SUPREME COURT OF FLORIDA

CAPITAL CITY COUNTRY CLUB, INC., et al.,

Petitioners,

vs.

KATIE TUCKER, etc., et al.,

Respondents,

and

INTERNATIONAL SPEEDWAY CORPORATION, a Florida corporation,

Amicus Curiae.

CASE NO. 78,201

INITIAL BRIEF OF AMICUS CURIAE INTERNATIONAL SPEEDWAY CORPORATION

THIS COURT'S CERTIFIED QUESTION FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

S. LaRue Williams
Florida Bar No. 0130159
KINSEY VINCENT PYLE, P.A.
150 S. Palmetto Avenue, Box A
Daytona Beach, Florida 32114
(904) 252-1561
Attorneys for International Speedway Corporation

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES PAGE

STATUTES AND ADMINISTRATIVE RULES

ISSUES PRESENTED

ISSUES: I. WHETHER IT IS PROCEDURALLY IMPROPER FOR THIS COURT *TO* CONSIDER THE CONSTITUTIONAL CHALLENGE TO § 196.199(2)(b), FLA. STAT. (1989), RELATIVE TO THE LEGISLATURE'S RE-CLASSIFYING LEASEHOLD INTERESTS AS INTANGIBLE PERSONAL PROPERTY

II. WHETHER § 196.199(2)(b), FLA. STAT. (1989), IS A CONSTITUTIONAL RE-CLASSIFICATION OF LEASEHOLDS AS INTANGIBLE PERSONAL PROPERTY FOR AD VALOREM TAX PURPOSES

STATEMENT OF THE CASE AND FACTS

The CAPITAL CITY COUNTRY CLUB, INC. ("CLUB") is a non-profit corporation with offices in Tallahassee, Florida. The CLUB leases 192 acres from the City of Tallahassee ("City"). The land was deeded to the City on the condition that the City perpetually restrict the use of the subject property to golf course recreation so long as it is owned by the City. Consequently, the lease is required to be utilized as a golf course.

In 1987, the CLUB paid intangible personal property taxes on its leasehold interest. Beginning in 1988, however, the CLUB received a bill for ad valorem real property taxes assessed against the City's ownership interest in the property. These taxes were paid under protest and a refund was requested by the CLUB.

On March 23, 1989, the CLUB filed a complaint praying for declaration of its rights, status, and duties with respect to the matters set forth above, and naming as defendants, the Property Appraiser, the Executive Director of the Department of Revenue, and the Tax Collector of Leon County.

On November 1, 1989, the CLUB received, from the City, a tax notice for payment of 1989 ad valorem real property taxes against the subject 192 acres. On November 30, 1989, the CLUB filed a complaint in circuit court against the Property Appraiser and the Executive Director of the Department of Revenue challenging the 1989 ad valorem real property tax

assessment for the golf course property. The referenced complaints were consolidated on February 22, 1990.

The CLUB filed a Motion for Summary Judgment and the Property Appraiser likewise filed a Motion for Partial Summary Judgment in his favor. The trial court denied the CLUB's Motion for Summary Judgment and granted the Property Appraiser's Motion for Partial Summary Judgment, finding that the CLUB "is a private membership club is [sic] not carrying on municipal or governmental functions on the property in issue." Therefore, the court found that the property was not entitled to an exemption from ad valorem tax assessed by the appellee Property Appraiser.

The CLUB filed its appeal with the First District Court of Appeal which issued its initial opinion on April 18, 1991, affirming the trial court and finding that the CLUB failed to show that the subject property was improperly taxed. Subsequent to the filing of the initial opinion, the Leon County Property Appraiser ("Property Appraiser") responded to the Petitioner's Motion for Rehearing En Banc or Motion to Certify the Question and, for the first time, appeared to question the constitutionality of § 196.199(2)(b), Fla. Stat. (1989). On June 6, 1991, pursuant to this response, the District Court amended its original opinion to include the following certified question as one of great public importance:

> IF IT IS CONSTITUTIONALLY PERMISSIBLE TO EXEMPT A NONGOVERNMENT LEASEHOLD (BEING USED FOR OTHER THAN TAXABLE PURPOSES) FROM AD VALOREM TAXATION (BY RECLASSIFYING IT AS AN INTANGIBLE), WHICH AD VALOREM TAX TREATMENT

IS CONSTITUTIONALLY CORRECT WITH REGARD TO **THE GOVERNMENTAL LEASED FEE: TO TAX** THE **MUNICIPAL PROPERTY** USED FOR **PRIVATE PURPOSES AS AN UNEMCUMBERED [sic] FEE INTEREST, OR TO TAX THIS PROPERTY AS A DIVIDED INTEREST, EXCLUDING THE LESSEE'S INTEREST?**

On July 9, 1991, the Supreme Court of Florida issued its Order **Postponing Decision on Jurisdiction and Briefing Schedule.**

SUMMARY OF ARGUMENT

It is procedurally improper for this Court to consider the constitutionality of § 196.199(2)(b), Fla. Stat. (1989). The issue of whether the legislature had the power to re-classify private leaseholds in governmental property as intangible personal property was not raised in the First District Court of Appeal until after issuance of the court's April 18, 1991 opinion. The constitutionality was apparently questioned for the first time by the Property Appraiser on May 20, 1991, in its Response for Motion for Rehearing En Banc, Etc., when it suggested that the question to be certified to the Supreme Court should relate, among other things, to the constitutionality of re-classifying leasehold interests as intangible personal property. Since this constitutional issue was not properly raised in the lower court, it cannot now be considered on review of the District Court's opinion. Additionally, the Property Appraiser has no standing to challenge duly enacted legislative acts of this state. Since the Appellant did not raise the issue, and the Appellees had no standing to challenge the constitutionality of § 196.199(2)(b), Fla. Stat. (1989), this Court should not consider the constitutionality of the legislature's re-classifying leasehold interests as intangible personal property.

Substantively, § 196.199(2)(b), Fla. Stat. (1989), properly re-classified leasehold interests as intangible personal property. This is consistent with common law where leasehold interests have always been considered as personal property

rather than real property. The court in Miller v. Higgs, 468 So. 2d 371, 376 (Fla. 1st DCA 1985), held that the legislature has the power to re-classify leasehold interests in governmentally-owned property as intangible personal property consistent with common law, and this classification process is not violative of the Florida Constitution.

POINT I

IT IS PROCEDURALLY IMPROPER FOR THIS COURT TO CONSIDER THE CONSTITUTIONAL CHALLENGE TO § 196.199(2)(b), FLA. STAT. (1989), RELATIVE TO THE LEGISLATURE'S RE-CLASSIFYING LEASEHOLD INTERESTS AS INTANGIBLE PERSONAL PROPERTY.

The constitutionality of the legislature's re-classifying leasehold interests as personal property was raised by the Property Appraiser for the first time after the initial opinion of the First District Court of Appeal on April 18, 1991. In his effort to re-state the (Petitioner's) suggested certified question to this court, the Property Appraiser appears to suggest that this court revisit the constitutionality of the legislature's re-classifying of leaseholds as intangible personal property. However, this issue has already been conclusively determined: In 1985, the First District Court of Appeal clearly held that the legislature had the authority to constitutionally re-classify leaseholds as intangible personal property. Miller V. Higgs, supra. The court did not, at that time, attempt to certify that question as one of great public importance despite the fact that the question was specifically raised and argued by the participants in that appeal. It appears, therefore, that the First District Court of Appeal did not intend to certify the question of the propriety of classification of leasehold interests as intangible, and therefore, the gratuitous interjectory clause, "If it is constitutionally permissible to exempt a non-governmental leasehold (being used for other than taxable purposes) from ad valorem taxation (by re-classifying it as an intangible)," is mere surplusage and

should be stricken or otherwise not considered by this court. Otherwise, the First District is attempting to certify a question as one of great public importance when that question was not before it, was not argued during the appeal, and was not certified when the precise issue was previously presented in Miller v. Higgs, supra.

Initially, it is well-settled that a party cannot raise arguments on rehearing that were not presented to the court in the appellate briefs or at oral argument. Sag Harbour Marine, Inc. v. Fickett, 484 So. 2d 1250 (Fla. 1st DCA 1986); Price Wise Buying Group v. Nuzum, 343 so. 2d 115 (Fla. 1st DCA 1977). Furthermore, an appellate court cannot pass on issues other than those properly presented on appeal. Lightsee v. First National Bank of Melbourne, 132 So. 2d 776 (Fla. 2d DCA 1961), cert. den. 138 So. 2d 334 (1962). See also, Larkin v. Tsavalis, 85 So. 2d 731, 733 (Fla. 1956) [points not raised by the parties below can have no effect on outcome of appeal]; Laramore v. Laramore, 64 So. 2d 662, 670 (Fla. 1953) [question not submitted to Supreme Court on appeal would not be decided]. The Property Appraiser's failure to raise this issue during the appeal similarly precludes consideration of this issue for the first time on review by this court. In Jones v. Meibergall, 47 So. 2d 605, 606 (Fla. 1950), the appellant raised the issue of whether a piece of property was homestead as contemplated by the Florida Constitution. This was the sole issue raised on first consideration of the case as well as in the petition for rehearing.

Id. at 606. Thereafter, upon petition for reconsideration, the appellant raised an equitable argument not raised below. Id. The court held that since the equitable issue was not raised until reconsideration of the cause, the Supreme Court would not entertain those issues on appeal. Id. Similarly, since the Property Appraiser chose not to raise the constitutional issue until its response to the motion for rehearing, this court should not consider that issue. Finally, since the question raised is a broad constitutional issue, and not absolutely necessary to the disposition of the case, it should not be decided by this court. E.g., Mayo v. Market Fruit Co. of Sanford, Inc., 480 So. 2d 555, 559 (Fla. 1949). Simply put, the Supreme Court should not consider retroactive questions which are procedurally improper to raise after the appellate court's opinion.

An additional procedural issue which must be determined at the outset relates to the standing of the Property Appraiser to contest the constitutionality of a duly enacted legislative act. It is a well-established rule in this state that property appraisers do not have standing to challenge duly enacted legislative acts. State officers and agencies are required to presume that the legislation affecting their duties is valid, and they do not have standing to initiate litigation for the purpose of determining otherwise. Department of Education v. Lewis, 416 So. 2d 455 (Fla. 1982); Barr v. Watts, 70 So. 2d 347 (Fla. 1953); Graham v. Swift, 480 So. 2d 124 (Fla. 3d DCA 1986).

While property appraisers do have the right to appeal decisions of the Property Appraisal adjustment Board, they may not "institute any suit to challenge the validity of any portion of the Constitution or of any duly enacted legislative act of this State." § 194.036(1)(a), Fla. Stat. (1989).

The Florida Supreme Court has already ruled that property appraisers do not have standing to attack the validity of duly enacted legislative acts. In Department of Revenue v. Markham, 396 So. 2d 1120 (Fla. 1981), property appraisers challenged the validity of a Department of Revenue administrative rule issued pursuant to Chapters 191 through 197 of Florida Statutes, inclusive. The Supreme Court stated that, "Since the property appraisers under Section 195.021(1), Florida Statutes (1977), had a clear statutory duty to comply with the prescribed Department of Revenue regulations governing the taxability of household goods, they clearly lacked standing for declaratory relief in their governmental capacities." Id. at 1121. Fla. Admin. Code Rule 12D-3.03(3) directs that leases of governmentally-owned land, held by private individuals, upon which rental payments are due shall be treated as intangible property, and Dick Brand, as Property Appraiser of Leon County, Florida, has a clear, statutory duty to comply with § 196.199, Fla. Stat. (1989), and does not have standing to challenge its constitutionality.

Therefore, the Property Appraiser lacks standing to sneak in an eleventh hour attempt to raise the issue of constitutionality of the statute re-classifying leaseholds.

POINT II

SECTION 196.199(2)(b), FLA. STAT. (1989), IS A CONSTITUTIONAL RE-CLASSIFICATION OF LEASEHOLDS AS INTANGIBLE PERSONAL PROPERTY FOR AD VALOREM TAX PURPOSES

Since this issue was improperly raised for the first time by the Property Appraiser in his suggested language for a certified question to this Court, it is unclear whether this issue will even be addressed in this appeal. In the interests of caution, and to provide historical background of leasehold interest taxation, DAYTONA SPEEDWAY will discuss the constitutionality and history of the legislature's re-classification of leasehold interests in Florida as intangible personal property consistent with common law.

A. HISTORY OF THE TREATMENT OF LEASEHOLDS OF GOVERNMENTALLY-OWNED PROPERTY IN THE STATE OF FLORIDA

At common law, leasehold interests were generally considered to be a type of intangible personal property. Kentucky Tax Commission v. Jefferson Motel, Inc., 387 S.W.2d 293 (Ky. 1965); see also Williams v. Jones, 326 so. 2d 425 (Fla. 1975), app. dism'd 429 U.S. 803, 97 S.Ct. 34, 50 L.Ed.2d 63 (1976). The rule in Florida has always been, in the absence of a statutory definition, a leasehold estate is a "chattel real" and is to be classified as personalty rather than realty. Thalheimer v. Tischler, 46 So. 514 (Fla. 1908). The Florida Supreme Court addressed the question of the nature of a leasehold estate in Park-N-Shop, Inc. v. Sparkman, 99 So. 2d 571 (Fla. 1957) and

invited the Legislature to define such interest for tax purposes:

> In our examination of the tax statutes we have not found provisions for the specific assessment of the lessees' interest and we have been referred to none, although we are not conscious of any reason why the legislature could not set up machinery for that purpose in situations such as that presented in this case, but we are satisfied that the interests of lessees are neither tangible nor intangible personal. property as presently defined. (Emphasis Supplied.)

Id. at 574.

Before the adoption of the 1968 Florida Constitution, the Legislature often granted special exempt status to lessees of governmentally-owned property in order to encourage private individuals to develop publicly-owned land. The best example of this involved Santa Rosa Island. The Santa Rosa Island Authority was created by Chapter 24,500, Special Laws of Florida, 1947. Chapter 25,810, Special Laws of Florida, 1949, granted a tax exemption to the lands of the Santa Rosa Island Authority that had been leased to private persons. Disputes arose concerning the validity of this tax exemption. Those private, commercial and residential lessees on Santa Rosa Island were using the services of Escambia County without contributing to the costs of those services. Another policy reason for taxing these privately held leaseholds was that such tax was necessary as a means of equalizing the competitive positions of businessmen who held tax exempt leaseholds with businessmen who owned their own property, and therefore, paid real property ad valorem taxes.

The Florida Legislature, accepting the invitation of the Florida Supreme Court in Park-N-Shop, Inc. v. Sparkman, supra, moved to correct this situation by enacting the Tax Reform Act of 1971. Chapter 71-133, Laws of Florida, 1971. When this Tax Reform Act was repeatedly challenged by Santa Rosa Island lessees, the Florida Supreme Court consistently upheld the authority of the Legislature to tax all property used for private purposes in order to ensure that all property bear its just share of the tax burden for support of local government and education. Williams v. Jones, supra; Am Fi Investment Corporation v. Kinney, 360 So. 2d 415 (Fla. 1978). The exemption which is now provided in § 196.199(2)(a), Fla. stat. (1989), was held not to apply to residential and commercial lessees on Santa Rosa Island. Those lessees were not carrying out governmental functions which is required for the exemption, but instead were carrying out proprietary functions. Williams v. Jones, supra.

The arguments by the lessees of Santa Rosa Island that the Legislature could not revoke their tax exemption was rejected by the Florida Supreme Court because one Legislature cannot bind its successors with respect to the exercise of the Legislature's taxing power. Straughn v. Camp, 293 So. 2d 689 (Fla. 1974), app. dism'd, 419 U.S. 891, 95 S.Ct. 168, 42 L.Ed.2d 135 (1974). Although Williams v. Jones, supra, was an exemption case, and not a classification for tax rate purposes case, the Florida Supreme Court dealt with issues similar to the apparent constitutional issue presented here. The Supreme Court defined the questions presented in that case as follows:

> Does the Legislature have the power constitutionally to treat leasehold interests in public land such as are here involved as real property for ad valorem tax purposes and, secondly, has the Legislature done so through the enactment of the statutory provisions hereunder attack. We answer both propositions in the affirmative.

Id. at 429.

In answering the second issue, the Court started with the basic notion that, under Florida law, the Legislature could change the common law rule that leasehold estates were "chattels real" and were classified as personalty rather than realty by statute. The Florida supreme Court went on to recognize that:

> [T]he Legislature, within developed constitutional limits, has broad powers of classification for taxation purposes so as to bring about a fair contribution by all property interests to the tax burden necessary to provide the revenues for the functioning of government.

Id. at 432.

The same basic rule which permitted the Legislature to change its position and tax privately held leaseholds as real property to carry out public policy also permits the Legislature to tax private lessees that pay rent in consideration of their governmentally-owned leaseholds at intangible tax rates in order to carry out public policy of fair contribution by all property interests to the tax burden.

In addition to the general rule that one Legislature cannot bind its successors with respect to the exercise of the Legislature's taxing power, it is also general law in this state that the Legislature is presumed to know existing law when it

enacts a statute and is also presumed to be acquainted with the judicial construction of former laws on subjects concerning which later statutes are enacted. Williams v. Jones, supra. When the Legislature enacted § 196.199(2)(b) in 1980, it must be presumed that it did so knowing of the Supreme Court decisions in Park-N-Shop, Inc. v. Sparkman, supra; Straughn v. Camp, supra; Williams v. Jones, supra; Volusia County v. Daytona Beach Racing and Recreational Facilities District, 341 So. 2d 498 (Fla. 1976), app. dism'd 434 U.S. 804, 98 S.Ct. 32, 54 L.Ed.2d 61 (1977); and Walden v. Hillsborough County Aviation Authority, 375 So. 2d 283 (Fla. 1979). While these cases dealt with the question of exemption, which is not the question here, they did involve discussions of the broad policy reasons behind the taxation of private leaseholds discussed above.

Having established that a non-arbitrary classification of interests in real property is permitted, we now address the question of whether the classification of leaseholds as tangible personal property is fair. While a leasehold in property does provide the lessee with possession of the property, it cannot be said that the lessee has rights equal to an owner in fee simple. Hence, the policy argument that taxation of leaseholds in governmentally-owned property is necessary to equalize the competitive positions of such leaseholders with businessmen who own their property, fails to take into account the property owners' inherent advantage of being able to do whatever they choose with their owned property. For example, the lessee

cannot sell or mortgage the real property which he possesses, while the owner of real property can sell and mortgage the privately owned real estate.

Additionally, a lessee of governmentally-owned property is in an even more disadvantageous position than the owner of private property. when an owner of private property does not pay his taxes, the law provides for a lien on that property, § 192.053, Fla. Stat. (1989). If the lessee of governmentally-owned property does not pay his taxes, he is subjected to a lien placed on all other property owned by that lessee anywhere in the State. § 196.199(8)(a), Fla. Stat. **(1989).** In addition, **if** the lessee fails to pay the taxes required under Chapter 196, Florida Statutes, the lessee shall have his occupational license revoked, or if the lessee is a corporation, its corporate charter revoked. § 196.199(8)(a), Fla. Stat. (1989). Thus, there is created a disincentive to lease property from the State or its political subdivisions. The imposition of the intangible tax rate on lessees who pay rent in consideration for their leasehold interests merely helps to insure that such lessees total intangible and real property **ad** valorem tax bill will not exceed the tax bill paid by an owner of private property with property of a similar value and with similar incidents of ownership. See Fla. Admin. Code Rule 12C-2,10(5)(b).

Section 196.199(2)(b), Fla. Stat. (1989), still carries out the constitutionally mandated requirement that all property bear

its fair share of the tax burden for local government services. Am Fi Investment Corporation v. Kinney, supra. § 196.199(2)(b) deals solely with those lessees of governmentally-owned property who, in consideration for their leasehold estate, pay rent to either the state or one of its political subdivisions. Note that § 196.199(2)(b) imposes an intangible tax rate on the value of only the leasehold estate. The last sentence of § 196.199(2)(b) provides,

> Nothing in this paragraph shall be deemed to exempt personal property, buildings, or other real property improvements owned by the lessee from ad valorem taxation.

Like the owner of real property, the lessee pays local ad valorem property tax on all personal property, buildings, or other real property improvements which the lessee owns. Therefore, the lessee is actually taxed by the local government for those items which caused the lessee to use local government services, i.e., buildings and other improvements owned by the lessee which require fire protection, police protection, building inspection, and other government services.

The lessee also pays rent to the state or political subdivision that owns the premises. To the extent that the leasehold by itself constitutes a burden on local government services, this burden can be taken into consideration by the government unit in determining the amount of rent to be paid by the lessee. In this way, the local government can include in its rental payments sufficient monies to cover the burden placed on local services by the leasehold itself. Such an arrangement does not

violate the constitutional requirement that all property bear its fair share of the burden for the cost of local government services since many leaseholds pay for the government services in the rental payments or do not impose burdens on local government services.

As was previously stated, the Legislature has broad authority in the realm of taxation, subject only to controlling constitutional limitations. see Department of Revenue v. Markham, 381 So. 2d 1101 (Fla. 1st DCA 1979), quashed on other grounds, 396 So. 2d 1120 (Fla. 1981). The legislative rationale behind § 196.199(2)(b), Fla. Stat. (1989), is both reasonable and logical. The method of taxation provided in that statute requires a lessee who pays rent in consideration for his right to lease governmentally-owned property to pay his fair share of the tax burden for local government services, and also alleviates Some of the disincentive to lease property from the state or its political subdivisions.

The Florida Legislature, in § 199.023(1)(d), Fla. Stat, (1989), has acted to define leaseholds. In so doing, the Legislature has readopted the common law treatment of leaseholds. Given that the lessees of governmentally-owned property are still required to bear their fair share of the burden of local government services, there is nothing in the Florida Constitution which would prohibit the Legislature from adopting the definition it has of leasehold estates.

B. GENERAL LAW CONCERNING THE DETERMINATION OF THE CONSTITUTIONALITY OF A STATUTE

It is appropriate to review some of the general law concerning the determination of the constitutionality of legislative statutes prior to determining whether § 196.199(2)(b), Fla. Stat. (1989), violates any specific portions of the Florida Constitution. The power of the state to tax is an innate sovereign power. The Florida Constitution does not grant this power: it merely limits it. Gaulden V. Kirk, 47 So. 2d 567 (Fla. 1950). Thus, in the realm of taxation:

> [T]he power of the State to classify for purposes of taxation is of wide range and flexibility, provided always that the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, *so* that all persons similarly circumstanced shall be treated alike. Mere difference is not enough: the attempted classification must rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed and can never be made arbitrarily and without any such basis.

State ex rel Vars V. Knott, 184 So. 752, 754 (Fla. 1938), app. dism'd, 308 U.S. 506, 60 S.Ct. 72, 84 L.Ed. 433 (1939).

Legislative acts are presumed to be constitutional and every doubt respecting the constitutionality of an act must be resolved in favor of finding the act constitutional. Gray V. Central Florida Lumber Company, 104 Fla. 446, 140 So. 320 (Fla. 1932), reh. den. 104 Fla. 446, 141 so. 604 (Fla. 1932), U.S. cert. den., 287 U.S. 634, 53 S.Ct. 84, 77 L.Ed. 549 (1932).

From this most basic rule of construction, case law has also determined that Florida courts must construe statutes as constitutional if at all possible. Aldana v. Holub, 381 So. 2d 231 (Fla. 1980); Trans Gulf Pipe Line Company/Department of Community Affairs v. Board of County Commissioners of Gadsden County, 438 So. 2d 876 (Fla. 1st DCA 1983): Trindade v. Abbey Road Beef'n Booze, 443 So. 2d 1007 (Fla. 1st DCA 1973). Where the Constitution may have several meanings and the Legislature has by statute adopted one, the legislative interpretation controls. Greater Loretta Improvement Association v. State ex rel Arthur T. Boone, 234 So. 2d 665 (Fla. 1970): Vinales v. State, 394 So. 2d 993 (Fla. 1981). If a statute can be interpreted in a way which will uphold its constitutionality, a court must adopt that interpretation, even if the statute is reasonably susceptible *to* another interpretation which would render it unconstitutional. Trans Gulf Pipe Line Company, supra; Department of Insurance v. southeast Volusia Hospital District, 438 So. 2d 815 (Fla. 1983), app. dism'd 466 U.S. 901, 104 S.Ct. 1673, 80 L.Ed.2d 149 (1984); Vildibill v. Johnson, 492 So. 2d 1047 (Fla. 1986). Another basic rule followed by Florida courts in determining whether a legislative act is unconstitutional is that, "an act will not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt". A.B.A. Industries, Inc. v. City of Pinellas Park, 366 so. 2d 761, 763 (Fla. 1979).

> The courts should not and must not annul, as contrary to the Constitution, a statute

> passed by the Legislature, unless it can be said of the statute that it positively and certainly is **opposed** to the Constitution. This is elementary.

Greater Loretta Improvement Association V. State ex rel Arthur T. Boone at 670.

Assuming, arguendo, the constitutional issue can be considered in this appeal, Respondents have the burden of proving that § 196.199(2)(b), Fla. Stat. (1989), is unconstitutional beyond a reasonable doubt. In Department of Revenue v. Amrep Corporation, 358 ***So.* 2d 1343**, 1349 (Fla. 1978), the Florida Supreme Court recognized the heavy burden resting upon one who asserts the unconstitutionality of a statutory taxation scheme. It is well-settled law in this state that a person challenging a legislative classification has not only the burden of showing that the classification made by the Legislature does not rest upon any reasonable basis, but also that the classification is arbitrary. State v. City of Miami Beach, 234 So. 2d **103** (Fla. 1970).

In regards to the constitutionality of tax statutes, the Florida Supreme Court stated the applicable rule as follows:

> Perfect equality in the operation of laws imposing a tax on real estate is recognized as impossible.
>
> ***
>
> It is generally recognized that, in the application of an excise tax, some objects of taxation will bear the burden while others will be relieved of it, one business will be relieved of it, one business will be selected while another will be omitted and one class

> of property will be taxed while another will go tax free. This fact, however, or the fact that it bears more heavily on one person or corporation than on another, does not vitiate the excise.

Gray v. Central Florida Lumber Company at 325.

With these basic rules of construction in mind, the question of whether § 196.199(2)(b), Fla. stat. (1989), violates any portion of the Florida Constitution will now be examined. There are only three sections of Article VII of the Florida Constitution which could possibly be a basis for holding § 196.199(2)(b) unconstitutional: Sections 3, 4 or 10 of Article VII of the Florida Constitution.

C. SECTION 196.199(2)(b), FLORIDA STATUTES, DOES NOT VIOLATE ARTICLE VII, SECTION 3 OF THE FLORIDA CONSTITUTION

Section 196.199(2)(b) does not provide an exemption; it denies an exemption. § 196.199(2)(b) states,

> Except as provided in paragraph (c), the exemption provided by this section shall not apply to those portions of a leasehold estate defined by Section 199.023(1)(f), subject *to* the provisions of sub-section (7).

The Florida Legislature did provide an exemption in § 196.199(2)(a) for leasehold interests in governmentally-owned property in which the lessee serves or performs a governmental, municipal or public purpose. Under § 196.199(2)(a), a lessee who meets the requirements is relieved of tax liability. Under § 196.199(2)(b), however, tax liability is imposed. Thus, it is impossible to allege that somehow Article VII, § 3, of the

Florida Constitution, is violated by § 196.199(2)(b), as that statute does not provide for an exemption, but instead imposes tax liability.

D. SECTION 196.199(2)(b), FLORIDA STATUTES. DOES NOT VIOLATE ARTICLE VII, SECTION 4 OF THE FLORIDA CONSTITUTION

Section 4 of Article VII of the Florida Constitution provides:

> By general law regulations shall be prescribed which shall secure a just valuation of all property for ad valorem taxation, provided:
>
> a. Agricultural land or land used exclusively for non-commercial recreational purposes may be classified by general law and assessed solely on the basis of character or use.
>
> b. Pursuant to general law tangible personal property held for sale as stock in trade and 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. (Emphasis Supplied).

The major thrust of this section is to insure that property subject to ad valorem taxation is taxed at its full market value. State Department of Revenue v. Adkinson, 409 So. 2d 53 (Fla. 1st DCA 1982): Tyson V. Lanier, 156 So. 2d 833 (Fla. 1963). Subparagraphs a. and b. of Article VII, § 4, of the Florida Constitution permit the Florida Legislature *to* provide for the valuation of the properties described therein at a value other than fair market value. All other property must, by general law, be assessed at just valuation.

Interlachen Lakes Estates, Inc. v. Snyder, 304 So. 2d 433 (Fla. 1973). The Florida Legislature and the Department of Revenue of the state of Florida have provided for a just valuation of leasehold interests, regardless of the method of taxation applied to the particular leasehold interest. § 199.032, Fla. Stat. (1989); Fla. Admin. Code Rule 12D-3.03(3).

Thus, it is not a question of whether those leaseholds defined by § 196.199(2)(b), Fla. Stat. (1989), as intangible property are being justly valued. Section 196.199 does not deal with a just valuation, i.e., fair market value, of leaseholds so it cannot violate Article VII, § 4, of the Constitution. If § 196.199(2)(b) is unconstitutional, it must be because it violates some provision of the Florida Constitution other than Article VII, § 4.

Section 196.199(2)(b), Fla. Stat. (1989), does not accomplish indirectly anything the Florida Legislature could not accomplish directly. In Archer V. Marshall, 355 So. 2d 781 (Fla. 1978) the Florida Supreme Court ruled that a scheme to remit to the lessees of Santa Rosa Island, through a reduction in rent, the amount of ad valorem taxes they were forced to pay was unconstitutional because it indirectly granted an exemption. Unlike the legislative act in Archer v. Marshall, the Florida Legislature has the authority to define leaseholds. Thalheimer v. Tischler, supra; Oliver v. Mencaldi, 103 So. 2d 665 (Fla. 2d DCA 1958); and Williams v. Jones, supra. Archer V. Marshall is further distinguishable in that no indirect exemption is granted

by § 196.199(2)(b). Section 196.199(2)(b) imposes tax liability. Thus, it cannot be attacked as an exemption.

E. SECTION 196.199(2)(b), FLORIDA STATUTES, DOES NOT VIOLATE ARTICLE VII, SECTION 10 OF THE FLORIDA CONSTITUTION

Article VII, § 10, of the Florida Constitution prohibits the Legislature from using its taxing power to aid private entities. The true purpose behind § 196.199(2)(b) is to aid the State and its political subdivisions and to ensure that lessees of governmentally-owned property carry no more than their fair share of the tax burden. In order to fully understand this concept, one must examine the broad public policy considerations involved in the taxation of leaseholds of governmentally-owned property. The fact that § 196.199(2)(b) is of some incidental benefit to lessees of governmentally-owned land is without consequence. If mere incidental benefit were the test under Article VII, § 10, then the taxing power could never be used to further any governmental purpose.

CONCLUSION

The constitutionality of § 196.199(2)(b), Fla. Stat. (1989), is not properly before this court. None of the litigants raised this issue in the appeal to the First District Court of Appeal. However, the Property Appraiser gratuitously prefaced its certified question with a phrase which appears to raise, for the first time, this constitutional issue. Since this issue is not properly before this court, and it is not essential to the disposition of this action, the constitutional question should not be considered by this court. Furthermore, it is well-settled law that the Property Appraiser has no standing to raise this issue in the first place.

In the event that this court chooses to consider the constitutionality of § 196.199(2)(b), Fla. Stat. (1989), its constitutionality is clear and should be upheld. Leaseholds have historically been treated as personal rather than real property. Accordingly, the legislature's reclassification of leasehold interests as personal property cannot be considered arbitrary. Since it would be the Property Appraiser's burden to prove that the law is arbitrary, and unconstitutional beyond a reasonable doubt, the Property Appraiser cannot meet his burden on this issue. In addition, given the significantly fewer rights of a lessee as compared to an owner of real property, the treatment of a leasehold interest as personal property is fair. Finally, since § 196.199(2)(b), Fla. Stat. (1989), does not provide an exemption, does not address just

valuation of leasehold interests, and does not violate public policy regarding taxation of leasehold interests, the law does not violate any portion of Article VII of the Florida Constitution.

REQUEST FOR RELIEF

Amicus Curiae INTERNATIONAL SPEEDWAY CORPORATION requests that this court refuse to consider the improperly raised constitutional issue or, in the alternative, determine that § 196.199(2)(b), Fla. Stat. (1989), is a constitutional exercise of the legislature's broad taxing authority.

KINSEY VINCENT PYLE,
PROFESSIONAL ASSOCIATION

By: S. LaRue Williams

S. LaRue Williams
Florida Bar No. 0130159
150 S. Palmetto Avenue, Box A
Daytona Beach, Florida 32114
(904) 252-1561
Attorneys for International
Speedway Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by mail, to the addressees on the attached Service List, this 23rd day of August, 1991.

S. LaRue Williams
S. LaRue Williams

SERVICE LIST

William C. Owen, Esquire
215 South Monroe Street
Post Office Drawer 190
Tallahassee, Florida 32302
Attorneys for Appellant

Robert A. Butterworth, Attorney General
Ralph R. Jaeger, Assistant Attorney General
The Capitol
Tallahassee, Florida 32399
Attorneys for Appellee Katie Tucker,
Executive Director of the Florida
Department of Revenue

Benjamin K. Phipps, 11, Esquire
Post Office Box 1351
Tallahassee, Florida 32302
Attorney for Dick Brand, Property
Appraiser of Leon County, Florida

Peter Guarisco, Esquire
Suite 101
2003 Apalachee Parkway
Tallahassee, Florida 32301
Attorney for John Chafin, Tax
Collector of Leon County, Florida

S. LaRue Williams, Esquire
Kinsey Vincent Pyle, P.A.
150 South Palmetto Avenue, Box A
Daytona Beach, Florida 32114
Attorneys for Amicus Curiae,
International Speedway Corporation

8520/0951