J. Schneider, P.E.
Vice President

cc: T. Henderson
D. Freedman
O. Walchuk

[illegible]
[illegible]

MALCOLM PIRNIE

FACSIMILE [illegible]

TO:

OF:

FAX NO.:

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FROM:

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TIME:

JOB NUMBER:

NUMBER OF PAGES:

RETURN ORIGINALS TO SENDER:

MESSAGE:

MALCOLM PIRNIE

MALCOLM PIRNIE, INC.
ENVIRONMENTAL [illegible] SCIENTISTS & PLANNERS

May 7, 1993

DRAFT

Mr. Hamilton Oven, P.E.
Florida Department of
Environmental Regulation
Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, FL 32399-2400

Re: Tax Assessment of the Broward County
Resource Recovery Facilities (RRFs)

Dear Mr. Oven:

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MALCOLM PIRNIE

DRAFT

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MALCOLM PIRNIE

DRAFT

If I have misunderstood your position on any of the aforementioned items, please contact me as soon as possible. I also request that Wheelabrator further breakdown those [illegible] where you believe there is partial [illegible] applicability of [illegible] pollution control equipment.

Once again, thank you for your cooperation with this matter.

Very truly yours,

MALCOLM PIRNIE, INC.

[illegible] Schneider, P.E.
Vice President

[illegible]

c: T. Henderson
[illegible]
[illegible] Walchuk

[illegible]-102

WOOD & STUART, P.A.
ATTORNEYS AT LAW

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B. JORDAN STUART

304 S.W. 12TH STREET
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(305) 463-4040
FAX (305) 764-5734

March 14, 1995

DEPARTMENT OF
ENVIRONMENTAL PROTECTION

MAR 17 1995

SITING COORDINATION

Hamilton S. Oven
Florida Department of
Environmental Regulation
2600 Blair Stone Road
Tallahassee, Florida 32399-2400

Re: Wheelabrator North & South RRF Facilities

Dear Mr. Oven,

In connection with our hearing of April 13, 1995, enclosed are your plane tickets. Please plan on coming to our office on Thursday morning and you and Mr. Wood can proceed to the hearing together. As far as meeting prior to the hearing we can arrange that once you are in town. Your plane arrives at 1:20 in the afternoon.

Many thanks for your participation on our behalf and if you need anything further, please just let us know.

Sincerely,

Beth Casten

Beth Casten
Legal Assistant

CC: Lee McKee, CFE

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April 28, 2000

BY FAX

HAMILTON OVEN, P.E.
Florida Department of Environmental Regulation
Twin Towers Office Bldg.
2600 Blair Stone Road
Tallahassee, FL 32399
Fax: (850) 921-7250

Re: Markham v. Wheelabrator et al., Case Nos. 93-014143 (14), 95-011412 (14)

Dear Mr. Oven:

Enclosed please find a Re-Notice of your deposition rescheduling the deposition that was previously scheduled for May 2, 2000. The deposition is now scheduled for May 11, 2000. We apologize for any inconvenience this rescheduling may have caused you and truly appreciate your cooperation.

Please let me know if you have any questions or if I can be of any assistance.

Very truly yours,

Ari J. Glazer

Ari J. Glazer

Enclosure

DEPARTMENT OF
MENTAL
SITING COORDINATION

WOOD & STUART, P.A.
ATTORNEYS AT LAW

GAYLORD A. WOOD, JR.
B. JORDAN STUART

304 S.W. 12TH STREET
FORT LAUDERDALE, FLORIDA 33315
(954)
(305) 463-4040
FAX (305) 764-5734

December 9, 1994

David A. Freedman, Esq.
200 South Biscayne Boulevard
Suite 4750
Miami, Florida 33131

DEPARTMENT OF
ENVIRONMENTAL PROTECTION
DEC 12 1994
SITING COORDINATION

Re: William Markham -v- Wheelabrator
Case No. 93-14143

Dear Mr. Freedman,

This is a response to your letter dated December 1, 1994. Mr. Wood has no objection to Mr. Oven and your designated agent meeting to discuss issues. However, such a conference would need to be scheduled when Mr. Wood may be in attendance and he expressly does not consent to any discussions taking place between parties, outside of his presence.

If this agreeable to you, please let know and I will contact Mr. Oven and your office to schedule this.

Very truly yours,

Beth Casten

Beth Casten
Legal Assistant

CC: Hamilton Oven
Mr. David Hlay
Mr. Lee McKee

Department of
Environmental Protection

Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, Florida 32399-2400

Jeb Bush
Governor

David B. Struhs
Secretary

March 22, 2000

Mr. David A. Freedman, Esq.
Broad and Cassel, Attorneys at law
Suite 3000, Miami Center
201 South Biscayne Boulevard
Miami, Florida 33131

Re: Wheelabrator North and South Broward Resource Recovery Facilities

Dear Mr. Freedman:

Thank you for providing me a copy of the Department's letter dated February 19, 1998. The letter as written is advisory to the Broward County Property Appraiser. It was not my normal response to a request by the Property Appraiser's Office where I state whether or not a certain list of pollution control equipment is eligible for assessment pursuant to § 193.621, Florida Statutes. In this instance, I was responding to your request to review the report analyzing the cost of pollution control equipment prepared by Mr. Thomas Fitzpatrick, P.E. I was commenting on Mr. Fitzpatrick's methodology. I was not responding to a formal request from Broward County. Therefore I do not consider the letter to be a certification as required by § 193.621, F. S.

If I can be of further assistance in this matter, please contact me.

Sincerely,

Hamilton S. Oven

Hamilton S. Oven, P.E.

cc: Gaylord Wood, Esq.
Lee McKee, CFE

Department of Environmental Protection

Jeb Bush
Governor

Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, Florida 32399-2400

David B. Struhs
Secretary

SITING COORDINATION OFFICE
FAX COVER SHEET

OFFICE TELEPHONE NO: 850-487-0472
FAX NO: 850-921-7250

DATE: 3/22/00

TO: Beth Casten FAX NO. (954) 764-5734

FROM: Buck Oven

COMMENTS: Re: Wheelabrator

Your FAX No. has not change either

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