INTRODUCTION

This brief Article is an attempt, in a small way, to memorialize the contributions of Judge Jim Lehan to the law of Florida. That this effort is a modest one is not to suggest that Judge Lehan's impact on the law was in any way modest or insignificant. Just the opposite is true, although Judge Lehan was himself modest and unassuming. This project represents my imperfect attempt to do justice to the work that he did and reflects my desire to keep this Article short, as he no doubt would have wished it to be.

I have selected for discussion one of Judge Lehan's opinions, quite simply, because it is among my favorites. This aside, it is an excellent example of his work, being elegant both in style and organization. It represents, however, more than stellar judicial craftsmanship, because it is an attempt to correct what he perceived, rightly in my judgment, to be an important imperfection in the law. That this opinion of his is not an isolated incident is well illustrated...
by the comments of Judge Chris Altenbernd found later in this Dedication. That Judge Lehan's attempt to set the law right has, unlike the situation mentioned by Judge Altenbernd, not yet succeeded, in no way diminishes the effort. To apply the words of Charles Evans Hughes to a situation slightly, but not significantly, different: “A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.” Michael A. Musmanno, late justice of the Pennsylvania Supreme Court, ended one of his famous dissents with the words: “And I shall continue to dissent from [the holding of the majority] until the cows come home.” It has been said that when, years later, the court adopted the position that Justice Musmanno had championed, it began its opinion with the words: “The cows have now come home.” It is to be hoped that one day the Florida Supreme Court will show equivalent wisdom.

**SCHULTZ v. TM FLORIDA-OHIO REALTY LTD. PARTNERSHIP, FAIRNESS IN AD VALOREM TAXATION**

In a series of cases, it was established that a tract of land occupied by a shopping center could be correctly appraised by a county property appraiser without taking into account in any significant way the fact that the shopping center’s principal tenant was enjoying the benefit of a lease that produced income that was meaningfully less than that prevalent at the time of the challenged appraisal...
— the so called “lease calling for submarket rent.” The line of reasoning in these cases is difficult for anyone not an expert in property appraisal to follow. The author of this Article certainly claims no such expertise. That conceded, it appears that the rule allowing nonuse of the lease calling for submarket rent was predicated on the questionable application of two principles of property appraisal.

First came the application of the rule that the property appraiser must consider all eight statutory criteria governing property appraisal, but need not utilize them all. Wide latitude was and is allowed in the choice among the criteria made by the appraiser. However, this latitude should not amount to unfettered discretion. In general, this is a salutary, even necessary, rule providing needed flexibility in the appraisal process. The problems began in the cases involving the lease calling for submarket rent when the rule was applied in a way that allowed the appraiser to choose not to use the income approach to valuation. This would give no weight in the

7. Schultz, 553 So. 2d at 1215. The phrase is used by Judge Lehan in his analysis of this problem.
8. Judge Lehan himself described parts of his opinion as being “fairly intricate.” Id. at 1205.
9. Fla. Stat. § 193.01 (1993). As described in the dissenting opinion of Judge Parker, the statutory criteria are, in pertinent part:
   (1) The present cash value of the property . . . ;
   (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 . . . ;
   (3) The location of said property;
   (4) The quantity or size of said property;
   (5) The cost of said property and the present replacement value of any improvements thereon;
   (6) The condition of said property;
   (7) The income from said property; and
   (8) The net proceeds of the sale of the property.
Schultz, 553 So. 2d at 1222 n.1 (Parker, J., dissenting) (quoting Fla. Stat. § 193.011 (1985)).
10. Valencia Ctr., 543 So. 2d 214, 216 (Fla. 1989) (citing Oyster Pointe Resort Condominium Ass’n v. Nolte, 524 So. 2d 415 (Fla. 1988)). “In arriving at fair market value, the [property appraiser] must consider, but not necessarily use, each of the factors set out in section 193.011.” Id.
11. See Valencia Ctr., 543 So. 2d at 216-17 (citing Blake v. Xerox Corp., 447 So. 2d 1348 (Fla. 1984)). The court stated:
   The particular method of valuation, and the weight to be given to each factor, is left to the discretion of the [property appraiser], and his determination will not be disturbed on review as long as each factor has been lawfully considered and the assessed value is within the range of reasonable appraisals.
Id.
12. Id. at 217.
The apparent rationale for this nonuse of the income approach to valuation is the application of a rule that all interests in the property must be considered in the valuation process. This is the second questionable application of a rule of property valuation. The rule worked well in Morganwoods Greentree, the case relied upon by the Florida Supreme Court for the rule's application in the shopping center situation with which this Article is concerned. How

13. Id. at 216.
14. Id. at 217.
15. Morganwoods Greentree, 341 So. 2d at 756. There, the following principle was stated by the supreme court:

We reaffirm the general rule that in the levy of property tax the assessed value of the land must represent all the interests in the land. This means that despite the mortgage, lease, or sublease of the property, the landowner will still be taxed as though he possessed the property in fee simple. The general property tax ignores fragmenting of ownership and seeks payment from only one owner.

Id. at 758, quoted in Valencia Ctr., 543 So. 2d at 217.

The circumstances of Morganwoods Greentree were quite different from Valencia Center and Schultz. At issue in Morganwoods Greentree was the proper method of assessment of the common areas of a townhouse complex. Id. at 757. The townhouses were individually owned in fee simple while the common areas, although subject to easements such as ingress and egress for the owners of the townhouses, were owned in fee simple by the corporation, Tampa Villas South, Inc. Id. To prevent the common areas from being fragmented, as was apparently attempted by the tax assessor (now known as the property appraiser), the Florida Supreme Court ordered that the common areas be separately assessed as the property of the corporation. Id. at 759. The corporation would then have to pay the taxes on the common areas although it could obtain the money to do so from the unit owners through authority contained in the declaration, presumably one of condominium. Id.

It is unclear what effect the easement had on the assessment of the common areas. At one point in its opinion, the supreme court spoke of not suggesting that an assessment be made “without regard to the effect of an [easement] on the value of the land.” Id. at 758. Yet, later in the opinion where the role of the corporation was being discussed, the court spoke of assessing “the value of the common areas separately with an adjustment being made in the value of each residential unit.” Id. at 759. One can read this language to mean that since the easements were not, after all, factored into the value of the common areas thus reducing the assessed value of those common areas, the adjustment in the value of the residential units was a reduction in the value since the residential units could not also be charged with the value of the common areas. In any event, even if the easements were not factored in, the corporation did not stand to lose since it could fully collect the taxes owed through its power of assessment. Thus, the nonfragmentation rule announced by the supreme court is hardly realistic precedent.
ever, in the shopping center situation, it produced the result of forcing the property appraiser to consider not only the interest of the lessor-owner, but also the interest of the lessee-tenant. In order to do this, the positive value to the lessee-tenant of the lease calling for submarket rent would, in effect, cancel out its negative impact on the lessor-owner. Thus, the lease producing submarket rent could legally not be factored in by the property appraiser in the appraisal process. The supreme court could then state that the property appraiser was placing a value on what was, in effect, the unencumbered fee interest of the owner. And, of course, it was the unencumbered fee that was to be considered in the willing buyer-willing seller scenario. This, at least to one not initiated into the mysteries of property appraisal, appears to be at the heart of the problem faced by Judge Lehan in Schultz.

In Schultz, Judge Lehan had facts with which to work that were just different enough from the earlier shopping center problem to allow him to distinguish that situation and construct an argument that would require a property appraiser to factor in a lease calling for submarket rent under those different facts. This crucial factual difference was the length of time the lease had to run. Judge Lehan stated: “That case [the earlier shopping center problem] in contrast to this case, was shown to have involved a lease extending no more than `several years into the future.” This difference had at least three effects which seem to have been central to Judge Lehan’s thesis regarding the effect of a lease calling for submarket rent. First, in the earlier shopping center situation,

and in contrast to the case at hand, the burden of taxes based upon an assessed valuation of property without reduction by reason of its being encumbered by a submarket-rent lease apparently could, within a relatively short period of time, have been shifted to the

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16. See Valencia Ctr., 543 So. 2d at 217. In Valencia Center the court stated: “Here, the overall interest consists of two parts: [T]he interest remaining in the hands of the owner-lessee, Valencia, and the interest held by the lessee, Publix. The amount a willing buyer would pay for the ‘fee simple’ equals the value of both the lessor’s and lessee’s interests.” Id.

17. Schultz, 553 So. 2d at 1216 (quoting Valencia Ctr., 432 So. 2d at 110). In contrast, the K-Mart lease in Schultz had 26 years to run. Id. at 1207.
party receiving the benefit of the encumbrance.\textsuperscript{18}

Second, Judge Lehan stated that:

The provision in [Florida Statutes,] section 193.011(2) requiring the consideration of “[t]he highest and best use to which the property can be expected to be put in the immediate future” further indicates the material difference between a case involving a long-term lease like that here and cases involving short-term leases. That is, to value property subject to a short-term lease as though there were no lease may be argued to properly take into consideration the forthcoming expiration of the lease and thereby the use to which the property can be in the at least relatively immediate future. But to value the property in this case as though it were not encumbered by a long-term lease would seem to contravene that statutory provision by basing the property's value upon its potential use at a time in the future which could not even arguably be “immediate.”\textsuperscript{19}

Third, while conceding the possibility that factoring \textit{in} the effect of a short-term lease calling for submarket rent \textit{might} result in an assessment figure that was below market value because a willing buyer \textit{might} "virtually ignore the only temporarily depressing effect of submarket rent upon the value of the property to the property owner,"\textsuperscript{20} Judge Lehan stressed that this would not be the case with a long-term lease calling for submarket rent.\textsuperscript{21} In other words, a willing buyer would not be likely to ignore the effect of such a long-term lease in deciding what he would pay for the property, nor, I suppose, could a willing seller expect him to do so. "The long-term 'fair market value' which is synonymous with 'just valuation' as required by section 193.011 and the Florida Constitution, is essentially the price for which property could be marketed. Of course, the property in this case could be marketed only by its owner and only as encumbered."\textsuperscript{22} Thus, \textit{Schultz}, could be considered sufficiently dif-

\textsuperscript{18} \textit{Id.} at 1216.
\textsuperscript{19} \textit{Id.} (quoting \textit{FLA. STAT.} § 193.011(2) (1993)).
\textsuperscript{20} \textit{Id.} at 1219.
\textsuperscript{21} \textit{Id.} at 1207. “The longer property is locked into a lease calling for submarket rent, the longer the owner of the property must wait to receive from a willing buyer a price for the property not reduced by the submarket rent.” \textit{Id.}
\textsuperscript{22} \textit{Schultz}, 553 So. 2d at 1226 (Lehan, J., concurring specially in the denial of a rehearing en banc and in the granting of the motion to certify).
different from the short-term lease situation to require the impact of the lease at issue there to be not just considered by the property appraiser, but used by him.

This brief description of what appears to be the core of Judge Lehan's reasoning is by no means descriptive of the thoroughness of the lengthy opinion.23 Virtually all applicable case law was marshaled in support of the conclusion reached. Even cases that are seemingly inconsistent were shown to be supportive.24 The reasoning of courts of other states on the question of the effect of a long-term lease calling for submarket rent was also considered.25

Temporarily, at least, it was all to no avail. In a brief per curiam opinion,26 the Florida Supreme Court ignored the distinction between a long- and a short-term lease, and held that the long-term lease calling for submarket rent was, correctly, not used by the property appraiser because for him to have done so would ignore its benefit to the lessee and thus fragment the interest in the property.27 In this way, the property would be viewed as unencumbered.28 Form triumphed over substance. A willing buyer would never consider such property unencumbered.29

23. Id. at 1204-21, 1226.
24. Consider the use of Morganwoods Greentree, supra note 15, where Judge Lehan pointed out that the Florida Supreme Court opinion could be read to say that the easements on the common areas had to be taken into consideration in assessing those common areas. Schultz, 553 So. 2d at 1214. Another example is, as has already been suggested, turning cases such as Valencia Center to his advantage by pointing out that the length of a lease calling for submarket rent has a dramatic effect on the price a willing buyer will pay for property so encumbered. See, e.g., supra note 21.
25. Schultz, 553 So. 2d at 1208-11.
27. Id. at 574.
28. Id. at 575.
29. See supra text accompanying note 22.