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IN THE SUPREME COURT OF FLORIDA

CAPITAL CITY COUNTRY CLUB, INC., a corporation not for profit,

Petitioner,

vs. CASE NO.: 78,201

KATIE TUCKER, Executive Director of the Florida Department of Revenue, DICK BRAND, as Property Appraiser of Leon County, Florida, and JOHN CHAFIN, as Tax Collector of Leon County, Florida,

Respondents. /

INITIAL BRIEF OF AMICUS CURIAE

HONORABLE ROBERT BURGESS, PROPERTY APPRAISER OF SANTA ROSA COUNTY, AND AS PRESIDENT OF THE PROPERTY APPRAISERS' ASSOCIATION OF FLORIDA

Larry E. Levy
FL BAR ID NO. 0047019
Post Office Box 10583
Tallahassee, Florida 32302
(904) 222-7680
Attorney for Amicus Curiae

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PRELIMINARY STATEMENT

This brief is being submitted on behalf of the Amicus Curiae the Property Appraisers' Association of Florida and the Honorable Robert Burgess, as President of the Property Appraisers' Association of Florida, and Property Appraiser of Santa Rosa County, in support of the position that the subject property owned by the City of Tallahassee and leased to and operated by a private commercial entity, the Capital City Country Club, Inc., is taxable. Herein this Amicus will be referred to as the "Appraisers' Association". The taxpayer, Capital City Country Club, Inc., will be referred to herein as the "Club". The executive director of the Department of Revenue will be referred to as the "Department". The Honorable C. C. "Dick" Brand, Leon County Property Appraiser will be referred to as the "Appraiser", and any other parties will be referred to by name.

References to the Record on Appeal shall be designated by "R:" followed by the appropriate page number.

STATEMENT OF THE FACTS AND CASE

This case arose in Leon County Circuit Court upon suit being filed by the Club against the Appraiser, the Department and the Tax Collector. The complaint challenged the assessment of ad valorem seal property taxes for tax year 1988 which such taxes in the amount of $11,079.93, have been paid under protest by the Club. The relief sought was declaratory in nature pursuant to Chapter 86, Florida Statutes. (R:1-27).

The Club also filed suit challenging the assessment for 1989 and both suits were subsequently consolidated. (R:48-49; 205-240).

The case was decided on cross motions for summary judgment filed by the parties with the Court finding that the property was not entitled to an exemption from the ad valorem real property tax assessed by the Appraiser. (R:193). Thereafter the Club filed a motion for entry of final judgment and a notice of voluntary dismissal of Count II which was granted by the Court. (R:194-200; 201-202).

The real property which the Court found to be taxable is 192 acres comprising a golf course which is virtually unimproved and is operated and maintained by the Club as a private golf course, pursuant to a 99-year lease with the City of Tallahassee which was assigned to the Club by its predecessor which had entered into said lease in 1956. This property was assessed by the Appraiser based on its fee simple value as unencumbered real property. The Appraiser did not appraise or

assess the leasehold interest of the Club, or consider same in arriving at the value of the property.

On appeal the First District Court of Appeal upheld the trial court's judgment but on motion for rehearing certified to this Court the following question as a question of great 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 UNENCUMBERED FEE INTEREST, OR TO TAX THIS PROPERTY AS A DIVIDED INTEREST, EXCLUDING THE LESSEE'S INTEREST?

SUMMARY OF ARGUMENT

The best thing that can be said about the question as certified by the District Court is that it is confusing and reeks with ambiguity. There can be little doubt but that the question attempts to suggest that dire constitutional implications surround the issue and are implicit in the issue. The Appraisers' Association contends that no such constitutional implications necessarily arise or are implicit in the decision of the circuit court in holding that the property is taxable as real property and that the assessment of said real property by the Appraiser was **proper.** The Appraiser assessed the property itself, he made no attempt to assess the leasehold interest in such property which is a separate and distinct form of property taxed as an intangible by the State through the Department of Revenue. Under Florida law Property Appraisers are required to assess real property as defined in Section 192.001(12), F.S., and that is exactly what the Leon County Property Appraiser did. He assessed the real property without taking into consideration any leasehold interest, mortgage, hunting leases or licenses, or any other liens which might appear of record against the property. under Florida law that is precisely what a Property Appraiser is required to do. See Schultz v. TM Florida-Ohio Realty Ltd., 577 So.2d 573 (Fla. 1991).

The Constitution prevents the state from taxing either real or personal property, and because of the mandate of Article VII, Section 1(a), Florida Constitution, the Legislature lacks the power to take away or restrict the power of counties and

municipalities to levy ad valorem taxes. Article VII, Section 1(a), Florida Constitution provides:

> No tax shall be levied except in pursuance of law. No state ad valorem taxes shall be levied upon real estate or tangible personal property. All other forms of taxation shall be preempted to the state except as provided by general law. (e.s.).

Since land and buildings thereon (improvements) are real estate, they can only be subject to ad valorem taxes by counties, municipalities, etc., and not the state. The statutes providing for taxation of leaseholds as intangibles must be read and construed with these precepts of organic, fundamental law firmly in mind. Likewise any appraisal methodology which would shift part of the real estate value and subject it to taxation by the state, would be inconsistent with the constitutional limitation. The state would then by taxing real estate which the constitution prohibits. Thus, the Club's contention that the real property value should be divided between the lessor and lessee, and the lessee should only pay intangible taxes on his "part", is squarely inconsistent with the Constitution.

The Appraisers' Association contends that except in the case of subsurface rights under Section 193.481, F.S., a Property Appraiser has no authority to consider the existence or non-existence of a lease in real property in arriving at the value of same when the property is used for taxable purposes. Land and any improvements thereon have a value separate and apart from any value which may or may not exist in any leasehold rights held by a lessee which may or may not have value. The Appraisers' Association does not agree with the contention made

by the Club that the value of the real property, that is the thing itself, should be divided between a lessor and a lessee when a lease exists in the real property. From this premise, (that the value of the property--the thing itself--must be divided when a lease exists between that of the lessor and that of the lessee), the Club argues that therefore, that which had previously been real property has somehow now been converted to intangible personal property so as to be subject only to intangible tax. The Appraisers' Association disagrees with this rationale and contention and contends that the value of the real property has nothing to do with the value of the leasehold interest.

The history of the statutes and case law hereinafter set forth will demonstrate that at one time a leasehold interest in real property was not subjected to any form of taxation whatsoever. It was not taxed as real property, personal property or intangible personal property. See Park-n-Shop, Inc. v. Sparkman, 99 So.2d 571 (Fla. 1958). Through various statutory changes beginning in the early 1960's the Legislature dealt with situations where governmentally-awned property was rented or used by private entities and commercial undertakings, and in 1971, through the enaction of Chapter 71-133, Laws of Florida, concluded to tax the leasehold interest in real property as a specie of real property, focusing directly on those leaseholds which existed in Florida which were of an original duration of 99 years or more. This election was no accident since all of the leases on Santa Rosa Island and the leases involving the Daytona

Beach Raceway, as well as others no doubt, were known to be of a 99-year duration, and since the real estate field generally considers 99-year leases as the equivalent of ownership. In such leases the Legislature commanded that the property would be taxed as if owned by the lessee, and this was held to be a standard of valuation in the case of Williams V. Jones, 326 So.2d 425 (Fla. 1975).

In 1980 the Legislature enacted Chapter 80-368, Laws of Florida, which changed the taxation of certain leaseholds and declared that these leaseholds would be assessed as intangibles instead of real property. It is the Appraisers' Association's contention that the 1980 law change did not affect or change a Property Appraiser's duties with regard to assessing real property which might be subject to lease and did not affect the taxable status of the property itself.

The Appraisers' Association contends that the proper method of valuing real property owned by a governmental entity but used by a private entity for commercial profit-making purposes would be any method permitted by Section 193.011, F.S., so as to arrive at a just value of said property. when real property ceases to be used for appropriate exempt purposes, (see Section 196.199(1) and Section 196.199(2)(c), F.S.), such property becomes taxable just ~~the same~~ as real property in private ownership used identically.

ARGUMENT

POINT I

WHERE REAL PROPERTY IS OWNED BY A GOVERNMENTAL UNIT AND LEASED BY IT TO A PRIVATE COMMERCIAL ENTITY WHICH USES SAID REAL PROPERTY FOR PRIVATE NON-GOVERNMENTAL PURPOSES, FLORIDA LAW DOES NOT PERMIT A PROPERTY APPRAISER TO EITHER REDUCE THE VALUE OF THE REAL PROPERTY BY VIRTUE OF THE EXISTENCE OF SAID LEASE, OR TO DIVIDE THE VALUE OF THE REAL PROPERTY BETWEEN THE GOVERNMENTAL LESSOR AND THE NON-GOVERNMENTAL LESSEE.

The basic premise underlying the Club's argument is that in the situation where a governmental unit owns real property and leases it to a private commercial entity which uses it for private nan-governmental purposes, the Property Appraiser has a duty to reduce the value of the real property by some amount which is determined to be the value of the leasehold interest of the lessee in such real property. In other words, the Club is contending that a Property Appraiser is required by law to take the total value of the real property and divide such value between the lessor and the lessee. We believe this premise to be incorrect under Florida law.

The Club's contention must first be measured against the limitations in Florida's Constitution. The constitutional framework pointed out in the Summary of Argument is recognized in Mallard v. Tele-Trip Co., 358 So.2d 969 (Fla. 1 DCA 1981), at page 973 as follows:

> Thus, the legislature, by enacting Section 624.520, cannot constitutionally "preempt" the counties from levying ad valorem taxation. Article VII, Section 1(a), Florida Constitution of 1968 provides:

> No state ad valorem taxes shall be levied upon real estate or tangible personal property. ALL other forms of taxation shall be preempted except as provided by general law. (e.s.)

Article VII, Section 9, further provides:

> Counties, school districts, and municipalities shall . . . be authorized by law to levy ad valorem taxes.

> Article VII, Section 9, by the use of the mandatory word "shall", appears to mandate the legislature to authorize only the counties the power to levy ad valorem taxes. Compare Tascano v. State, 393 So.2d 540 (Fla.1980)(reh. den., February 27, 1981). Hence, it does not appear that the legislature has the power to revoke the counties' authority to levy such taxes in part or in full. Even if the legislature has the power to take away or restrict a county's ability to levy ad valorem taxes, it cannot "preempt" that power because it is prohibited from exercising the power itself by virtue of Article VII, Section 1(a). Therefore, it cannot be assumed that the legislature intended to include ad valorem taxation within the species of taxes preempted by Section 624.520. A statute should be construed if possible, to avoid a conclusion that is unconstitutional, Knight & Wall Co. v. Bryant, 178 So.2d 5 (Fla.1965) (cert. den., 383 U.S. 958, 86 S.Ct. 1223, 16 L.Ed. 301), so as to avoid absurd results. Sharon v. State, 156 So.2d 677 (Fla. 3d DCA 1963). Therefore, an ad valorem tax is not preempted by Section 624.520, Florida Statutes. (e.s.).

It should not be presumed that the Legislature intended to infringe upon the constitutional restriction found in Article VII, Section 1(a), supra. The Club's basic premise is squarely inconsistent with this constitutional restriction on the legislative power. The Club's premise takes away from counties,

cities and school districts part of the value of real estate and transfers it to the state subjected to intangible tax. Taxing part of the value of a parcel of real estate is the equivalent to taxing the real estate and the constitution prohibits the state from taxing real estate. But this is what the Club is contending should be done.

A statute should be construed, if possible, to avoid a conclusion that it is unconstitutional, and also to avoid a construction which would lead to an unconstitutional interpretation. ***See*** Knight & Wall Co. v. Bryant, 178 So.2d 5 (Fla. 1965), cert. den., 383 U.S. 958, 86 S.Ct. 1223, 16 L.Ed 301, and State v. Cotney, 104 So.2d 346 (Fla. 1958). In Cotney, the Supreme Court stated at page 349:

> Nor do we find Ch. 57-1226, supra, amenable to the attack here made upon it. It is our duty to resolve doubts as to constitutionality in favor of validity; and, if the Act admits of two interpretations, we should adopt that which leads to its constitutionality. Gray v. Central Florida Lumber Co., 104 Fla. 446, 140 So.2d 320, 141 So, 604.

In simply recognizing that an intangible is a specie of rights separate and distinct from real property and personal property, and that the valuation of the one has nothing to do with the value of the other, no constitutional infringement occurs.

First it must be remembered that Property Appraisers are req ired by law to perform two essential functions which are (1) appraise real and personal property, and (2) administer exemptions. Property Appraisers have neither the duty nor the

authority to appraise or assess intangible rights in real property. A lease is a document which gives to the lessee certain rights secured by the lease in and to the real property. This is not the same as the real property itself. Intangibles consist of money, including certificates of deposit, cashier and certified checks, bills of exchange, drafts, the cash equivalent of annuities and life insurance policies, stocks, accounts receivables, unsecured promissory notes, promissory notes secured by real property such as mortgages, bonds and other obligations for the payment of money, condominium and cooperative apartment leases of recreational facilities, land leases, and leases of other commonly used facilities, and leaseholds or other possessory interests in real property owned by governmental entities. *See* Section 199.023, F.S. Generally, "intangible personal property" means all personal property which is not in itself intrinsicly valuable, but which derives its chief value from that which it represents. A leasehold interest in real property easily fits within this definition. It should be noted that not only leasehold ok possessory interests in governmentally-owned property, but also land leases, condominium and cooperative apartment leases of recreational facilities, and leases of other commonly used facilities are also classified as intangible personal property.

Thus, that which falls within the definition of intangible personal property to be taxed accordingly, are the rights secured by such documents, not the thing itself. For instance, stocks held by individuals could represent ownership

interests in incorporated companies but this certainly would not mean that the cash and other securities held by such corporate companies would not also be taxable, and no double taxation would exist in such case. Similarly, the fact that a promissory note may be secured by a mortgage representing a secured interest in real property would not mean that the real property itself would not also be taxable or that the real property itself should have a value reduced by any outstanding indebtedness for which it stood as security. The Club's premise is false. The value of the intangible lease has nothing to do with the value of the real property.

The following examples should demonstrate this clearly. Assume the existence of a five-acre parcel of property with land worth $10,000.00 and a home on it worth $90,000.00, for a total value of the parcel of $100,000.00. Assume, however, that a third party, John Doe, held a promissory note and mortgage in this property executed by the owner and secured by the property in the amount of $125,000.00. The promissory note would be an intangible which would be subject to intangible tax based on the face value of the note of $125,000.00, even though the value of the property securing the note is only $100,000.00. The non-recurring tax imposed under Section 199.133, F.S., of two mills would be imposed on the just valuation of the note, and the valuation of same would be the face amount of the note as set forth in Section 199.155, F.S. In other words, intangible tax would be due on a value of $125,000.00, even though the value of the real property was only $100,000.00. Had the note not been

secured by a mortgage the note would have been subject to an annual tax, instead of the one time tax, and would have been valued as set forth in Section 199.103(6), F.S., which would permit the taxpayer to establish a lesser value than the face amount of the note or the unpaid balance. Section 199.103(7), F.S., requires that all forms of intangible personal property be valued on the basis of those factors customarily considered in determining fair market value. This is somewhat similar to the standards which Property Appraisers must use in valuing real and personal property in Section 193.011, F.S.

The value of an unsecured promissory note, just like a check, could vary depending on the credit reliability of the maker. A $100,000.00 unsecured promissory note executed by a person who had died leaving no assets would have no value. Similarly, a $100,000.00 check executed by a person who could not be found and who had no assets could have little or no value. Similarly, a $10,000.00 check of a bankrupt company which left no assets could have no value. A debt (account receivable, intangible) has little or no value if it can't be collected. The point is that the value of an intangible is separate and apart from the valuation of the real property.

In the case of a lease, a lessee's interest in a lease may or may not have value depending on whether or not the contract rent is greater or less than the market or economic rent. To illustrate, if a businessman had entered into a 20-year lease for office space in downtown Tallahassee at a fixed rental of $5.00 per square foot ten years ago, which such office space was

now worth $20.00 per square foot, the businessman could sub-lease that office space to another tenant for $20.00 per square foot and realize as a profit the difference between the $5.00 per square foot which he was obligated to pay to the lessor/landlord, and the $20.00 per square foot which he would be realizing from the lessee. In that situation the contract rent would be less than the true market or economic rent for office space in downtown Tallahassee and thus, the lessee would have a valuable intangible interest in his lease in the office building which he had leased. However, this value of the lessee's interest has nothing to do with value of the building itself and the land on which it was located.

In fact, this Court recently considered a situation very similar to the example in the case of Valencia Center, Inc. v. Bystrom, 543 So.2d 214 (Fla. 1989). In Valencia Center the landlord had entered into a fixed rental lease which became sub-market over a period of some 20 years and since the lease did not provide that the ad valorem taxes would be passed on to the lessee, the lessor had to pay the taxes thus further reducing his income from the lease. This Court held that a statute which purported to classify such leases and treat them differently for ad valorem property valuation purposes, was unconstitutional. Most recently this Court in overturning and reversing the decision of the Second District Court of Appeal in Schultz v. TM Florida-Ohio Realty, Ltd., supra, held that the Property Appraiser's duty was to assess the unencumbered fee of the

property without regard to the existence or non-existence of leases thereon.

Thus, the basic premise of the Club is inconsistent with both Valencia and Schultz. The basic premise attempts to divide the valuation of a parcel of real property between a landlord and tenant by virtue of a lease and then to require that part of the value of the real property be considered an intangible, and allocated to the lessee, and taxed as an intangible by the state. No statutory duty exists on a Property Appraiser to divide or allocate the value of a parcel of real property between a lessor and a lessee or to alter the value of property because of the terms of a lease.

It is well settled in Florida law that in appraising a parcel of real property the Property Appraiser is required by law to appraise the thing itself without regard to the existence or non-existence of leases, easements, mortgages, or any other encumbrances on or to said real property. See Wolfson v Heins, **149 Fla. 499, 6 So.2d 858** (Fla. 1942); Dickinson **v.** Davis, **224** So.2d 262 (Fla. 1969); Homer v. Dadeland Shopping Center, Inc., **229 So.2d 834** (Fla. 1970); and Valls v. Arnold Industries, Inc., **328** So.2d **471** (Fla. **2** DCA 1976). The basic premise of these cases were recently reaffirmed in the case of Day v. High Point Condominium Resorts, Ltd., 521 So.2d 1064 (Fla. 1988), wherein this Court reversed the Second District Court of Appeal pointing out that no authority existed in Florida law to divide, separate, or "break-out" the interest of each undivided time-share owner in a single condominium apartment. In that case condominiums had

been converted to time-share and a week's worth of occupancy was sold to various individuals who each received an undivided 1/51st interest in the property. The time-share holders and the time-share developments contended that each time-share week holder should be entitled to receive a separate bill for his 1/51st interest in the single parcel and that failure to so provide constituted a violation of due process and equal protection. This Court rejected this argument recognizing that in Florida it is the parcel of property which is assessed not the various ownership interests in same. Five owners holding undivided interests in a 100-acre parcel of property would receive only one bill and the same would be true of a condominium apartment converted to time-share use, In fact, the ad valorem tax machinery of Florida would probably come to a screeching halt were this not true because the sale of tax certificates and tax deeds secures the tax structure and no authority exists or should exist for the sale of a 1/51st interest in a single condominium apartment. Florida's tax structure is always premised on the assumption that tax deeds and tax certificates should sell, because if they don't sell then the county will ultimately become the owner of the parcel and it could hardly be considered sound government philosophy to have the county become a joint owner of an undivided 1/51st interest in a single condominium parcel.

There can be no question but that the argument of the Club is based upon the erroneous basic premise that the value of the total fee property must be somehow divided between the lessor

and the lessee. This is recognized at page 8 of the Club's brief where it is stated:

> The threshold question is whether taxes may be assessed against the interests of both the municipal lessor and the private lessee. Second, this Court must determine whether the value of these two components of the total fee may be compounded to yield a total assessed value in excess of the true market value, or whether the overall value of the property must be apportianed between the component interests. (e.s.).

The Appraiser's Association contends that the Club's basic premise is false and that the issue before this Court is not that as stated by the Club. That which has been stated previously points out clearly that the valuation of an intangible lease is totally separate and has nothing to do with the valuation of the property. They are two separate and distinct species of property which are subjected to tax under Florida law. Real property is defined in Section 192.001(12), F.S., as follows:

> (12) "Real property" means land, buildings, fixtures, and all other improvements to land. The terms "land," "real estate," "realty," and "real property" may be used interchangeably.

Intangible personal property has been previously defined herein and it is readily apparent that the two are totally different and must be in light of the constitutional restriction in Article VII, Section 1(a), supra. The Club is attempting to establish a premise for this Court which does not exist from which it can argue that the total value must then be apportioned. No apportionment exists because the species of property are separate and distinct.

At page 9, the Club's conclusion based on the false premise is again set forth as follows:

> Failure to require apportionment or allocation of the total property valuation between the two taxable interests exposes the bundle of rights comprising the entire property to multiple ad valorem taxation in violation of the basic constitutional privileges and entitlements. (e.s.).

Here again the false premise is used to support an erroneous conclusion. No potential violation of constitutional privileges occurs for the simple reason that the rights afforded by the lease (the intangible) are just that, an intangible, deriving its chief value from that which it represents as opposed to the thing itself. The thing itself, the real property, is assessed as real property. No double taxation exists and this has been recognized by numerous decisions of this Court. In 50 Fla Jur 2d beginning at page 109, double taxation is discussed as follows:

> It's frequently stated or implied that before double taxation may be said to exist, both taxes must have been imposed in the same year, for the same purpose, on property owned by the same person, and by the same taxing authority.

Continuing therein it is stated:

> Double taxation doesn't occur if there are two taxpayers and two separate taxable transactions. It's not double taxation to tax the installation of a cable television hookup into a viewer's home, even though the sale of the hookup to the cable television company had been taxed previously.

In State v. Lee, 24 So.2d 798 (Fla. 19461, the Supreme Court discussed intangible taxation stating at page 801;

> The answer to this contention is that intangible taxes are a peculiar species of taxes that were not contemplated by the

> constitution when it was adopted. They were brought into existence by Section 1 of Article 9 of the Constitution as amended in **1924** and **1944.** They are levied by ~~the~~ legislature and in lieu of state. county, district and municipal taxes, all of which are barred from imposing them. They are apportioned by the legislature as it *sees* fit, and may be apportioned by the legislature as it seeks fit, and may be apportioned to the support of the county officers' and employees' retirement fund or for any other legitimate purpose. They are in no way affected by Sections 2 and 5, Article 9 of the constitution or any other provision of the constitution relating to excise, license or ad valorem taxes. They are a distinct tax, brought into being by the constitution, and the whole law for their collection and distribution is comprehended within Section 1 of Article 9. (e.s.).

In discussing the nature of intangible taxes in State v. Gay, 35 So.2d **403** (Fla. 1948) the Supreme Court stated at page **408:**

> What we have said with regard to Section 1 Article IX of the Constitution is likewise true with respect to the statutory law enacted pursuant to Section 1 Article IX.
>
> Chapters 20724, 21943 and 22867, Laws of Florida, enacted respectively in 1941, 1943 and 1945, pursuant to Section 1, Article IX, contain the entire statutory law of this State with regard to intangible personal property **taxes.** This law now appears in Chapter 199, Florida Statutes **1941**, F.S.A. The taxes imposed under Chapter **199** are ad valorem taxes imposed against intangible personal property,
>
> Intangible personal property is defined by section 199.01 as being "all personal property which is not in itself intrinsically valuable but which derives its chief value form that which it represents."

This case also recognizes ". . . that in contemplation of law, intangible personal property accompanies the person of owner and is taxable at his domicile." Also see Just Valuation & Taxation

League, Inc. v. Simpson 209 So.2d 229 (Fla. 1968), in which the contention was made that intangible and real and personal property should be assessed the same. The Court stated at page 233:

> So it is our opinion and we hold that the citizens of Florida had the right by constitutional amendment to place intangible personal property in a separate classification and to authorize the Legislature to impose a special tax thereon and to place a limit on the amount of the tax thus to be imposed, and that in doing so they did not offend against the due process clause of the Constitution of the United States, and the learned Chancellor was eminently correct in so holding.

For other cases discussing double taxation *see* In Re Advisory Opinion to Governor, 509 So.2d 292 (Fla. 1987), Ryder Truck Rental, Inc. v. Bryant, 170 So.2d 822 (Fla. 1970), and American Video Corp. v. Lewis, 389 So.2d 1059 (Fla. 1 DCA 1980), and 71 Am. Jur 2 page 362.

It should be remembered that prior to 1958 there was no statute in Florida which taxed a leasehold interest in real property. It was not taxed as personal property, real property, or intangible personal property. *See* Park-n-Shop v. Sparkman, 99 So.2d 571 (Fla. 1958). If the Legislature today chose to amend Chapter 199, F.S., and not tax any leasehold interest, the value of the real property in which such leaseholds existed wauld not be changed or altered one jot or one tittle. Thus, if the Legislature repealed Section 199.023(1)(c) and (d), F.S., both of which pertain to leaseholds, such leaseholds would no longer be taxed at all. Thus land leases and condominium and apartment leases of recreational facilities and leases of other commonly

used facilities, would no longer be subject to intangible tax. The same is true of leasehold and other possessory interests of property owned by a governmental unit. If this were to occur the value of the condominium or cooperative apartment would remain unchanged and the same is true €or the property of a governmental unit privately used.

The constitutional issues which are addressed only arise if the Club's original premise is correct. Since that premise is obviously incorrect, the constitutional issues which the Club refers to simply do not exist. Park-n-Shop recognized that a leasehold interest was not taxed at all in Florida. In 1971 the Legislature saw fit to tax the leasehold interest as real property and in 1980 decided to tax it as an intangible which is consistent with the common law where the leasehold interest in real property was considered a chattel real which was a type of personalty or personal property. See Wood v. Ford, 3 So.2d 490 (Fla. 1941)

In fact, the brief by the Honorable J. McHenry Jones in the case of Williams v. Jones, supra, contains an excellent discussion and citation of authorities elucidating this principle because in said case he contended that such leaseholds, if taxable, should be taxed as intangible personal property and not real property. The Supreme Court rejected this contention based on the conclusion that the statute enacted in 1971 evidenced an intent to tax a leasehold as real property. Had the Legislature in 1971, instead of taxing the leasehold as real property taxed it as intangible personal property and left the remaining

framework of exemption for governmentally-owned property the same, the governmentally-owned property could only be exempted if both owned and used for a legitimate governmental, municipal or public purpose. Section 196.199(1), F.S.

A general review of the history of the taxation of leasehold interests is in order.

In the case of Straughn v. Camp, 293 So.2d 689, (Fla. 1974), appeal dismissed 95 S.Ct. 168, 419 U.S. 891, 42 L.Ed.2d 135, the Supreme Court considered the taxation of property located on Santa Rosa Island. By special act all property located on Santa Rosa Island had been exempt even if used, pursuant to leases, for private purposes. The special acts involved were Chapter 24500, Laws of Florida, Special Acts 1947 and Chapter 25810, Laws of Florida, Special Acts 1949. The 1947 special act had expressly authorized the Board of County Commissioners of Escambia County to, among other things, contract or lease with individuals, firms or corporations, ". . . hotels, restaurants, eating places, cottages, homes, dwellings, tourists camps and other places of lodging and eating places of all kinds, taxi cabs, buses, and transportation systems; office and store buildings, warehouses, depots, stations, and all other kinds of business or commercial properties; . . .". The exemption provided in 1949 in Section 2 of Chapter 25810, Special Acts, 1949, was preserved by Chapter 61-266, Laws of Florida, General Laws, 1961, and was carried as Section 192.62, Florida Statutes, (1961-1967), and finally was carried as Section 196.25, F.S., (1969). In the 1949 Special Act Section 2 provided:

> Section 2. All of the seal and personal property owned, controlled or used by Escarnbia County, Florida, or Santa Rosa Island Authority under or by virtue of said Chapter 24,500, Laws of Florida, Acts of 1947, or for any purposes thereof, including real and personal property rented or leased to others by said county or said Santa Rosa Island Authority, shall be exempt from state, county, municipal and all other ad valorem taxes of every kind.

However, in 1971, the Legislature enacted Chapter 71-133, Laws of Florida, which such enactment is specifically addressed in the Camp case.

> Pursuant to Chapter 71-133, Section 14, the exemption afforded to the appellees under Chapter 25,810 was repealed as follows:
>
> > "All special and local acts or general acts of local application granting specific exemption from property taxation are hereby repealed to **the extent that such exemption is granted. . . ."** (Emphasis added.)
>
> Under Chapter 71-133, Section 15, the tax exemption which the appellees had enjoyed under Fla.Stat. § 196.25 (1969), F.S.A., was expressly repealed.

In rejecting the contention that the exemption provided in the 1949 Special Act and carried forward in subsequent enactments exempted the property on Santa Rosa Island from taxation the Court stated at page 694:

> It is true that the Legislature in Chapter 25,810 exempted from state, county and municipal (and other) ad valorem taxes all real and personal property owned, controlled, used or leased by the County of Escambia or the Santa Rosa Island Authority. See State **v.** Escambia County, (Fla.1951) 52 So.2d 125. However. this exemption bv Chapter 25,810 did not preclude a subsequent legislature from providing for the taxation of these leaseholds of the Countv and the Authoritv to

> private persons for predominantly private purposes.
>
> The Legislature in enacting what is now Section 196.199 has expressly provided for such leasehold taxation. For the reasons and authorities hereinafter set forth we must conclude that the leaseholds in question are taxable as a matter of law. (e.s.).

The Court then pointed out that there may be changes of legislative policy and gave examples of these as follows:

> In recent years several changes of legislative policy relative to tax exemptions have been made, e. *g.,* those involving lease properties of church and fraternal societies and leased properties of education and charitable associations and foundations. Moreover, the predominate use or status of a property may change from public to private rendering it taxable under the Constitution. See Hillsborough County Aviation Authority v. Walden, supra. (e.s.).

The Court reiterated at page **695** the fundamental principle that it is the utilization of leased property from a governmental source that determines whether it is taxable under the Constitution, and pointed out that tax exemption should be strictly construed against the claimant stating:

> It is the utilization of leased property from a governmental source that determines whether it is taxable under the Constitution. Furthermore, tax exemptions should be strictly construed against the claimant. State v. Inter-American Center Authority (Fla.1955) **84** So.2d 9. Reference is made particularly to Rast v. Hulvey, **77** Fla. **74, 80** So. **750,** holding that where property was not being used solely for educational purposes, but was used also as a home by an individual and his family, it was not exempt from taxation. To the same effect see Amos v. Jacksonville Realty and Mortgage Co., 77 Fla. **401,** 81 So, **524;** Orlando Utilities Commission v. Millican (DCA **4** 19691, **229 So.2d 262;** State ex rel. Miller **v. Dos,** 146 **Fla. 752, 2 So.2d 303;** State **v. Town** of north

> Miami (Fla.1952) 59 So.2d 779, text 784; Adams v. Housing Authority of City of Daytona Beach (Fla.1952) 60 So.2d 663 and Hillsborough County Aviation Authority v. Walden, supra. (e.s.).

It should be remembered that the statute in existence at the time of the Camp case provided that if governmental property was subject to a 99-year lease then it should be assessed as if owned by the lessee. This language was held to fix a "standard of valuation", in the later Supreme Court case of Williams v. Jones, supra, which also involved taxation of property on Santa Rosa Island and was a frontal attack on virtually all the provisions of Chapter 71-133, supra. The property appraiser in the Camp case and the Williams case had assessed the leasehold based on the appraised value of the property (buildings and land) as if the property was owned by the lessee which was pursuant to the commands of the statute. However, Camp, which more restrictively addressed primarily legal issues raised by the Legislature repealing a law which had provided for a prior exemption, expressly recognized that the law reached not only leaseholds but also the property itself. See page **695** of the Camp decision where the Court stated that it was the utilization of leased property which determined whether it (the property) was taxable under the Constitution. It is also recognized at page **694** of the Camp decision in the following statement:

> That a subsequent legislature has the unquestioned authority to repeal prior tax exemption statutes as was done by Section 14 of Chapter 71-133, see Daytona Beach Racing and Recreational Facilities, Inc. v. Paul, (Fla.1965) 179 So.2d 349, text 355. The Legislature also has the power to provide for the taxing of private leaseholds previously

> exempt as it has done in Chapter 71-133. The pertinent provisions of Chapter 71-133 so providing now appear as Sections 196.199(2)(a) and 196.012(5), F.S.1971, F.S.A. See application of the holding of Hillsborough County Aviation Authority v. Walden (Fla.1968) 210 So.2d 193, to Section 192.62, F.S., F.S.A., a predecessor statute to Sections 196.199(2)(a) and 196.012(5). (e.s.).

Here the Court is articulating two separate findings which are:

> (1) that a subsequent legislature can repeal prior tax exemption statutes, and
>
> (2) that the legislature has the power to provide for the taxing of private leaseholds which had previously been untaxed.

In the case of Park-N-Shop, supra, the Supreme Court was confronted with a question of whether or not a leasehold was taxable under Florida law and in holding that it was not taxable as either tangible or intangible personal property the Court stated at page 574:

> 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, (e.s.).

The statement by the Court in Camp is merely recognizing that the Legislature has the power to provide €or the taxation of leaseholds. In point of fact, the Legislature did react to the Supreme Court's decision in Sparkman, in 1961 by enacting Section 192.62, F.S., (1961-67), which provided for the taxation of any real or personal property which for any reason is exempt or

immune from taxation when it was being used for profit-making purposes by any person, firm, corporation, partnership, or organization. Also see Lykes Bros., Inc. v. City of Plant City, 354 So.2d 878 (Fla. 1975).

The question of whether or not the leasehold should be assessed as a specie of real property or as intangible property was decided in the Williams case which held that the Legislature had intended that it be assessed as real property. This holding is significant and is precisely that which was recognized in the case of City of Orlando v. Hausman, 534 So.2d 1183 (Fla. 5 DCA 1988), rev. den. 544 So.2d 199 (Fla. 1989), wherein the Court recognized the difference between the assessment of a leasehold and the assessment of property. The Supreme Court had pointed out in Sparkman that at that time, 1957, no statute existed in Florida law which subjected to taxation a leasehold. This meant that the Legislature had the option of either leaving it untaxed, taxing it as real property, or of taxing it as intangible property. The Williams case held that the intent was that the leasehold be taxed as real property. After Williams in 1980, the Legislature enacted Chapter 80-368, Laws of Florida, which taxed certain leaseholds as intangible personal property but this did not affect the taxable status of real property as distinguished from a leasehold interest in real property. As recognized in Hausman, the valuation of a leasehold is separate and apart from the valuation of the property itself and the taxation of the one is not dependent upon the taxation or exemption of the other.

Hausman was decided after Bell v. Bryan, 505 So.2d 690 (Fla. 1 DCA 1987, rev. den. 513 So.2d 1060 (Fla. 1987), but before Parker v. Hertz Corp., 544 So.2d 249 (Fla. 2 DCA 1989), but makes no mention of the Bell case. Hertz which was decided after Hausman makes no mention of Hausman. Thus, the situation is presented where three different District Courts of Appeal have addressed an issue involving ad valorem taxation involving governmentally-owned property. Hertz and Bell cite Section 196.199(2)(b), F.S., as the controlling statute for their respective holdings, while Hausman cites Section 196.199(1)(c), F.S., and finds Section 196.199(2)(b), F.S., to have no application. In Hausman, the Fifth District Court stated:

> The city claims that the leasehold interests of its tenants are subject only to intangible personal property taxation. Although the reclassification of leasehold interests as intangible personal property presents some interesting constitutional questions, we need not decide those issues. There is no evidence that the property appraiser included the leasehold interests of the tenants in his assessment, Since the leasehold interests were not included, section 196.199(2)(b) simply has no application here. (e.s.).

The contention of the City of Orlando in Hausman is set forth in part at page 1183 as follows:

> In December 1986, the City of Orlando, a municipal corporation, the Greater Orlando Aviation Authority, an agency of the city, and ten tenants of property leased from either the city or the authority, filed an action to contest real property assessments made by Ford Hausman, the property appraiser of Orange County. The plaintiffs contended that the properties in question were exempt from ad valorem taxation. Specifically, the olaintiffs araued that the tenants' "leasehold interests" were subject only to intangible personal property taxation and

> that the city's "reversion interest'' was exempt from ad valorem taxation. After the plaintiffs conceded that the tenants' use of the property was not for a municipal or public purpose, the trial court entered summary final judgment in favor of the property appraiser. We affirm. (e.s.).

In addressing the use of the property made by the tenants at page 1185 and concluding that the assessment was valid, the Court stated:

> Here the tenants' use of the properties is private and commercial and not for a municipal or public purpose. Since the properties were being used for private purposes, there was no exemption from ad valorem taxation and the trial court was correct in upholding the assessment of taxes against the city. (e.s.).

The Court had previously quoted from parts of Section 196.199(1), F.S., which contains the basis for exemption of property owned by a governmental unit. Section 196.199(1)(c), F.S., provides:

> (1) Property owned and used by the following governmental units shall be exempt from taxation under the following conditions:
>
> * * * * *
>
> (c) All property of the several political subdivisions and municipalities of this state or of entities created by general or special law and composed entirely of governmental agencies, or property conveyed to a nonprofit corporation which would revert to the governmental agency, which is used for governmental, municipal, or public purposes shall be exempt from ad valorem taxation. except as otherwise provided by law. (e.s.).

Since the use made of the property in Hausman was commercial and for profit the property did not qualify for the exemption and as the court pointed out the property appraiser had assessed the property, not the leasehold.

In both Bell and Hertz, the property appraiser had not assessed the property, that is, the land (real property). Bell suggests that the property appraiser had assessed the leasehold, but this is not factually accurate. He assessed the improvements to the land which by definition is "real property". The Bell decision is somewhat confusing because it holds **that** the improvements should have been assessed at an intangible personal property rate instead of the real property rate. This can only reflect a total misunderstanding of ad valorem tax law on the part of the First District Court of Appeal, because property appraisers have nothing to do with the assessment of intangibles. So the suggestion that the property appraiser should have extended an intangible tax rate instead of an ad valorem tax rate against the leaseholds is totally contrary to the facts and the law as it has existed in Florida since 1971. In Bell the Court stated at page 691:

> The alternative ground suggested by appellees €or granting summary judgment was that the assessments were erroneous in that thev taxed the improvements at a real property rate instead of at an intangible personal property rate. The trial court agreed with this interpretation of existing law. So do we. **(e.s.).**

Further at page 691, after quoting parts of Section 196.199(2)(b), F.S, the Court held that ". . . [T]the exemption contained in this section is applicable to the instant leaseholds.". (e.s.). This is somewhat inconsistent with the holding in Hausman which squarely rejected the suggestion that Section 196.199(2)(b), F.S., was applicable in a situation where a property appraiser has assessed the property itself, which

consisted of both the land and the improvements. Perhaps this confusion exists because the Property Appraiser was not permitted to be a party in Bell and therefore was never afforded the opportunity to defend or explain his assessment. The Court in Bell never addressed the issue of whether the use of the property for a purely private purpose affected the exempt status of the property. In the case at bar, the First District Court judiciously avoided any mention or citation of Bell in its decision upholding the Appraiser and the assessment.

In Hertz, as in Bell, the property appraiser did not assess the land but did assess the improvements (not the leasehold interest) on the theory that pursuant to the documents entered into between the Aviation Authority and Hertz, Hertz was the actual owner of the improvements. Thus the issue in Hertz was whether or not the various agreements entered into by Hertz with the authority operated to convey to Hertz sufficient indicia of ownership to support imposition of property taxation on such improvements. At page **251** in Hertz the Court stated:

> Hertz asserts that its lack of unfettered use and enjoyment and inability to alienate the premises forecloses ownership. Although those elements are frequently characteristic of ownership, their absence alone, in the presence of other factors, does not demand a finding, as in this instance, that the entity in possession of the property is not the owner, See Mikos **v. King's** Gate **Club,** Inc., **426** So.2d **74** (**Fla.** 2d **DCA** 1983) (dominion over property is equivalent to ownership). The Ground Lease convinces us that Hertz possesses and exercises sufficient dominion over the improvements warranting the conclusion that it is the owner subject to ad valorem taxation. (e.s.).

No question was presented in Hertz as to whether or not Hertz's use of the property was for a private commercial purpose. This appears to have been conceded by all parties.

Thus, in neither Bell nor Hertz was the court required to resolve the issue of whether or not the property was being used for a legitimate exempt purpose. In Hertz the question was whether or not Hertz owned the buildings and improvements so as to be subject to tax thereon and in Bell the court focuses on what appears to be the misunderstanding that the property appraiser had assessed a leasehold and had a duty to assess intangibles.

In Hausman however, the court squarely considered the question of whether or not the property which included the land and the improvements thereon, was exempt from taxation if not used for a legitimate public or governmental purpose and held that it was not exempt even though owned by a governmental unit, in that case, a municipality. The statute, Section 196.199(1)(c), F.S., includes not only municipalities but political subdivisions and other governmental entities created by general or special law and mandates that such property owned by such governmental units is only exempt if it is used ". . . for governmental, municipal, or public purposes . . .".

There is considerable difference in the appraisal of a leasehold and the appraisal of real property consisting of land and buildings. Hausman recognizes this and correctly follows the law of the State of Florida with regard to use of property owned by a governmental entity.

The Appraisers' Association's position is that the taxable or exempt status of the real and personal property of a governmental unit is controlled by the provisions of Section 196.199(1)(c), **F.S.**, which provides:

> (1) Property owned and used by the following governmental units shall be exempt from taxation under the following conditions:
>
> * * * * *
>
> (c) All property of the several political subdivisions and municipalities of this state or of entities created by general or special law and composed entirely of governmental agencies, or property conveyed to a nonprofit corporation which would revert to the governmental agency, which is used for governmental, municipal, or public purposes shall be exempt from ad valorem taxation, except as otherwise provided by law. (e.s.).

The Club concedes that its use of the property is not for a public purpose. This is entirely consistent with the Supreme Court's pronouncement in the Williams case which held that the exemptions contemplated by Section 196.012(5), F.S.:

> ". . . relate to "governmental-governmental" functions as opposed to "governmental-proprietary" functions. With the exemption being **so** interpreted all property used by private persons and commercial enterprises is subject to taxation either directly or indirectly through taxation on the leasehold. Thus all privately used property bears a tax burden in some manner and this is what the Constitution Mandates."

Municipalities engage quite generally in proprietary activities which although public or municipal in the sense that they are engaged in for the benefit of the public good, are not sovereign/governmental. See Chardkoff Junk Co. v. City of Tampa, 135 So. 457 (Fla. 1931); Walden v. Hertz Corp, 320 So.2d 85 (Fla.

2 DCA 1975); St. Johns Associates v. Mallard, 366 So.2d 34 (Fla. 1 DCA 1978), writ dis. 373 So.2d 912; Mallard v. R. E. Hobelmann & Co., Inc., 363 So.2d 1176 (Fla. 1 DCA 19781, writ dis. 378 So.2d 280; Volusia County v. Daytona Beach Racing and Recreational Facilities Dist., 341 So.2d 458 (Fla. 19761, app. dis. 98 S.Ct. 32, 434 U.S. 804, 54 L.Ed. 61.

The contention that the reversionary interest of the City either affects the value of the property or the property's taxable status is without merit. In Tre-O-Ripe Groves, Inc., v. Mills, 266 So.2d 120 (Fla. 1 DCA 1972), the First District Court addressed the following situation:

> Appellant is the lessee in a contract with the National Aeronautics & Space Administration. The contract covers certain citrus groves in Volusia County to which the National Aeronautics & Space Administration holds fee title and which appellant rents for $49,000.00 per year which entitles it to use the land for cultivation and harvesting of citrus fruits. Appellant contends that assessment and collection of the tangible personal property tax is illegal because it is a direct imposition of tax on property of the United States of America which is immune from such tax.

Thereaftex the Court stated:

> We are of the opinion that the trial court correctly dismissed the second amended petition far the reason that the same failed to state a cause of action. It is well established beyond the need for citation of cases that when Federal property is placed in the hands of private enterprise for gain by that enterprise, the immunity from taxation of the property is lost. We do not feel that appellant has sufficiently alleged facts in its petitions which wauld give rise to an exemption to this rule. The utilization of the property as a predominately public or private purpose, not the character or nature of its owner, is the major criteria in

> determining liability for taxes. There can be no doubt in the present case that the purposes to which the citrus groves are utilized are essentially private to the appellant, rather than public.

Also *see* Bancroft Inv. Cors. v. City of Jacksonville. 157 Fla. **546, 27** So.2d 162 **(Fla. 1946);** U.S. v. Brown, D.C. 41 Fed.Supp. **838 (1942).**

In this historical context it is clear that the constitutional issues suggested as being implicit and alluded to by the Club disappear and evaporate if the matter is viewed from the proper premise which is that the taxation of intangible personal property has nothing to do and cannot alter, change or modify the taxation and assessment of **real** property. The two are two distinct species of property both of which may be subjected to taxation and no double taxation exists therefrom. In this context the case of Miller v. Higgs, **468** So.2d 371 (Fla. 3 DCA), rev. denied, 471 **So.2d 117** (1985), will **be** reviewed. First, that case involved a suit filed by the Property Appraiser in Monroe County founded on the basic premise that Chapter 80-368, Laws of Florida, which provided that leaseholds in governmentally-owned property should be assessed as intangibles, was unconstitutional. The challenge in the Miller case is obviously founded on the same **false** premise as that of the Club. In this posture the District Court held that the Property Appraiser lacked standing to directly challenge the constitutionality of a statute, and that the Legislature had the power to classify leasehold interests as intangibles. In the Miller case Higgs assumed a legislative intent which is not evidenced from a reading of the law. That

is, he assumed that he could no longer assess property owned by a governmental unit leased to a private entity for private purposes. This was a false assumption as has now been recognized by the Fifth District Court of Appeal in the Hausman case. The Hausman decision is squarely consistent with a reading of the statute. That is, the statute provided that governmental property is exempt only if used for governmental purposes. Same confusion was no doubt in the minds of the Legislature when the 1980 law was passed but that confusion was probably caused by the fact that in both the Williams case and the Daytona Beach case 99-year leases were involved which required the Property Appraiser to assess the property itself. Thus the entire property was assessed as if owned in fee simple. The Legislature somehow concluded for whatever political reasons it may have had in mind, that by subjecting a leasehold in governmentally-owned property to intangible tax, that this would somehow affect the taxation of the real property itself if owned by a governmental unit and leased to a private entity for private purposes. Regardless of whatever political considerations may have been in the minds of the Legislature when the 1980 law passed, the law is quite clear that the taxable or non-taxable status of real property was not changed or altered one jot or one tittle.

There are many entities in Florida which have been created by special act such as the special act before this Court in Camp and Williams. Some airport authorities are founded under the auspices of the county, some airport authorities are founded under the auspices of a municipality, for instance, see

Hillsborough Aviation Authority v. Walden, 210 So.2d 198 (Fla. 1968), and the special acts referred to previously herein. Some airport authorities may be created by special law as subagencies of a county while others may be created as subagencies of a city. But, as in the case of airport authorities all will be performing basically the same function and renting or leasing property titled in either the county or the city as the case may be to private, commercial enterprise. All private commercial enterprise using governmentally-owned property pursuant to such leases should be treated identically. That is, the property should be taxed and under Section 196.199(1)(c), F.S., all such property is treated identically, whether titled in the name of the county, a municipality ". . . or of entities created by general or special law and composed entirely of governmental agencies, . . .". Most of these special acts contain some provisions therein dealing with taxation. See for example Chapter 27763, Laws of Florida, Special Acts, 1951 and Chapter 28922, Laws of Florida, Special Acts, 1953. Like the special act before the Court in Williams, many of these special acts will contain language exempting property from taxation, but as this Court pointed out in Williams, all such provisions would have been repealed by implication to the extent of any inconsistency with the general law fixing a firm and definite framework of ad valorem tax structure in Florida. See Chapter 28922, supra. Under these various special acts it would not be necessary to have a special tax exemption provision therein for the real property owned and used by the public body itself, and the tax

exemption provisions generally supplied the ability to market bonds for construction on such properties at favorable rates by exempting the income. However, when such property became leased to private enterprise in conjunction with the statutory purposes for the operation of the county airport authority, city airport authority, independent housing authority, hospital authority, port authority or whatever, property rented and used by private lessees in these various entities will be treated identically under Section 196.199(1)(c), F.S. Said statute is most explicit in its terms.

However, in law no double taxation exists and no question of constitutional dimension arises because the intangible personal property is a separate and distinct form of property from the real property. Taxation of the one does not preclude taxation of the other and as recognized in Park-n-Shop, failure to tax the one (intangible leasehold), would certainly not preclude the taxation of the real property attendant to such leasehold. Thus, the correct methodology to be employed in valuing real property owned by a governmental unit which is the subject of a leasehold held by a private entity used for private purposes would be the same method of valuation used by the Property Appraiser in valuing any other real property encumbered by mortgages, leaseholds or whatever. That is, the Property Appraiser should follow the criteria set forth in Section 193.011, F.S. Under Section 196.199(1)(c), F.S., if a governmental unit in the State of Florida does both own and use the property it would be exempt. Conversely, if a governmental

unit as delineated in the statute, continues to own but decides to lease such property and permit it to be used for private purposes then such property ceases to be exempt and is subjected to real property taxation to the same extent as other privately owned and used real property. That which is being assessed is the real property itself. In such situations the governmental unit would no doubt include in its lease a provision requiring that any ad valorem taxes to become due with regard to the property would be paid by the lessee as part of the rent. In this manner all property used for private purposes is subjected to taxation and no private commercial entities are discriminated against. In this manner the governmental unit is requiring payment of all taxes due pursuant to the lease and if the lessee fails to comply with the terms of the lease in this regard the governmental unit has two remedies available which are (1) to sue on the lease and also (2) to sue the lessee directly in debt as provided in Section 196.199(8)(a), F.S. Obviously the sale of a tax certificate in the governmentally-owned property would not be a permissible way to effect payment.

POINT II

THAT SECTION 196.199(4), FLORIDA STATUTES DOES NOT PREVENT TAXATION OF THE MUNICIPAL GOLF COURSE LEASED TO THE CAPITAL CITY COUNTRY CLUB.

The Club relies on Section 196.199(4), F.S., and contends that since its lease was entered into prior to April 15, 1976, that the golf course property should not be subject to tax. The Club argues that this constituted a grandfather clause to prevent taxation of property where leases were in existence prior to the stated date. As originally enacted Section 196.199(3) and (4), F.S., provided:

> (3) Nothing herein or in §196.001 shall require a governmental unit or authority to impose taxes upon a leasehold estate created prior to December 31, 1971 if the lease agreement creating such leasehold estate contains a covenant on the part of such governmental unit or authority as lessor to refrain from imposing taxes on the leasehold estate during the term of the leasehold estate, but any such covenant shall not prevent taxation of a leasehold estate by any taxing unit or authority other than the unit or authority making such covenant.
>
> (4) Property owned by the United States, by the state, or by any political subdivision, municipality, agency, authority or other public body corporate of the state which becomes subject to a leasehold interest of a nongovernmental lessee other than that described in subsection (2)(a) above on or after June 1, 1971, and the leasehold interest of such a lessee, shall be subject to ad valorem taxation unless the lessee is an organization which uses the property exclusively for literary, scientific, religious or charitable purposes. (e.s.).

Both sections were subsequently amended and the date changed from December 31, 1971 in subsection (3) to April 15, 1976, and from

June 1, **1971** to April **14, 1976** in subsection (4). There were several amendments involving this in 1976; Chapter **76-3,** Chapter **76-283,** Chapter **76-361 and** Chapter **76-362,** Laws **of** Florida. Chapter **76-3,** passed first and took effect on April 15, **1976.** Chapter **76-283,** repealed Chapter **76-3** and inserted the April 14 and 15 dates in Section 196.199(3) and (4), F.S.

Chapter **76-361,** was a special act which this Court invalidated in Archer v. Marshall, 355 So.2d 781 **(Fla. 1978).** All these acts sought to avoid payment of taxes. In Archer this Court stated:

> In a lengthy and well reasoned opinion, the trial court found that this legislation violated our state constitution in six different respects; (1) it creates an illegal exemption from taxation an property not authorized by the state constitution; (2) its effect is to provide for ad valorem taxation at a non-uniform rate within the taxing unit of Escambia County, in violation of Article VII, Section **2;** (3) it violates Article III, Section 11(a)(8), which prohibits special laws, or general laws of local application pertaining to the refund of money legally paid; (4) it is a special act pertaining to the care, custody, and method of disbursing county funds, prohibited by Article VIII, Section 1(b); (5) its effect violates Article VII, Section 10, which prohibits the use by a county of its taxing power or credit to aid any person; **(6)** it is **a** special law pertaining to the assessment and collection of taxes for state or county purposes which is prohibited by Article III, Section 11(a)(2). We agree with the trial court that the purpose and effect of this special act is to create an indirect exemption from taxation on property not authorized by the state constitution, and therefore find it unnecessary to address the additional grounds set forth by the trial court to support its conclusion. (e.s.).

At page 784 this Court stated:

> The Legislature is without authority to grant an exemption from taxes where the exemption has no constitutional basis. Presbyterian homes for the Synod of Florida v. Wood, 297 So.2d 556 (Fla. 1974). Regardless of the term used to describe the set-off, the reduction in rent afforded the leaseholders has the effect of a tax exemption and as such is unconstitutional since such exemption is not within the provisions of our present state constitution. Williams v. Jones, 326 So.2d 425 (Fla. 1975); Straughn v. Camp, 293 So.2d 689 (Fla. 1974). It is fundamentally unfair for the Legislature to statutorily manipulate assessment standards and criteria to favor certain taxpayers over others.

The Club seeks a special exemption because of its pre-1976 lease, arguing that Section 196.199(4), F.S., grants same.

In the case of Lykes Bros., Inc. v. City of Plant City, 354 So.2d 878 (Fla. 1978), this Court resolved a contention virtually identical to that made in the case at bar by the Club. In that case Lykes Brothers contended that Section 196.199(3), F.S., applied to a contract which it had with the City of Plant City which was a pre-1972 contract and that the statute grandfathered in its agreement so as to prevent taxation of its property. This Court disagreed stating at page 881:

> Our last inquiry, then, is whether this savings clause for pre-1972 contracts benefits Lykes. In ruling that it does not, the trial judge stated that the statute would be constitutionally infirm if applied to Lykes. He referred to Straughn v. Camp, 293 So.2d 689 (Fla. 1974), Hillsborough Aviation Authority v. Walden, 210 So.2d 193 (Fla. 1968), and City of Bartow v. Roden, 286 So.2d 228 (Fla.2d DCA 1973), from which we conclude he meant that Florida's 1968 Constitution requires the taxation of private leaseholds in government-owned property used for non-public purposes. We agree that the Constitution requires taxation of these leaseholds, but we find it unnecessary to

exemption because of the use of the date set forth therein. As this Court recognized in Williams v. Jones, supra, exemptions from taxation should not be implied. Thus, for two reasons the Club's contentions in this regard are without merit which are (1) the statute does not clearly state that the Legislature intended that such property be exempted if a lease existed prior to the given date and (2) even if it did it would be unconstitutional as recognized in Lykes Bros. and Archer.

It is also significant to note that the statute specifically in clear unequivocal terms requires taxation of the property itself owned by the governmental entity of the state subject to a leasehold interest or other possessory interest of a non-governmental lessee. In Williams this Court recognized that after the effective date of the 1971 act such were taxable and Lykes Bros. and Archer were decided by this Court after the statute was changed in 1976. Without delving into what might have motivated the Legislature to attempt to distinguish between pre-1971 and post-1971 governmental property subjected to lease or pre-1976 and post-1976 governmental property subjected to lease, in either situation all must be treated identically and that is what this Court recagnized in Lykes Bros. and Archer. That which the Constitution does not exempt cannot be exempted by the Legislature.

> reach the constitutional question on which the trial judge ruled. (e.s.).

Continuing this Court stated:

> Lykes' contention with respect to the application and validity of Section 196.199(3)--that an ultra vires municipal contract can be legislatively ratified if it could have been authorized initially--is generally correct, but it neglects an additional requirement. The legislative attempt at ratification must itself be consistent with the Constitution. At the time Section 196.199(3) was enacted, the Legislature no longer possessed the constitutional power to authorize tax exoneration of property awned by a municipality and used by a private lessee predominantly for non-public purposes. Moreover, we do not read into the language of Section 196.199(3) a legislative attempt to exceed this constitutional limitation by giving legal effect to otherwise invalid pre-1972 contracts, and thereby creating a new category of tax exemption. (e.s.).

If the statute is construed as suggested by the City it would clearly unconstitutionally exempt property otherwise taxable under Section 196.199(1)(c), F.S., and not exempted by the Constitution. This Court in Lykes had before it a lease agreement entered into between Lykes Brothers and the City of Plant City which exempted property of Lykes Brothers if such property were ever annexed into the city. This Court held that the contract was ultra vires and void. Although the lease agreement in the case at bar does not contain such a provision it should be noted that the statute relied upon by the Club does not specifically provide that property owned by any municipality, agency, authority or other public body corporate of the state which is the subject of a leasehold interest entered into prior to April 14, 1976, is exempt. The Club is attempting to imply an

CONCLUSION

The Florida Constitution preempts to the counties, cities, school districts, etc., the power to levy ad valorem taxes on real estate and personal property. Taxing part of the value of the real estate as an intangible would violate the constitutional restriction. An intangible is a specie of property distinct and separate from the thing itself, and is neither real property or personal property. The valuation of a leasehold interest has nothing to do with the value of real property. The proper method of valuation of government owned real property used far private purposes pursuant to lease is the same as that for any other privately owned real property; assessment of the fee as unencumbered pursuant to Section 193.011, F.S. It would be unconstitutional to tax part of the real estate as an intangible by transferring part of the value to the lessee and taxing it as an intangible. The Property Appraiser's assessment is proper and should be upheld.

RESPECTFULLY SUBMITTED,

Larry E. Levy
FL BAR ID NO.: 0047019
Post Office Box 10583
Tallahassee, Florida 32302
(904) 222-7680
Attorney for amicus Curiae

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to WILLIAM C. OWEN, ESQUIRE, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, Post Office Drawer 190, Tallahassee, Florida 32302; S. L. WILLIAMS, ESQUIRE, 150 South Palmetto Avenue, Box A, Daytona Beach, Florida 32114; JOSEPH C. MELLICHAMP, 111, Chief, Tax Section, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050; BENJAMIN K. PHIPPS, ESQUIRE, Fine, Jacobson, Schwartz, Nash, Block & England, Post Office Box 1351, Tallahassee, Florida 32302; and PETER GUARISCO, ESQUIRE, 2003 Apalachee Parkway, Suite 101, Tallahassee, Florida 32301 on this the 30th day of September, 1991.

Larry E. Levy