OA 9-29-92

IN THE SUPREME COURT OF FLORIDA

FILED
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SEP 25 1992
CLERK, SUPREME COURT
By Chief Deputy Clerk

JIM SMITH, as **Secretary** of **State of Florida,**

Defendant, Appellant,

vs.

CASE NO. **80,438**

AMERICAN AIRLINES, INC.; DELTA AIRLINES, INC.; FLAGSHIP AIRLINES, INC.; NORTHWEST AIRLINES, INC.; UNITED AIRLINES, INC.; USAIR, INC.; FLORIDA PORTS COUNCIL, INC.; PANAMA CITY PORT AUTHORITY, PORT EVERGLADES AUTHORITY; GATX TERMINALS CORPORATION, **and** HVIDE SHIPPING, INCORPORATED,

Plaintiffs, Appellees.

APPELLANT'S REPLY BRIEF

ON CERTIFICATION FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

ROBERT A. **BUTTERWORTH**
ATTORNEY GENERAL

LOUIS F. HUBENER
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF **LEGAL** AFFAIRS
THE CAPITOL - SUITE 1603
TALLAHASSEE, FL 32399-1050
(904) 488-8253

Counsel for Appellant

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SUMMARY OF THE ARGUMENT

1. The ballot summary adequately informs a reasonable voter of the chief purpose of Proposition 7 when the language is read in its entirety. The appellees' argument is based on unreasonable inferences and assumes a reasonable voter knows nothing about ad valorem taxation and has no duty to investigate details of a proposed amendment on taxation.

2. Appellees fail to show the facial invalidity of Proposition 7. The Commission -- ultimately the people -- may protect reasonable reliance interests. Appellees failed to prove those interests do not exist and that they cannot be accorded legal recognition.

ARGUMENT

I. THE TRIAL COURT ERRED IN RULING THE BALLOT SUMMARY DEFECTIVE.

The chief purpose of Proposition 7 is to tax leaseholds in government property at ad valorem rates. The summary clearly and precisely states that purpose. All that section 101.161, Fla. Stat. requires is that the summary state the chief purpose. Carroll v. Firestone, 477 So.2d 1204 (Fla. 1986). The appellees are understandably unwilling to credit the voters with knowing that ad valorem taxes include taxes on real property. The appellant submits that the voters do know this, exactly as the trial court acknowledged (Tr. 80),

and that they can think logically. This being *so*, if they are told that pre-1968 leases are taxed at the intangible rate, they must conclude that post-1968 leases are taxed at real property rates, the only other rate that could possibly apply. Appellants would have this Court isolate and pick apart each sentence of the summary rather than read them together. This is improper:

> [T]he reviewing court must look to the totality of the ballot language, as such language would be construed by a reasonable voter.

People Against Tax Revenue Mismanagement, Inc. v. County of Leon, 583 So.2d 1373, 1376 (Fla. 1991) (emphasis the Court's).

Contrary to the Airlines' argument, a "reasonable voter" is not one who is completely uninformed, completely content to remain *so*, and completely unable to reason. Here, the totality of the ballot language informs the voter of the chief purpose of the amendment. The summary would not deceive a reasonable voter, and the reliance of the appellees and the trial court on the decisions in Askew v. Firestone, 421 So.2d 151 (Fla. 1982), and Wadhams v. Board of County Comm'rs, 567 So.2d 414 (Fla. 1990), is clearly misplaced.

> We have held that a court may interfere with the right of the people to vote on referendum issues only if the language in the proposal is clearly and conclusively defective. Askew v. Firestone, 421 So.2d 151, 154 (Fla.

> 1982). Typically we have overturned an election because of defective ballot language where the proposal itself failed to specify exactly what was being changed, thereby confusing voters. Id.; Wadhams v. Board of County Comm'rs, 567 So.2d 414, 416-17 (Fla. 1990). This especially is true if the ballot language gives the appearance of creating new rights or protections, when the actual effect is to reduce or eliminate rights or protections already in existence. Askew, 421 So.2d at 154.

People Against Tax Revenue, 583 So.2d at 1376. Proposition 7 will not reduce or eliminate any rights or protections now in the constitution.[1]

The Airlines contend a voter could infer the Legislature retains discretion as to taxation of post-1968 leases. The summary does not suggest this, and the inference is wholly unreasonable.

With respect to the Airlines' Point 11, it is likewise unreasonable to infer that pre-1968 leases are taxed for the first time. This is not relevant to the chief purpose -- to constitutionally require taxation. Current or past tax treatment is a matter the voter may investigate, if he is interested in it.

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[1] Appellees contend that uncertainty may also arise because "tangible personal property" may also be subject to ad valorem taxation. It is highly unlikely, as a matter of simple logic, that a reasonable voter would consider a leasehold to be tangible personal property. See section 192.001(11)(d), Fla. Stat. (definition), and Park-N-Shop Inc. v. Sparkman, 99 So.2d 571, 574 (Fla. 1958) (leasehold is not tangible personal property).

The Airlines also complain that the voter is not informed that **pre-1968 leaseholders** are **to** be a favored "select class of taxpayers." (Airline Br. p. 8) The second sentence of the summary clearly states the tax treatment afforded that class. It is most notable that what the Airlines offer as a perfect ballot summary (Br. p. 15) **does** not even attempt to address this asserted defect by identifying a favored class.

In Point 111, the Airlines attempt to excuse their failure to adduce any evidence of the existence of 1968 leases by asserting they lacked time. They cite no case that says lack of time excuses a failure of proof. Moreover, they fail to explain why they waited three months after the Commission approved Proposition 7 (on April 22, 1992) to file their suit (July 22, 1992). **These** six airlines had the time, and certainly the means, to undertake a modicum of investigation. The State does not bear the burden of proof, as they suggest. Those challenging a summary must prove it "clearly and conclusively defective."

The date, of course, is not "indisputably misleading on its face" as the Airlines assert. It tells the average voters what they need to know -- an approximate date. Surely this Court can credit any voter who holds a lease in government property with some knowledge of this proposed amendment and **some** desire to investigate its details. Miami Dolphins v. Metropolitan Dade County, 394 So.2d 981 (Fla. 1981).

In Point IV the Airlines argue the summary to be misleading because it "indicates" that public purpose exemptions would be eliminated. We again note that the Airlines' proffered ballot summary (Br. p. 15) fails to deal with this asserted defect.[2]

The argument is curious for here the Airlines are willing to credit the voters with actual knowledge of the exemptions authorized by article VII, section 3(a). Assuming the voters know of that authorization, the summary does not state section 3(a) is repealed. Such an inference is unreasonable and depends, again, on the Airlines isolating the second sentence and focusing on the phrase "shall be taxed as intangible personal property." The intangible rate is mandatory, not the tax. The summary's first sentence states only that all leaseholds in government property are "subject to" ad valorem taxation. "Subject to" does not reasonably imply repeal of 3(a).

The Airlines begin their conclusion by offering a deceptively simple test for an adequate ballot summary, which reduces to this: is a knowledgeable voter informed of material changes to existing law?

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[2] We additionally note that in argument below and at p. 4 of the final order, the summary was faulted for failing to explain Proposition 7 entailed a major shift from state to local taxing authority. The argument is not pressed on an appeal, nor is the flaw addressed in the Airlines' ballot summary.

This cannot be the test for an addition to the constitution that would require changes in statutory law. The addition of one sentence to the constitution could easily mean wholesale changes to any number of statutes. The test offered by the Airlines would preclude virtually all constitutional amendments. The authority the Airlines rely on for this test is plainly inappropriate. Askew v. Firestone concerned a change to existing constitutional language. Wadhams concerned a change to a county charter. While a voter should certainly be informed that a change is being made to such a basic document, as this Court held, neither decision is authority for a ballot summary test that requires an explanation of statutory implications.

Tax laws are usually complex and changes to them can have significant and multifarious ramifications. The State again asserts that the voters have some duty to inform themselves about the details of a tax proposal and that a "reasonable voter," for whom the summary is written, should be presumed to be somewhat informed. This Court has so ruled before.

The ballot summary for Proposition 7 is adequate, if not perfect. Even the Airlines' revised version fails to address three of the defects they have asserted to be fatal flaws. Proposition 7 should be submitted to the voters.

II. PROPOSITION 7 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

1. The Appellees Have Failed To Demonstrate Facial Unconstitutionality.

The equal protection argument of the appellants does not satisfy the requirement of Gary v. Winthrop, 115 Fla. 721, 156 So. 270 (1934), and Gray v. Moss, 115 Fla. 701, 156 So. 262 (1934), that they demonstrate that Proposition 7 is "wholly void on its face" and "incapable of being made operative under any conditions or circumstances." 156 So. at 272. Rather, their argument is based on supposition and hypothetical lease conditions that were not proved at trial to even exist. *See* Brief of Port Authorities, pp. 11, 31. Such argument does not demonstrate the facial unconstitutionality of Proposition 7.[3]

Consistent with the conjectural character of their argument, the Port Authorities ("Ports") also suggest that it is no longer their burden as the challengers of Proposition 7 to "negate every conceivable basis which might support it." Br. at 22-23. In fact, just this year, Coy v. Florida Birth-Related Injury Comp. Plan, 595 So.2d 943, 945 (Fla. 1992), reaffirmed this as a challenger's burden. The

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[3] Appellant Smith still maintains the argument of his initial brief that the equal protection issue is not justiciable at this time. Grose v. Firestone, 422 So.2d 303 (Fla. 1992).

Ports cite Coy far other purposes but ignore its controlling standard. As shown, they have not met this burden.

2. Proposition 7 Has A Rational Basis.

The Ports attack the State's argument by asserting that its analysis of the 1885 Florida Constitution is "patently incorrect" because the State's initial brief asserted that under the 1885 constitution "local government had unfettered power to grant tax based incentives ...." (Port Br. pp. 25, 31) Having created this strawman, they then proceed for several pages attempting to score various debating points.

The Ports have misrepresented and misstated the State's argument. What the State's brief asserted was that the "state and local government" could provide tax-based incentives under the 1885 constitution. (Initial Br. p. 25) Indeed, as further explained by the brief (p. 26, n. 4), the legislature facilitated this through enactment of ad valorem tax exemptions. Pursuant to these exemptions, and prior to 1968, many persons entered long-term leases in local government property and were not subject to ad valorem taxation.

The history of the creation, evolution and elimination of these exemptions (except for public purpose exemptions authorized by article VII, section 3(a), Fla. Const. (1968)) is explained at some length in Roberts, Ad Valorem Taxation of Leasehold Interests in Governmentally Owned Property, 6

Fla.St.L.Rev. 1084 (1978). The State cited and relied on the article's analysis in its initial brief. The Ports' answer brief completely ignores the article, preferring to find fault with an argument the State did not make.

The Roberts article is included, for the Court's convenience, in the appendix to this brief. It establishes that before 1968 leaseholds in government property were not subject to ad valorem taxation, id. at 1088-1091, and only became so following the adoption of the 1968 Constitution and the "sweeping reform of chapters 192 and 196 of the Florida Statutes." Id. at 1092.

All pre-1968 leases, therefore, had to have been negotiated when the leaseholds were not subject to ad valorem taxation. The Ports' argument is thus reduced to one simple but erroneous contention: that the only reliance interest that Proposition 7 could legitimately recognize must be based on a lease that contained specific "covenants against taxation which were supported by appropriate legislation." (Br. at 35) This contention is not supported by a single case. Moreover, it depends upon two unsupportable assumptions, one factual and one legal. First, as fact, it assumes that leaseholders would negotiate the actual rental terms of the lease as if they were liable for ad valorem taxes when in fact they were not. Second, it assumes the local government could contract away its obligation to collect taxes should it be required to levy

them. Local governments had no authority to contract away the power to tax.

The Ports thus conclude that persons entering into government leaseholds before and after November 5, 1968, were "identically situated in that none has any greater basis for a 'reliance interest' than any other." (Port Br. p. 36) This is simply wrong. After the approval of the 1968 constitution, prospective lessees were on notice that ad valorem tax exemptions were limited to the public purpose uses allowed by article VII, section 3(a).

In essence, then, the Ports are left with the argument that, as a matter of fact and law, there can be no cognizable reliance interest in leases negotiated before November 5, 1968. City of New Orleans v. Dukes, 427 U.S. 297, 96 S.Ct. 2513 (1976), makes this proposition untenable. There, the City of New Orleans enacted an ordinance that banned pushcart vendors from the French Quarter who had not operated their businesses for at least eight years. The Supreme Court upheld this ordinance against an equal protection challenge, stating:

> *The* city could reasonably decide that newer businesses were less likely to have built up substantial reliance interests in continued operation in the Vieux Carre and that the two vendors who qualified under the "grandfather clause" -- both of whom had operated in the area for over 20 years rather than only eight -- had themselves become part of the distinctive character and charm that distinguishes the Vieux Carre. We

> cannot say that these judgments so lack rationality that they constitute a constitutionally impermissible denial of equal protection.

96 S.Ct. at 2518. The City did not undertake, and the Supreme Court did not require, any inquiry into the actual degree of the reliance interest, i.e., the amount of investment, that individual vendors may have made. The Court simply accepted the presumption that those who operated longer had greater reliance interests that the City could decide to recognize and protect.

The State submits that the Commission, in adopting Proposition 7, could reasonably assume that persons negotiating leases in government property before November 5, 1968, did so knowing they would owe no ad valorem taxes and thus agreed to terms intended to compensate the local government, at least in part, for the exemption. The Commission did not have to have evidence before it that this was absolutely the case in every instance in which a lease was entered any more than did the City of New Orleans when it assumed that long-term pushcarts vendors had a greater investment than short-term vendors. Equal protection demands are satisfied in this respect if "the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker ...." Nordlinger v. Hahn, 112 S.Ct. 2326, 120 L.Ed.2d 1, 13 (1992) (citing Minnesota v.

Clover Leaf Creamery Co., 449 U.S. 456, 101 S.Ct. 715 (1981)). And, as the Court went on to note, "[t]his standard is especially deferential in the context of classifications made by complex tax laws." 120 L.Ed.2d at 13. The Ports have failed to negate the Commission's reasonable factual assumption.[4]

Although the Ports' brief purports to engage in the same analysis that Nordlinger did, it conveniently ignores the facts and the ruling of that decision. As Nordlinger makes clear, a reliance interest need not be an interest that the governmental decisionmaker is legally or equitably compelled to recognize. Although there are certain reliance interests that government may be obligated to recognize under established principles of law and equity, the government is not prohibited from recognizing others. See Nordlinger v. Hahn, 120 L.Ed.2d at 14 (citing Heckler v. Mathews, 465 U.S. 728 (1984); Kadrmas v. Dickinson Public

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[4] The Ports cite Archer v. Marshall, 355 So.2d 781 (Fla. 1978), and argue there is no proof any leaseholder acted in reliance on the promise they would never be subject to ad valorem taxes. Archer, however, specifically recognizes that "hundreds of persons" entered leases on Santa Rosa Island following enactment of a law exempting the land from ad valorem taxes. The Court rejected only the legislative finding that the County was unjustly enriched by improvements made by leaseholders, reasoning that such improvements would be gone before the 99-year leases expired. Archer was not an equal protection case. Moreover, in Straughn v. Camp, 293 So.2d 689, 693 (Fla. 1958), the Court recognized that Santa Rosa Island property "was promoted as being tax exempt."

Schools, 487 U.S. 450 (1988); and City of New Orleans v. Dukes, 427 U.S. at 305).

The reliance interest the Court recognized in Nordlinger as entitled to favorable tax treatment was simply one of older homeowners "against higher taxes." 120 L.Ed.2d 14. As the Court stated,

> an existing owner rationally may be thought to have vested expectations in his property or home that are more deserving of protection than the anticipatory expectations of a new owner ....

Id. That, in a nutshell, states the case of a pre-1968 leaseholder who may be accorded the deferential treatment of Proposition 7.

In any event, in the area of taxation, "the states have large leeway in making classifications and drawing lines ...." Nordlinger v. Hahn, 120 L.Ed.2d at 13 (quoting Williams v. Vermont, 472 U.S. 14, 22 (1985)). Here, the Commission has drawn a reasonable line, and the voters should be allowed the ultimate decision as to whether it will become law.

III. PROPOSITION 7 WAS ADOPTED IN COMPLIANCE WITH ARTICLE XI, SECTION 6, FLORIDA CONSTITUTION.

Point III of the Ports' brief raises a point that was not considered below and hence cannot be considered here. Purportedly, it is based on Count III of the complaint. That count, however, was a contrived attack on the

Commission's voting on April 29, 1992, to reconsider Proposition 7 -- a vote which failed -- and a subsequent vote on May 6, 1992 to "waive the rules" to again reconsider Proposition 7, a vote that likewise failed. Proposition 7 was not reconsidered on May 6.[5]

Point III of the brief asserts, however, that Proposition 7 has been rendered ambiguous and of uncertain intent because of a resolution adopted by the Commission on May 7, 1992, and hence is not a proper proposal. (See Port App. at 33, 35) Count III did not reference this resolution or make this argument. The point cannot be raised on appeal for the first time.

In any event, Proposition 7 leaves intact the exemptions provided for in article VII, section 3(a) and does not purport to amend the subsection. It would merely add new subsection (e) to section 3. The resolution and Proposition 7 are wholly consistent.

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[5] See Commission Minutes of April 29, 1992 (Port Authorities App. at 56, 61) (Vote to reconsider failed 6 in favor, 13 against); Commission Minutes of May 6, 1992 (Port Authorities App. at 64, 65) (motion to waive rules failed). Under the Commission's rules, a motion to reconsider could only be taken up once unless the rules were waived by a two-thirds vote. (Tr. 45-46)

CONCLUSION

The judgment of the trial court should be reversed.

ROBERT A. BUTTERWORTH
Attorney General

LOUIS F. HUBENER
Assistant Attorney General
Florida Bar No. 140084
Department of Legal Affairs
The Capitol - Suite 1603
Tallahassee, FL 32399-1050
(904) 488-8253

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing APPELLANT'S INITIAL BRIEF has been furnished by Hand Delivery to BARRY RICHARD, Esquire, 101 East College Avenue, Post Office Drawer 1838, Tallahassee, Florida 32301 and CASS D. VICKERS, Esquire, Post Office Box 1876, Tallahassee, Florida 32302; and by U.S. Mail to JOHN R. LaCAPRA, Esquire, 2701 Ponce de Leon Boulevard, Coral Gables, Florida 33134 and S. LaRUE WILLIAMS, Esquire, 150 S. Palmetto Avenue, Box A, Daytona Beach, Florida 32114 this 25th day of September, 1992.

Louis F. Hubener
Assistant Attorney General

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APPENDIX

AD VALOREM TAXATION OF LEASEHOLD INTERESTS IN GOVERNMENTALLY OWNED PROPERTY

BONNIE ROBERTS

I. INTRODUCTION

To remedy a situation currently fraught with confusion nd inequity, the Florida Constitution Revision Commission devoted a portion of its time to the question of taxation of leasehold interests in governmentally owned property held by private individuals and entities.[1] Under current Florida law, leasehold interests in governmentally owned property are subject to ad valorem taxation unless expressly exempted.[2] Since the inception of ad valorem taxation of leasehold interests in 1961, constitutional and statutory provisions have exempted certain leasehold interests. Numerous changes in these constitutional and statutory provisions, however, have kept the legal standards relevant to leasehold tax exemptions in a state of confusion. Moreover, inequity has arisen in that some leasehold interests which were tax-exempt at the beginning of the lease are now subject to ad valorem taxation by virtue of the changed exemption standards. Thus, a lessee who finds himself in this position must now pay an unexpected tax bill in addition to the regular rental payment on the leasehold interest.

The revision commission initially took up the issue of leasehold tax exemptions in order to provide relief to lessees of governmentally owned property who had allegedly relied on the tax-exempt status of their leasehold interests.[3] The first proposal made to the commission was simple and straightforward: All existing leasehold interests in governmentally owned property were to be exempt from ad valorem taxation. To accomplish this objective, the commission adopted Proposal 206, which stated: "Ad valorem taxes on leaseholds of property owned by the United States, State of Florida, or any political subdivision, authority, municipality, or other public body shall not be applicable to existing international or interstate commerce facilities, maritime, transportation, military, sports, recreational or other leasehold interests."[4]

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1. The scope of this note pertains only to the question of ad valorem taxation of leasehold interests in governmentally owned property. The discussion does not relate to the taxable nature of leasehold interests in privately owned property.

2. FLA. STAT. § 196.001 (1977) provides "Unless expressly exempted from taxation. the following property shall he subject to taxation in the manner provided by law: . . . (2) All leasehold interests in property of the United States, of the state. or any political subdivision, municipalitv. agencv. authority, or other public body corporate of the state."

3. Transcript of Fla. C.R.C. proceedings 183-213 (Jan. 24. 1978).

4. Proposal 206, which was cosponsored by Commissioners Kenneth Plante and Yvonne

Although Proposal 206 was adopted by a wide margin, its passage was not uncontested.[5] Opponents of the proposal questioned the merits of a wholesale exemption of any and all such existing leasehold interests which did not consider the use to which the leased property was being put. To illustrate the broad scope of the proposed exemption, Commission Chairman Talbot "Sandy" D'Alemberte cited the example of **a** Miami yacht club which could, under Proposal 206, qualify for a property tax exemption on lands leased from the state and used solely for recreational purposes. This, D'Alemberte suggested, was an exemption the State of Florida should not grant.' Amid growing concern about the broad scope of the exemption, Proposal 206 **was** referred to a select committee for further consideration.'

After hearing testimony, the committee substantially revised the proposal and reported back to the commission. The provision that the commission finally approved for the ballot in November is a narrower and more specific exemption.* Although Proposal 206 would have granted a wholesale exemption to all existing leasehold interests, the final proposed revision would place certain restrictions on that exemption:

> ***All*** *leasehold interests created prior to January 1, 1978, in property owned by the United States, the state, or any political subdivision, municipality, authority, district, agency* or *public body corporate shall be exempt from ad valorem taxes when:*
>
> *(1) The leasehold interests were created pursuant to legislation or* **lease** *agreements which exempted, or which covenanted to* **exempt**, *such leasehold* ***interests*** *from ad valorem taxes, or which conuenanted to indemnify or hold harmless the lessee from any ad valorem taxes levied in respect of the leased premises, or*
>
> (2) ***The*** *property is leased for use in connection with providing air, ground or water transportation, or* ***is*** *leased for use in connection with providing services to the public engaged in air, ground or water transportation; provided however, no leasehold interest shall be exempted by the provisions* of *this paragraph (2) if, prior*

B. Burkholz, was initially considered as an amendment to article XII of **the** 1968 Florida Constitution. The commission's Style and Drafting Committee instead placed it in article VII, § 3. Fla. **C.R.C.** Comm. on Style and Drafting, Report to the Florida Constitution Revision Commisaion *72* (Mar. **6,** 1978) [hereinafter cited as Style and Drafting Report].

5. Proposal 206 was adopted by **a vote** of 21-8. Transcript of Fla C.R C proceedings 213 (Jan. **24.** 1978).

6. *Id.* **at *207.***

7. The proposal **was** referred to the select committee, composed of Commissioners James Apthorp, Kenneth Plante, and Stella F. Thayer, on Jan. *27,* 1978. 25 Fla C.R C. Jour. 356 (Jan. **27,** 1978).

8. ***See generally*** **2** Transcript of Fla. C.R.C. proceedings 14-133 (Mar 9. 1978).

to January 1, 1978, there shall have been a voluntary payment of ad valorem taxes levied in respect of such leasehold interest.[9]

'Another important distinction between Proposal 206 and the final proposed revision is that although the former made no mention of exempting leasehold agreements concluded after January 1, 1978, the latter implicitly allows this to be done by law. The proposed revision provides:

All leasehold interests in property owned by the United States, the state, or any political subdivision, municipality, authority, district, agency, or public body corporate may be exempted from ad valorem taxation as provided by law when the property is leased for a public purpose for use in connection with providing air, ground, or water transportation, whether or not for private profit,[10] *or is leased for a public purpose for use in connection with providing necessary services, whether or not for private profit,*[11] *to the public engaged* in *air, ground or water transportation* [12]

Finally, the proposed revision adopted for the November ballot contains an additional section which reads: *"The exemption of leasehold interests from ad valorem taxation provided by subsections (c) and (d) shall not be granted to any lessee who discriminates in its membership,* services *or other activities on account of race, religion, sex or physical handicap."*[13]

Thus, in moving from the wholesale exemption for all existing leasehold interests to the more restricted exemptions embodied in the final revision proposal, the commission intended to provide relief only to that narrow class of lessees who. in the commission's estimation, had received unfair treatment by the application of the 1968 constitution and implementing legislation. Because the final revision is a response to the problems created by the 1968 constitution, a review of the history and theory of leasehold taxation in Florida is necessary for an evaluation of the scope and effect of the proposed constitutional amendment.

9. Fla. C.R.C.. Rev. Fla. Const. art. VII, § 3(c) (May 11, 1978).

10. The language "whether or not for private profit" was inserted by the commission on April 14, 1978. Commissioner Donald H. Reed proposed the additional language, which was adopted by a vote of 36.0. 30 Fla. C.R.C. Jour. 566 (Apr. 14. 1978).

11. *See* note 10 *supra.*

12. Fla. C.R.C., Rev. Fla. Const. art. VII, § 3(d) (May 11, 1978).

13. *Id.* § 3(e). Proposed by Commissioners Thomas H. Barkdull, Jr. and Jesse J. McCrary, Jr., this rather noncontroversial portion of the amendment serves merely to deny an exemption to any lessee who discriminates on the basis of the enumerated pounds. For a very broad discussion of this amendment, see 2 Transcript of Fla. C.R.C. proceedings 79-83 (Mar. 9, 1978).

II. HISTORICAL PERSPECTIVE

A. The Theory of Leasehold Taxation

At common law, a leasehold interest in property was treated as personal property rather than real property and was, therefore, not subject to ad valorem taxation." Florida courts, however, have traditionally held that the legislature could vary this common law rule by statute.[15] In 1957, in *Park-N-Shop, Inc. v. Sparkman*,[16] the Florida Supreme Court all but invited the legislature to enact such legislation by stating that although such leasehold interests were not presently taxable, "we are not conscious of any reason why the legislature could not set up machinery for that purpose . . . ."[17]

The parties advocating taxation in *Sparkman* argued that taxation was necessary, not as a source of additional revenue, but rather as a means of equalizing the competitive positions of businessmen who had the benefits of leasehold interests in government property and businessmen who owned their own property.[18] The competing businessmen may be initially in the same economic position. But the businessman who owns his property suffers an economic disadvantage in that he must pay ad valorem taxes while the businessman who leases from the government is not taxed. To the extent that the two businesses use the same amount of services

14. Williams v **Jones.** 326 So. 2d 425, 433 (Fla. 1975).

15. Thalheimer v. Tischler, 46 So. **514** (Fla. 1908):Oliver v. Mercaldi. 103 So. 2d 665 (Fla. 2d Dist. Ct. App 1958).

16 YY So. 2d 571 (Fla. 1957).

17 *Id* at 574. At issue in *Sparkman* was the taxahle status of leasehold interests held by private businessmen on county-owned property. The chancellor found the leasehold interests to be taxable as tangible personal property. The county was willing to accept this determination. but the appellant insisted that the leases should be subject to an ad valorem tax. The supreme court rejected the positions of the chancellor and the appellants and held that the leasehold interests in county-owned property were not subject to taxation.

18. *Id* at 572 In basing the theory of leasehold taxation on an attempt to equalize competitive positions, advocates of the tax apparently overlook the property owner's inherent advantage of being able to deal with his property in whntever manner he chooses. The lessee, on the other hand, finds his use of leased property circumscribed by the terms and duration of the lease. This distinction in the quality of ownership serves as the rationale for subjecting the property owner, but not the lessee, to ad valorem taxation in the purely private lease agreement, When the lessee leases governmentally owned property. however, he automatically becomes subject to ad valorem taxation.

The differing treatment of leasehold interests in governmentally owned and privately owned properties may be traced to the character of the lessor When a private properly owner leases to a commercial enterprise and both parties profit from the arrangement, public opinion applauds the arrangement as a good business deal. When a governmental unit is the lessor, however, a policy question arises as to the government's equal treatment of all its citizens and enterprises. To avoid the appearance of impropriety that occurs when the government gives a competitive advantage to a commercial enterprise. advocates of the tax urge that it must be imposed on such leasehold interests.

provided by the taxing unit, such as police and fire protection, the property owner is required to pay for services not only to his business but to the lessee's business as well. In this way, free enterprise is thwarted, and the lessee is given an unfair economic advantage. Assessment of ad valorem taxes against the leased property would reestablish equality in competitive positions.

Four years after the *Sparkman* decision, the 1961 Florida Legislature accepted the invitation offered by the court and enacted a statute, section 192.62(1), authorizing ad valorem taxation of leasehold interests in governmentally owned property.[19] Not all leasehold interests needed to be taxed, however, because not all such interests were being used in a commercial setting in competition with private businesses. So the legislature turned its attention to framing an appropriate exemption provision.

A significant limitation on the legislative authority to frame any property tax exemption is the general rule that all statutory exemptions must be based on authorization granted in the Florida Constitution.[20] Thus, before granting any exemption from leasehold taxation, the legislature had to find authorization in the 1885 constitution.

Two sections of the 1885 constitution afforded the basis for an exemption. Article IX, section 1 permitted the legislature to exempt by law property used for "municipal, education, literary, scientific, religious or charitable purposes." Article XVI, section 16 provided an exemption for corporate property held and used exclusively for the same specified purposes.[21] Relying on these provisions, the 1961 legislature exempted leasehold interests from ad valorem taxation if the underlying property was being used for a "public purpose."[22]

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19. Ch. 61-266, § 1, 1961 Fla. Laws (repealed 1971), states:

> Any real or personal property which for any reason is exempt or immune from taxation but is being used, occupied, owned, controlled or possessed, directly or indirectly by a person, firm, corporation, partnership or other organization in connection with a profit making venture, whether such use, occupation, ownership, control or possession is by lease, loan, contract of sale, option to purchase or in any wise made available to or used by such person, firm, corporation, partnership or organization, shall be assessed and taxed to the same extent and in the same manner as other real or personal property.

20. *See, e.g.*, State *ex rel* Burbridge v. St. John, 197 So. 131 (Fla. 1940); Maxcy v. Federal Land Bank, 150 So. 248 (Fla. 1933).

21. The two provisions were distinguishable in that art. IX, § 1 was applicable to all real property but required implementing legislation while art. XVI was limited to corporate property and was generally held to be a self-executing provision. Lummus v. Miami Beach Congregational Church, 195 So. 607 (Fla. 1940); Lummus v. Florida Adirondack School, 168 So. 232 (Fla. 1936). *Contra*, Jasper v. Measemanor, 208 So. 2d 821 (Fla. 1968).

22. Ch. 61-266, § 1, 1961 Fla. Laws 497 (repealed 1971), states:

> (2) This section shall not apply to property described in subsection (1) when:
> . . . the property is owned or used by the state, any county, municipality, or public

In addition to this general statutory exemption enacted in 1961, the legislature from time to time passed special acts exempting specific leasehold interests. These acts always contained a legislative finding that the underlying property was being used in a manner consistent with a public purpose.[23] It was of some significance that although the constitutional provisions in articles IX and XVI referred to use for "municipal purposes," the legislature based the statutory exemptions on use for a "public purpose." Subsequent cases construing the legislation, however, found the terms "municipal purposes" and "public purposes" coextensive, thereby avoiding a clash between the constitutional and statutory sections.[24]

Although the 1961 law appeared on its face to require taxation of most leasehold interests used in profitmaking ventures, judicial interpretation severely limited its reach. In *Daytona Beach Racing & Recreational Facilities District v. Paul,*" the first in a series of cases involving taxation of the Daytona International Speedway, the court was forced to determine the scope of the taxing statute and the municipal/public purposes exemption. The case arose when the City of Daytona Beach leased **374** acres of city-owned property to the Daytona Beach Racing and Recreational Facilities District. A special act of the 1955 legislature created the district and provided that any racing and recreational facilities constructed by the district would be exempt from taxation.[26]

A ninety-nine year lease between the city and the district provided that the city would not tax the leased property. The district planned to issue revenue bonds to finance construction of a racetrack. The bond issue was validated by the Florida Supreme Court,[27] but the attempted sale was unsuccessful. The district then subleased the property to the Daytona International Speedway Cor-

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entity or authority created by statute and is leased or otherwise made available to such person, firm, corporation, partnership or organization by such public body for a consideration in the performance by the public body of a public function or public purpose authorized by law, or which property prior *to* the effective date of this act was leased for valuable Consideration for purposes not otherwise exempt hereunder . . .

23. *See, e.g.*, Act of June 23, 1955. ch. 31343. § 13. 1955 Fla. Laws (Special Acts) 3675 (repealed 1971); Act of May 5, 1949, ch. 25.810. 1949 Fla. Laws (Special Acts) 664 (repealed 1971).

24. Daytona Beach Racing & Recreational Facilities Dist. v. Paul, 179 So. 2d 349 (Fla. 1965); Gwin v. City of Tallahassee. 132 So. 2d 273 (Fla. 1961). *See also* 18 U. FLA. L. REV. 708 (1966); 21 U. FLA. L. REV. 641 (1969)

25. 157 So. 2d 156 (Fla. 1st Dist. Ct App. 1963), *rev'd*, 179 So. 2d 349 (Fla. 1965).

26. Act of June 23, 1955, ch. 31343. § 13, 1955 Fla. Laws (Special Acts) 3675 (repealed 1971).

27. State v. Daytona Beach Racing & Recreational Facilities Dist., 89 So. 2d 34 (Fla. 1956).

poration under a fifty-year lease with a twenty-five year renewal option. The corporation's primary consideration for the leasehold was its obligation to build the racetrack at its own expense. The lease between the district and the corporation provided that the corporation would not be liable for any taxes assessed on the leased land.

In 1960 and 1961, Volusia County assessed the leased property for ad valorem taxes. The corporation, the district, and the city all sued to enjoin collection of this tax. The First District Court of Appeal held the leasehold interest taxable, stating that "while a project may be of great benefit to the public, if its primary purpose is to benefit private persons or a private corporation, it is not a municipal purpose."[28] The Florida Supreme Court reversed this decision in 1965, holding that under article IX, section 1 of the 1885 constitution the exemption should be granted.[29] The court reasoned that the speedway's contribution to the economic, commercial, and residential development of the Daytona Beach area was indeed a public purpose, and that, in this context, a public purpose was equivalent to a municipal purpose.

The supreme court's holding in *Daytona* dealt a substantial blow to the legislature's attempt to tax leasehold interests. The exemption of a racetrack simply because the facility stimulated the local economy implied a broad construction of the public purpose test. The decision placed most commercial lessees in precisely the same position as they were before the legislative enactments — untouched and unaffected by ad valorem taxation. Thus, businessmen who owned their own property found themselves still subsidizing governmental services to commercial lessees of governmentally owned property.

B. *The Erosion of Constitutional Change*

The drafters of the 1968 Florida Constitution attempted to deal

28. Davtona Beach Racing & Recreational Facilities Dist. v. Paul. 157 So. 2d 156, 165 (Fla. 1st Dist. Ct. App. 1963). *rev'd*, 179 So. 2d 349 (Fla. 1965).

29 Davtona Beach Racing & Recreational Facilities Dist. v. Paul. 179 So. 2d 349 (Fla. 1965).On remand, the circuit court denied the tax collector's motion to amend, and the First District Court of Appeal affirmed this denial. 208 So. 2d 653 (Fla. 1st Dist. Ct App. 1968).

Compare the supreme court's holding in *Daytona* with its holding in Hillsborough County Aviation Auth. v. Walden, 210 So. 2d 193 (Fla. 1968), in which certain lessees at Tampa International Airport (a service station, two car rental companies. a motel, a construction company, an aircraft repair company, and a communications equipment repair company) were found to be serving predominantly private purposes. Only one lessee. a company that provided neressary services to an airport-owned and-operated restaurant, was found to he serving a public purpose. *Id.* at 196. By labelling the private/public purpose distinction a question of fact, the supreme court managed to adopt the chancellor's findings without a clear articulation of the criteria involved in such a determination.

with the problem by limiting the constitutional grounds on which an exemption could be based. The 1968 constitution states: "All property owned by a municipality and used exclusively by it for municipal or public purposes shall be exempt from taxation."[30] The constitution appears to specify three requirements for the exemption. First, the property must be owned by a municipality. This requirement. was a significant. change from article IX, section 1 of the 1885 document, which referred to property being held or used for enumerated purposes but placed no restrictions on ownership of the property. The second requirement of the 1968 constitution is that the municipally owned property must be used "exclusively by it," that is, by the municipality. The third constitutional requirement is that the use to which the property is put must serve a municipal or public purpose.[31]

Pursuant, to the 1968 constitution, the 1971 Florida Legislature enacted a sweeping reform of chapters 192 and 196 of the Florida Statutes. The legislature repealed all the statutory provisions, both general laws and special acts, relevant to leasehold taxation and exemption.[32] In their place, the legislature substituted a provision stating that all leasehold interests in governmental property were taxable unless expressly exempted by law.[33] The lawmakers provided an express exemption to leaseholds "only when the lessee serves or performs a governmental, municipal, or public purpose or function . . . ."[34] Governmental, municipal, or public purpose or function was defined as a use which is "demonstrated to perform a function or serve a governmental purpose which could properly be performed or served by an appropriate governmental unit, or which is demonstrated to perform a function or serve a purpose which would otherwise be a valid subject for the allocation of public funds."[35]

When read together, the provisions of article VII, section 3(a) of the 1968 constitution and the 1971 statutory modifications substantially tighten the requirements of an exemption. No longer, or so it seemed, could a leasehold interest such as that involved in *Daytona* be exempted simply because the leasehold interest, served a "public purpose" in the broadest sense of that. term. Instead, the new provi-

30. FLA. CONST. art. VII, § 3(a)

31. D'Alemberte, *Commentary*, *in* 26A FLA. STAT. ANN. 43 (West 19701; Florida State University College of Law, Constitutional Revision Research Project 2.4 (Aug. 5, 1977).

32. Act of June 15, 1971, ch 71-133, 1971 Fla. Laws 394.

33. *Id* (codified at FLA. STAT. § 196.001 (1977)). For the text of the statute, in part, *see* note 2 *supra*

34. FLA. STAT. § 196.199(2)(a) (1977)

35. *Id* § 196.012(5).

sions required taxation of all leasehold interests not expressly exempted by law, with an express exemption granted to only those interests owned and used exclusively by a municipality in a manner consistent with the performance of governmental functions or the allocation of public funds.

Although the new constitutional and statutory requirements seemed clear, the judicial application of these requirements to leasehold interests proved to be complex. In 1973, the Florida Supreme Court considered the new requirements in *Dade County v. Pan American World Airways, Inc.*[36] At issue in *Pan American* was the taxation of the airline's leasehold interest in property at Miami International Airport. The real estate involved was owned by Dade County,[37] leased to the Dade County Port Authority, and subleased to the airline. When Dade County attempted to tax the leasehold interests, the airline challenged the validity of the assessment. The trial court enjoined collection of the taxes, and the Florida Supreme Court affirmed, thus approving an exemption.

Dade County tried to use the constitutional requirements to defeat the exemption. Turning first to the requirement in article VII, section 3(a) that the leasehold interest be owned by the municipality in order to merit an exemption, the county attempted to distinguish the ownership of the property interests involved by pointing out that although the municipality owned the real estate, the airline owned the interest in question, the leasehold. Since the constitutional language extends only to interests owned by the municipality, the county argued that the leasehold interest owned by the airline could not satisfy the requirement of municipal ownership. Without satisfactory explanation, the court rejected the argument as being without merit.[38] According to the majority, "[t]here is no require-

36. 275 So. 2d 505 (Fla. 1973).

37. Although art. VII, § 3(a) expressly grants an exemption only to municipally owned property, the section has been applied with equal force to property owned by a county or the state. The reason for this apparent discrepancy stems from the tax status of state and county property as opposed to municipal property. Municipal property would be taxable but for the exemption in art. VII, § 3. State and county property, on the other hand, is immune from taxation and requires no specific exemption to codify that immunity. Thus, there is simply no need for a constitutional provision restating the immunity of state and county property. Dickinson v. City of Tallahassee, 325 So. 2d 1 (Fla. 1975). *See also* R. Shevin, Report and Recommendations of Attorney General Robert L. Shevin to the 1978 Constitution Revision Commission 147 (June 1977). As discussed in the text accompanying note 20 *supra*, without a constitutional basis, the legislature cannot exempt from taxation any leasehold interest. The joinder of the two rules of construction would appear to require taxation of all leasehold interests in state and county property. To avoid this harsh result, the Florida courts have, with little or no discussion of the problem, interpreted art. VII, § 3 as applying to all governmentally owned property, whether it be owned by the state, a county, or a municipality.

38. Justice Ervin, however, based his dissent on that argument and urged that an exemp-

ment in Article VII, § 3(a) (1968), or old Article XVI, § 16 (1885), that the municipality own the *leaseholds;* the municipality must only own the *property* as it does here."[39]

In holding that a lessee could qualify for an exemption so long as the municipality owned the underlying property, the *Pan American* court also eroded a portion of the second constitutional requirement — that the property be used exclusively by the municipality. Although the court, in *Pun American* did not, deal directly with the argument, that the only exempt use contemplated by the constitution **was** use by a municipality and not be a lessee, rejection of this argument was implicit in the court's conclusion that a lessee may qualify for the exemption.

After glossing over the requirements of ownership and use by the municipality, the supreme court was left with only the third constitutional requirement, that the property be "used exclusively . . . for municipal or public purposes . . . ." Dade County argued that this phrase required total devotion of the property to public purposes. Since the airline used its leasehold interest for the private purpose of making a profit, the county maintained that the airline's use of the leased property was not "exclusively" for public purposes. Again, the supreme court rejected the county's argument.[40]

It is of some significance that in adopting a definition of use for a "public purpose" the court did not look to the statutory definition of the term found in section 196.012(5). Indeed, the only mention the court made of the 1971 statutory reform was in a brief footnote which did no more than acknowledge the existence of the new statutory provisions.[41] Two reasons may be offered to explain the court's failure to use the statutory definition of public purpose. First,, the court seemed concerned that the relevant leasehold interests were executed prior to the effective date of the 1971 legislation.[42] The pre-1971 legislation may have been applied to avoid retroactivity problems. Second, the court may have deemed the new legislation consistent with the previous law and, thus, may have seen no need to differentiate between the provisions. The latter explanation seems unlikely, though, because of the 1971 statutory definition of public purpose. Although perhaps not inconsistent with the prior judicial definition of the term, the statutory definition could certainly be

tion could not be granted when someone other than a municipality owned the leasehold interest. 275 So. 2d nt 516.

39. *Id* at 513 (emphasis in original)

40. 275 So 2d *at* 512.

41. *Id* at 511 n.8.

42. Ch 71-133 took effect Dec. 31, 1971. The **leases** in *Pan American* were executed prior to this date. 275 So. 2d at 511-12.

read as more restrictive than the case law definitions. At th least., it should have been noted as a departure from prior law.

Instead of looking to the statutory definition of public purpose in order to evaluate the airline's leasehold, the *Pan American* court fell back on the common law definition of the term, invoking a two-step analysis. Following the theory set forth in *Daytona*, the court defined public purpose broadly as any use "primarily and predominantly for the public benefit even though there may be some incidental private purpose, too."[43] Since both parties had stipulated that the airport facility was used for a public purpose, the court turned to the second issue — whether the use for a public purpose was an exclusive use. Given the judicial conclusion that a public purpose could encompass "inconsequential private purposes,"[44] the court stated that the profit motive involved in the leasehold had so merged with the stated public purpose of providing airline transportation that the Pan American leasehold interest was. in fact. being used exclusively for public purposes.[45]

After *Pan Amerrcan*, little remained of the stricter constitutional and statutory exemption requirements. *Pun American* narrowed the three constitutional requirements to two: A leasehold exemption could be granted if (1) the municipality simply owned the real estate subject to the lease agreement and (2) the lessee used the property primarily for a public purpose, regardless of any incidental private purposes, including use for private profit. By employing a broad definition of public purpose rather than the narrower statutory definition, the court in effect reinstated the *Daytona* holding, notwithstanding the legislative attempts to tighten the exemption requirements.

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43. *275* So. 2d at 512.

44. *Id.*

45. *Id.* A subsidiary **issue** in *Pan American* was the applicability of FLA. CONST. art. VII, § 10(c), which provides that if any facility financed with industrial revenue bonds is "occupied or operated by any private corporation, association. partnership or private person pursuant to contract or lease with the issuing body. the property interest **created** by nurh contract or lease shall be subject to taxation to the **same** extent as other privately owned property." Because the relevant leases were executed before the effective date of the 1968 constitution, the *Pan American* court refused to construe this section

The court did construe the provision. however. in Hertz Corp. v. Walden. 299 So. 2d 121 (Fla. 2d Dist. Ct. App. 1974). *aff'd*, 320 So. 2d 385 (Fla. 1975). Indicating that the section required implementing legislation. the court found no mandate to tax per se. Rather. the lessee would be allowed to establish an exemption under art VII, § 3(a) The court indicated that the purpose of § 10(c) was to put property financed with revenue bonds on an equal footing with property not so financed. In applying art. VII, § 3(a) to the property in question. the *Hertz* court found that **a car** rental facility located on the premises of the Tampa International Airport served A public purpose. whereas a remote Hertz facility did not.

Decisions in the years immediately following *Pan American* adhered to the court's broad exemption theory. For example, a Hertz car rental outlet located in Tampa International Airport obtained an exemption,[46] as did an amusement **park** located in Tampa."[47] Although these cases referred to the statutory definition of public purpose, no distinction was drawn between use for private profit and use which would be a valid governmental function or allocation of public funds.

C. The Judicial Retreat

The judicial abandonment of the broad exemption theory articulated in *Pan American* and subsequent cases began rather subtly. The first important step was a holding by the Florida Supreme Court in 1974, in *Straughn v. Camp,* that "in the instances where the predominant use of governmentally leased lands is for private purposes the Constitution *requires* that the leasehold be taxed."[48] The theoretical basis for this holding has not been explained by the court. Given the court's admission in *Pan American* that the 1885 constitution did not *require* such taxation, coupled with its assertion that the 1968 constitution was "comparable insofar as relevant" to the provisions of the 1885 constitution,[49] this construction is somewhat puzzling. But regardless of its basis, the court has since remained firm in its position that leaseholds used for predominantly private purposes must, under the 1968 constitution, be taxed.[50] The importance of this holding, however, was not appreciated until the court recently began to retreat from the broad definition of "public purpose."

As was noted earlier, section 196.012(5), Florida Statutes, had already provided the basis for a more limited construction of the term "public purpose" than that which was used in *Pun American.* In 1975, in *Williams v. Jones,* the supreme court finally recognized this statute as a limitation on exempt uses.[51] The court found that

46. Walden v. **Hertz** Corp., 320 So. **2d** 385 (Fla. 1975).

47. City of Tampa v Walden. 323 So. **2d** 58 (Fla. 2d Dist. Ct. **App.** 1975).

48. 293 So. 2d 689, 696 (Fla. 1974). ***appeal dismissed,*** 419 U.S. 891 (1975) (emphasis added).

49. Dade County v. Pan American World Airways. Inc., 275 So. 2d **at** 512.

50. ***See.*** e.g., Lykes Bros. v. City of Plant City. 354 So. 2d 878 (Fla. 1978).

51. 326 So. 2d **425** (Fla. 1975). *Williams* involved a challenge **by** Santa **Rosa** Island lessees to taxation of their leasehold interests. The lessees argued that leasehold interests should be taxed as intangible personalty rather thsn as real property. that the attempt to **classify** leasehold interests as real property constituted an unreasonable classification in violation of art. VII, §§ **2.** 4 of the 1968 constitution, **end** that the tax violated the **equal** protection clauses of the Florida Constitution and the **14th** amendment to the United States Constitution, *Id.* at 429. The court rejected all three of these arguments.

only those leasehold interests used for "governmental-governmental" functions could be exempted, whereas those used for "governmental-proprietary" functions could not be.[52] Although the court failed to elaborate on the criteria relevant to the newly established "governmental-governmental" classification, it appeared that the reference was to that limited class of activities that a governmental unit could legally perform or finance itself. Of major significance in *Williams* was the court's denial of an exemption to leasehold interests which were "purely proprietary and for profit."[53] The reference to the profit motive in connection with a taxable leasehold was a significant indication that the court might reconsider the *Pan American* holding that a profit-oriented use could be deemed inconsequential for purposes of the exemption.

The decision that dealt the final blow to this aspect of *Pan American* is a striking illustration of the recent change in the law. In 1976, the Daytona International Speedway once again found itself in court, this time litigating the validity of its ad valorem tax bill under the 1968 constitution and the new statutory provisions. The only fact that had changed since the 1963 litigation was that the City of Daytona Beach had conveyed its interest in the leased lands to Volusia County. The county still asserted that the leasehold interest was taxable. The speedway still argued against taxation. In *Volusia County v. Daytona Beach Racing & Recreational Facilities District*, the lower court found the leasehold interest tax-exempt, and the taxing authorities appealed to the supreme court.[54] Despite the 1965 holding that the speedway served a public purpose, Justice Hatchett, writing for the majority, found the speedway's leasehold interest taxable. Hatchett based the decision on a finding that "[t]he lessee in the present case does not serve a governmental purpose. . . . The Corporation exists in order to make profits for its stockholders and uses the leasehold to further that purpose. The use is determinative."[55] The essence of the court's holding was that

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62. *Id.* at 433. Although the governmental-governmental/governmental-proprietary distinction is currently being used by the Florida courts, proponents of the proposed constitutional revision have argued that the distinction has effectively destroyed any exemption that could have been granted under art. VII, § 3(a) because a governmental unit simply does not delegate governmental-governmental functions to anyone and certainly not to lessees. Fla. C.R.C., Select Committee on Proposal 206 Minutes (Mar. 7, 1978) (testimony of Woodrow Mervin, Jr.).

53. *326* So. 2d at 433.

54. 341 So. 2d 498 (Fla. 1976).

55. *Id.* at 502. The Daytona International Speedway has recently argued that the Florida Supreme Court denied the exemption solely because the speedway did not perform a function which could appropriately be performed by a governmental unit. The court did not rule on the question of whether the speedway performs a function "which would otherwise be a valid

any leasehold interests used for private profit would be classed as a proprietary, that is, a taxable, interest.

The contrast between the *Pan American* and *Volusia County* decisions is striking. In 1973, the court in *Pun American.* allowed a profit-oriented use to qualify for an exemption. In 1976, the court in Volusia County deemed a profit-oriented use ineligible for an exemption.

The composition of the Florida Supreme Court changed substantially between 1973and 1976.[56] Surely, it is no mere coincidence that the judicial retreat from the broad notion of a "public purpose" coincided with a major turnover in the membership of the court. Justice Hatchett, one of the newcomers to the court, attributed the result in *Volusia County* solely to the statutes.[57] But the constitutional ramifications of the decision must be appreciated.

If one were to accept the statutory definitions of public purpose as the sole basis for the decision in *Volusia County*, one might conclude that some legislative tinkering with the appropriate statutes could once again render a profit-oriented lease tax-exempt. This conclusion, however, would be erroneous because of that seemingly innocuous statement in *Straughn v. Camp* that leasehold interests used for private purposes must be taxed by virtue of the 1968 constitution. Should the legislature attempt to amend the statutory definition of public purpose to include private uses for profit, the supreme court might strike the amendment as unconstitutional on the ground that private use under the 1968 constitution must be subjected to ad valorem taxation.

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subject for the allocation of public funds." FLA. STAT § 196.012(5) (1977). An appellate court has rejected this argument hut has certified the case to the Florida Supreme Court as a question of great public interest. Daytona Reach Racing & Recreational Facilities Dist, v. Volusia County, 355 So. 2d 175 (Fla. 1st Dist. Ct. App. 1978).

56 Brill & Hayes, *State and* Local *Taxation,* 31 MIAMI L. REV. 1231, 1251 (1977).The 1973 Florida Supreme Court was led by Chief Justice Vassar B. Carlton. The six other justices were James C. Adkins, Jr., Joseph A. Boyd. Jr., David L. McCain, Hal P. Dekle. Richard W. Ervin, and H.K. Roberts. By 1976 the cornposition of the court had changed substantially. R.K. Roberts was again the chief justice. Justices Adkins and Boyd were also still with the court. Askew appointees replaced Justices Dekle and McCain, who had resigned in 1975 during inquiries into judicial conduct by the Florida House of Representatives.

Askew appointed Ben F. Overton to the court in 1974, and both Alan C. Sundberg and Joseph W Hatchett in 1975. Justice England, elected in 1974, rounded out the 1976 court. Justice England had served previously as an Askew aide. A. MORRIS, THE FLORIDA HANDBOOK 1973-1974, 197.202 (14th ed. 1973), THE FLORIDA HANDBOOK 1975-1976, 207-14 (15th ed. 1975), THE FLORIDA HANDBOOK 1977-1978, 196-203 (16th ed. 1977).

57 Volusia County v. Daytona Reach Racing & Recreational Facilities Dist.. 341 So. 2d at 502 n.5.

D. *The Inequities*

Thus, it was clear by the time the Constitution Revision Commission convened in 1977 that all leasehold interests in governmentally owned property had to be taxed in the absence of a specific exemption. This premise had been based by the court on both constitutional and statutory grounds. **An** express exemption could be granted only to a lessee who put the property to a "governmental-governmental" use, and any attempt, to broaden the basis for which an exemption could be granted to include private uses would violate the constitutional requirement that all private uses of leasehold interests be taxed.

Recalling that leasehold taxation is intended to equalize the competitive positions of the commercial lessee and the property owner, one might well conclude that this tightening of the exemption standard is a positive step that should not be altered by constitutional amendment. The present state of the law, however, is not without its inequities. Problems have arisen for the lessee who, under the old constitution and the old exemption statutes, negotiated a long-term, tax-exempt, lease and made improvements on the property, only to find in 1977 that the basis for a tax exemption had changed so drastically that the leasehold interest could no longer qualify for the exemption. Some lessees who entered into agreements in reliance on the tax-exempt status of the leasehold interest now find themselves faced with an ad valorem tax bill in addition to the rental payments on the lease.

The problem of the lessee who once had, then lost, an exemption has arisen in two contexts.[58] The Daytona International Speedway exemplifies the first class of lessees: profit-oriented individuals or entities which once qualified for the exemption under the broad "primary benefit to the public" definition of public purpose. Under

58. The legislature attempted to evnid the result of the repealed exemption by providing in FLA. STAT. § 196.199(3) (1977) that:

> Nothing herein or in s. 196.001 shall require a governmentel unit or authority to **impose** taxes upon a leasehold estate created, extended, or renewed prior to April 15, 1976, 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 such taxing unit or authority other than the unit or authority making such covenant

This provision **was** severely limited by the supreme court in Lykes Bros. v. City of Plant City, **354** So. 2d 878 (Fla. 1978), in which the court stated that at the time of enactment of § 196.199(3), the Florida Legislature no longer possessed the constitutional power to **exempt** municipally owned property used by a private lessee predominantly for private purposes. *Id.* at 881. The court avoided the question of the statute's constitutionality by finding that § 196.199(3) was not intended to **exceed** constitutional limits

current. law, the use of the leasehold for profit-oriented purposes renders these interests taxable. The second class of lessees who no longer qualify for the exemption are individuals who use their leased property as residential dwellings. No profit-oriented use is involved. The most publicized examples of this class are the residents of Escambia and Okaloosa counties who lease county property located on Santa Rosa Island and Holiday Isle.

In 1947, Escambia County acquired land on Santa Rosa Island from the federal government.. The deed stated that the property was "to '[B]e used by it [Escarnbia County] for such purpose as it shall deem to be in the public interest, or be leased by it. . . .to such persons and for such purposes as it shall deem to be in the public interest. . . .' "[59] In that same year, the Florida Legislature, by special act, created the Santa Rosa Island Authority to control and manage the property.[60] Two years later, again by special act, the legislature exempted all lands controlled by the authority from ad valorem taxatinn."

While these exemptions were in force, the authority advertised the lands as suitable for residential dwellings and off'ered leases for a term of ninety-years. Although none of the leases contained a clause expressly exempting the lessee from tax liability, the tax-free status of the leasehold was an important, part of the advertising campaign. Some 750 leases were executed, and the lessees remained exempt from taxation until the legislative tax reform of 1971.[62]

With the passage of the new exemption and taxation statutes. though, the Santa Rosa Island lessees found themselves facing property taxation. Use of the leasehold interests for residential dwellings clearly was not a use which the governmental unit could properly perform or finance. Unwilling to pay the taxes, the lessees litigated the validity of the tax in *Straughn v. Camp*[63] and then in *Williams v. Jones*.[64] In both cases, they lost.

The primary argument advanced by Santa Rosa Island lessees was that the legislature's rescission of the previously granted exemptions constituted an impairment, of contractual obligations in

59 Straughn v Camp, 293 So. 2d 689, 6W-91 (Fla. 1974). *appeal dismissed*, 419 U.S. 891 (1975).

60 Act of June 16. 1947, ch 24,500, 1947 Fla. **Laws** (Special **Arts)** 836.

61 **Act of May** 5, 1949, ch. 25,810, 1949 Fla. Laws (Special Acts) 664.

62. Straughn v Camp. 293 So. **2d** 689, 692 (Fla. 1974). *appeal dismissed*, 419 U.S. 891 (1975). While none of the leases contained exemptions, a few of the agreements contained a provision that if taxes were ever assessed, the lessee would be liable for the tax due *Id* at 693.

63 293 So. 2d 689 (Fla. 1974). *appeal dismissed*, 419 U.S. 891 (1975).

64. 326 So 2d 425 (Fla 1975).

violation of article I. section 10 of the United States Constitution.[65] Their contracts clause argument, however, was flawed in two respects. First, the contracts relating to the Santa Rosa Island property had never contained express exemptions for the lessees' land Thus, no relevant contractual promise was impaired by the subsequent revocation of the exemption.[66]

The lessees maintained that although the agreements did not contain exemption clauses, exempt status had been made part of the agreement implicitly by the authority's advertisement of tax-exempt leaseholds. This argument raised the issue of the authority's power to grant such exemptions, and, more narrowly, the issue of whether any governmental body, including the legislature, could grant an exemption for any period of time other than the immediate taxing year. Here the second flaw of the residential lessees' argument became apparent., for the United States Supreme Court has held that one legislature cannot bind subsequent legislatures to tax exemptions.[67] Just as the 1949 legislature had the power to grant the exemption to the Santa Rosa Island lessees, so the 1971 legislature had the power to repeal that exemption.[68] Consequently, the lessees could not argue successfully that their reliance on the exemption was reasonable.

Although there appears to be no legal impediment to taxation of lessees who negotiated leases with the understanding that the interest was tax-exempt, lessees who find themselves in this position have argued that the tax-exempt status was part of a good faith bargain, one they might not have entered into had the interest been taxable initially. In reliance on exempt status. the lessees occupied

65. Straughn v. Camp. 293 So. 2d at 690.

66. *Id.* at 695.

67. Wisconsin & Mich. Ry. v. Powers. 191 U.S. 379 (1903).

68. Straughn v. Camp. 293 So. 2d at 694. Although dormant for a few years after *Straughn*, the contracts clause argument has recently reappeared. In Daytona Beach Racing & Recreational Facilities Dist. v. Volusia County, 355 So. 2d 175 (Fla. 1st Dist. Ct. App. 1978), the most recent speedway case, the lessees argued that the *Straughn* court's analysis of the issue was no longer valid in light of the United Stetes Supreme Court's decision in United States Trust Co. v. New Jersey, 431 U.S. 1 (1977). The Supreme Court held there that a state could vary its own contracts only upon a showing "that impairment was both reasonable and necessary to serve the admittedly important purposes claimed by the state." *Id* at 1521. The Supreme Court defined the standards of reasonableness and necessity as arising only when less drastic means were not available and the circumstances relating to alteration of the contract were unforeseen at the time the contract was made

The First District Court of Appeal rejected *the* contracts clause argument, stating that if *United States Trust* had in fact affected the *Straughn* holding, the Florida Supreme Court would have an opportunity to overrule *Straughn* by virtue of the district court of appeal's certification of the case as one of great public interest The Florida Supreme Court has not yet ruled on this issue

and improved the properties, often at substantial personal expense. Since the leases were long-term, the lessees expected the benefit of the improvements to inure to them rather than to the lessors. For the legislature and the courts to determine, after all the improvements have been made, that the initial promise of exemption is no longer binding is unfair in the minds of the lessees.[69]

III. THE REVISION COMMISSION

A. Statutory Exemptions

It is to lessees like the Daytona International Speedway and the residents of Santa Rosa Island, lessees who once had, then lost, a tax exemption, that the first portion of the proposed constitutional revision is addressed. If passed, the revision will exempt any lessee who had an exemption either by lease agreement or by special legislative act prior to January 1, 1978. As noted earlier, this proposal differs significantly from Proposal 206, which would have exempted all existing leasehold interests without regard to the lessees' use of the property or the lessees' reliance on a promised exemption. The final proposed revision, however, refers to the lessees' reliance on the exempt status of the lease by exempting only those leasehold agreements *"created pursuant to legislation or lease agreements which exempted . . . such leasehold interests from ad valorem taxes* ".[70]

Although the Commission was in relative agreement that lessees who had been promised an exemption should receive one, there was some disagreement among the commissioners as to the best way to achieve that goal. Chairman D'Alemberte, still concerned about the broad scope of the exemption provision," offered a substitute proposal which would have granted to all existing leasehold interests in governmentally owned property "equitable adjustment of rental payments upon proof that any charge in [such] lease was intended to be in lieu of ad valorem taxes or upon proof that the lease was induced through governmental representation that such taxes would not be levied and that the lease payments are inequitable."'[71] D'Alemberte's substitute proposal was based in part on an excerpt from *Williams v. Jones*, where the court stated that if lessees could prove that their rent had been in lieu of taxes, "such lessees may

69. Fla. C.H.C., Select Committee on **Proposal** 206 Minutes (Mar. 7. 1978) (testimony of Santa Rosa Island lessees).

70. Fla. C.H.C.. Rev. Fla. Const. **art.** VII, § 3(c)(1) (May 11, 1978).

71. 2 Transcript of Fla. C.H.C. proceedings 21-22 (Mar. 9, 1978) (remarks of Chairman Talbot "Sandy" D'Alemberte).

72. *Id* at 19.

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80. *Id.* at 97.

very well be entitled, in a proper forum, to seek an equitable adjustment of their rental payments . . . ."[73] Under D'Alemberte's proposal, the lessor and lessee could agree to the equitable adjustment between themselves. Failing such an agreement, the lessee could resort to the courts.[74]

Two objections were raised to the D'Alemberte amendment. First, commissioners wondered how the terms "equitable" and "inequitable" would be construed. Would they be interpreted in a way that would unfairly restrict the exemption? Would the standards applied to the terms of the lease be those relevant to a 1978 business deal or those that would have applied when the lease was executed?[75] Despite D'Alemberte's argument that the terms would only invoke a court's traditional equity powers,[76] the commission passed an amendment striking the terms from the substitute proposal.[77]

The second objection raised was that the proposal recommended resort to the courts for an adjustment in the rental payment to account for taxes. During debate, Commissioner Yvonne Burkholz maintained that since resort to the courts had not proved helpful before, D'Alemberte's proposal to send the lessees back into court was no solution to the problem.[78] The Commission rejected the D'Alemberte proposal by a vote of nineteen to thirteen" and adopted the current, "grandfather" provision by a vote of twenty-seven to seven.[80]

The "grandfather" clause of the proposed amendment has significant legal and economic consequences. As is true of all tax exemp-

73. 326 So 2d 425. 436.37 (Fla 1975)

74 2 Transcript of Fla. C.R.C. proceedings 47 (Mar 9, 1978) (remarks of Chairman Talbot "Sandy" D'Alemberte).

75. *Id* at 29. 41 (remarks of Commissioners Dexter Douglass and James Elliott Messer).

76. *Id* at 40 (remarks of Chairman Talbot "Sandy" D'Alemberte).

77. *Id* at 44. The amendment to strike the reference to equity in the D'Alemberte amendment was proposed by Commissioner William H. Gardner. *Id* at 39

78. *Id* at 2F (remarks of Commissioner Yvonne R. Burkholz). Commissioner Burkholz's argument ignored the fact that under the D'Alemberte proposal. the lessees would go back into court with a new constitutional provision mandating a rent adjustment upon a proper showing of facts.

79. *Id* at 69. Attetnpts by Cornmissioner DuBose Ausley to revive the D'Alemberte proposal also failed to win commission approval *Id* at 84-88. D'Alemberte then proposed another substitute amendment which would have replaced article VII, $ 3(c) with a provision that the legislature could by law exempt leasehold interests. *Id* at 69. By vesting constitutional power in the legislature to grant exemptions. D'Alemberte argued that the commission could achieve its goal of aiding lessees who had actually been victims of misrepresentation while at the same time deferring the problem to a more competent factfinding body. *Id* at 72-74. The commissioners, however, defeated D'Alemberte's second proposed amendment by a vote of 17-15. *Id* at 79.

80. *Id* at 97

tions, the economic consequences of exempting certain lessees from ad valorem taxation would be either a net loss of revenue for the taxing entity or a shifting of the tax burden to other taxpayers. It is, therefore, essential to determine the exact amount of tax dollars involved in each exemption. The cornmission was less than diligent in formulating statistics. No concrete figures were ever made available on the potential fiscal impact of the proposed revision.[81]

Proponents of Proposal 206 initially indicated that exemption of all existing leasehold interests would have no fiscal impact since the exemption would not affect property listed on current tax rolls.[82] During public testimony on Proposal 206, however, Representative Carl Ogden of Jacksonville, a legislative authority on state and local taxation, estimated that $300,000,000 in assessed property would be removed from the tax rolls if the proposal passed.[83] Chairman D'Alemberte later pegged the assessed value of affected property at $700,000,000.[84] In considering the final proposal, the commissioners could not gauge the potential economic impact of their actions accurately.[85] However, given projections that exemption of the Santa Rosa Island lessees alone would mean an annual loss of $2,400,000 in revenue,[86] it can be safely said that approval of the grandfather clause would have an important economic impact. Probably it should have been considered more carefully by the Commission

In contrast, the legal impact of the grandfather clause seems relatively clear. The amendment would apparently overrule all cases presently requiring taxation of the Santa Rosa Island and Davtona International Speedway leaseholds. It would forestall any attempt by county authorities to tax pre-1978 leasehold interests if the lessee can show that an exemption was contained in the lease agreement or in a special legislative act. Although the grandfather clause is drafted in narrow, clear language, it leaves unanswered a few questions that may be raised in its implementation,

One question is the lessee's liability for assessed taxes prior to the

81 Fla. S., Appropriations Comm., Preliminary Analysis — Pending Amendments to Constitution Revision Commission's Proposals 6 (Mar, 7, 1978).The fiscal impact study prepared for the commission's use indicated only that the proposal was "pending further study."

82. Transcript of Fla. C.R.C. proceedings 201 (Jan. 24, 1978) (remarks of Commissioner Yvonne B. Burkholz).

83. The Center for Governmental Responsibility, Public: Testimony Before the Fla C.R.C.. Summaries of Points Raised at Hearings Feb. 21-23, 1978, at 51 (Mar 2, 1978)

84. 2 Transcript of Fla C.R.C. proceedings 31 (Mar. 9, 1978).

85. Commissioner Nat Polak expressed dissatisfaction with the financial impact statement prepared for the commission. Commissioner Kenneth Plante argued that no comprehensive fiscal statement could be assembled until the commission sdopted a specific exemption. *Id* at 106

86 Pensacola J., Mar. 8, 1978, § 2 (West Florida), at 1, col 3

effective date of the revision. Many of the lessees who argue that their exemption was **taken** from them wrongfully by the 1971 legislature have either refused to pay the annual tax assessment or have paid under protest. Should the revision become law and all existing, qualifying leasehold interests become exempt, would each lessee thereby be exonerated from the taxes assessed since 1971 and empowered to petition for a refund of any taxes paid? Or would the taxing units insist on collecting taxes for that period of time during which the leaseholds were taxable? This question is not answered by the proposed revision. Indeed, one might ask whether the Constitution Revision Commission could legally propose a retroactive exemption.

In the light of the long controversy surrounding the taxation of these interests, a decision by the taxing authorities not to push for the collection of the 1971-1977 taxes or a corresponding decision by the lessees *to* abandon their fight against payment seems unlikely. Whatever the voters do in November, both parties to the controversy will undoubtedly maintain their longstanding positions on the tax bills for this seven-year period. Undoubtedly, the courts will again be asked to resolve the question.

The court's answer to these questions if the proposed revision does not pass is clear. Justice Hatchett authored the Florida Supreme Court's unanimous opinion in *Am Fi Investment Corp v Kinney*, where the court held unconstitutional special legislative enactments requiring Escambia County to repay ad valorem taxes paid or owing by Santa Rosa Island leaseholders from 1972 through 1974. The court reasoned that the Santa Rosa Island leaseholds were not performing or serving a public purpose and that the special acts provided an indirect exemption not authorized by the state constitution. "The Florida Constitution requires that all property used for private purposes bear its just share of the tax burden for the support of local government and education, with certain exceptions specifically enumerated in the constitution."[87]

Another problem associated with the grandfather clause is whether the language "leasehold interests created pursuant *to* legislation or leasehold agreements" requires that the lessee have relied on the exempt status of the lease. Although the language clearly provides an exemption to a lessee who held an interest exempted by virtue of legislation or a lease agreement, how much further the provision extends is unclear. Would the exemption, for example, reach a bona fide purchaser of a leasehold interest even if the pur-

87. 360 So 2d 415, 416 (Fla 1978)

chase occurred after passage of the 1971 legislation, so that the purchaser was on notice that the leasehold interest would be taxed? What of the 300 Santa Rosa Island leases concluded after the 1971 tax reform?[88]

If the intent of the grandfather clause is to exempt only those lessees who relied on the purported exemption when signing their leases, then arguably any lessee who entered into an agreement after the 1971 tax reform did not rely on a promise of exemption arid should not be reached by the grandfather clause. This result could be reached by a court's construing the language "interests . . . created pursuant to legislation or lease agreement" to include only leases negotiated when an exemption was legally possible.

Although this result, would appear to be consistent with the theory of reliance underlying the grandfather clause, it apparently is not consistent with the intent of the commission. In discussing the problem of the 300 post-1971 leases on Santa Rosa Island, Commissioner Kenneth Plante, the chief sponsor of the proposed revision, maintained during debate that "we still ought to grandfather them all in and just. say for the duration of that lease."[89] Plante said too that the bona fide purchaser of a once-exempt leasehold interest should likewise be granted an exemption.[90] Given the tension between the underlying theory of the grandfather clause, the possible constructions that may be placed on the revision's language, and Plante's statements about the revision's coverage, it seems likely that a significant number of law suits may be spawned by the uncertainty over the necessity of reliance by the lessee.

Aside from problems of interpreting the effect of the grandfather clause, the overriding question facing the voters in November is whether, as a policv matter, the exemption offered by proposed article 7, section 3(c)(1) is advisable. Proponents of the grandfather clause maintain that the proposal would eliminate double taxation of leasehold interests and, furthermore, would uphold the integrity of the state. Opponents argue that the problem of double taxation is nonexistent, and that the state owes no moral obligation to preserve in perpetuity the exempt. status of some leasehold interests.

The double taxation argument is based on the theory that the higher than usual rental paid by a lessee should be treated as a payment in lieu of taxes. The lessees argue that the original lease-

88. 2 Transcript of Fla. C.R.C. proceedings 53 (Mar. 9. 1978) (remarks of Commissioner Edward R. Annis).
89. *Id* at 54.
90 *Id* at 55.

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hold agreements were negotiated with this thought in mind and that to assess property taxes in addition to the high rental payments would amount to double taxation. This argument has been advanced most persistently by the Santa Rosa Island lessees. Convinced that those lessees should receive aid in their fight against taxation, the 1975 legislature passed a bill which would have allowed the island lessees to reduce their **tax** bill by the amount of rent paid on their lease.[91] Governor Askew, however, vetoed the bi[11.92]

In 1976, the legislature again attempted to assist the island lessees by passing a bill which required ad valorern taxes in Escambia and Okaloosa counties to be reduced by the rental payment made in the preceding year.[93] Although this act became law, the supreme court recently held it unconstitutional as an unauthorized tax exemption.[94] However, even Governor Askew seems to have accepted the double taxation argument, at least with regard to the island lessees. for he stated during a recent interview:

> A lease where the amount of lease is reasonably equivalent of what you would otherwise **pay** taxes [sic] and it's so stated that you pay them in lieu of ad valorem taxes which is the **way** almost all of the leases on Santa Rosa Island are, . . . so in that category, in my opinion it's double taxation. If you are paying the equivalent of

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91 Fla HB 1759 (1975)

(b) In the case of governmental property leased or subleased to a nongovernmental lessee whose lease agreement covenants that assessments to be paid are in lieu of taxes or who purchased a lease under a statute which covenanted and implied same. the annual ad valorem tax to be **paid** by the nongovernmental lessee on such leasehold shall be diminished by the amount of the rent on such leasehold paid to any governmental lessor, or sublessor. regardless of whether the rent is paid to the same governmental unit that levies the ad valorem tax, unless the lease provided to the contrary

(d) The provisions of paragraphs (b) and (c) of this subsection shall apply only in Escambia. Santa Rose, and Okaloosa counties and only to leases executed on or prior to the effective date of this act.

92. Fu. H.R. JOUR. 1362 (1975).

93. Ch. 76-361, 1976 Fla. Laws (Special **Acts)** 101. Governor Askew allowed the hill to become law without his signature.

94 Archer v. Marshall. 355 So. 2d 781 (Fla. 1978). In 1971, the Florida Legislature repealed a 1949 special **law** which exempted hundreds of long-term leases between individuals and the Santa Rosa Island Authority from ed valorem taxes. The leasehold interests. therefore. **were** liable for ad valorem taxes beginning in 1971. The 1976legislature passed a special law which provided that the annual rent payable hy the **lessees** would he reduced by an amount equal to that paid to Escambia County for the ad valorem taxes on their lease interests. The Florida Supreme Court determined that the special law **was,** in effect, a tax bill and that the legislature had no constitutional authority to grant the exemptinn.

> taxes in your lease payment, and then you have to pay taxes, then you are paying taxes twice.[95]

Opponents of the grandfather clause, though, insist that the theoretical basis of the double taxation argument is faulty. The rental payment, they assert, is not a payment in lieu of taxes but simply a payment for use of land. Any taxes paid by the lessees would be used to provide such county services to the lessees as police protection, fire protection, roads, and a court system.[96] In writing for the court in ***Archer*** *v. Marshall*, Justice Hatchett agreed that a rental payment for the use of land must be distinguished from a tax payment used to provide services to county residents.[97]

In their testimony to the revision commission, island residents attempted to demonstrate that their use of governmental services was taken into account when their rental payments were set.[98] The commercial lessees attempted to show that they made no use of county services. For example, in testimony before the commission, representatives of the Daytona International Speedway indicated that the speedway uses very few county-supplied services. It provides its own security force in lieu of county police and also provides for its own cleanup and sanitation.[99]

The resolution of the double taxation problem turns on whether one accepts the lessees' characterization of the situation or Justice Hatchett's analysis in *Archer*. At least to some extent, it may be assumed that the rental payments do cover the lessees' use of governmental services. "Regardless of the term used to describe the setoff, 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."[100]

A more difficult argument to deal with is the lessees' contention that the state has a moral obligation to sustain the exempt status of these leasehold interests. Although it is true that at one time the

95. Gov. Reubin Askew, statement during television interview, Pensacola, Florida. Feb. 12, 1978, *cited* in The Center for Governmental Responsibility. Public Testimony Before the Fla. C.R.C., Summaries of Points Raised at Hearings Feb. 21-23, 1978, at 45 (Mar. 2, 1978). Although Governor **Askew may** accept the double taxation theory of the island lessees, he has publicly attacked the commission's proposed revisions in the area of leasehold interests. Pensacola J., May 19, 1978, § **2 (West** Florida), at 1, col. 4.

96. Archer **v.** Marshall, 355 So. 2d 781, **784** (Fla. 1978).

97. *Id.*

98. Fla. C.R.C., Select Committee on Proposal 206 Minutes (Mar. 7, 1978) (testimony of Santa Rosa Island lessees).

99. *Id* (testimony of representatives of Daytona International Speedway and City of Daytona Beach).

100. *355* So. 2d at **784.**

State of Florida, through the legislature, provided an exemption for these interests, one must recognize the legislature's authority to change or repeal tax exemptions at will. The lessees in fact may have relied on the exempt status of their leasehold interests, but legally that reliance can only be termed unreasonable. A less legalistic view, however, would indicate that although the lessees should not have relied on the exemptions, they had no reason to expect that the legislature would ever repeal them. A cogent argument can be made that the state does owe some obligation to these lessees.

B. *Transportation-related Leases*

The second exemption proposed by the revision commission is yet another grandfather clause. This one would afford an exemption to all existing leasehold interests in governmentally owned property where the lessee uses the property in connection with providing transportation or providing services to the public engaged in transportation.[101] The exemption would be denied, however, to any qualifying lessee who has voluntarily paid taxes on the leasehold interest. According to Commissioner Plante, this denial is intended only where lessees in transportation-related facilities have traditionally paid taxes.[102] The exemption would be allowed in all other cases of transportation-related facilities.

This special grandfather section was included because lease agreements for transportation-related facilities have not generally included tax-exemption clauses. Moreover, such facilities have not generally been the recipients of special legislative exemptions. The transportation facilities have always been deemed to serve a public purpose and to merit a tax exemption based, not on an express promise, but rather on common practice.[103] This common understanding has been altered, however, by the holding in *Volusia County* that any leasehold interest used in furtherance of a profit motive is not constitutionally eligible for an exemption.[104] Under the logic of *Volusia County,* lessees making a profit on their leasehold interests must be assessed ad valorem taxes. In the wake of this decision, the transportation facilities, most notably the airlines, have been waiting for tax bills to arrive.

In order to avoid the application of the *Volusia County* holding to transportation-related facilities, the Constitution Revision Com-

101. *See* text accompanying note 9 *supra.*
102. 2 Transcript of Fla. C.R.C. proceedings 89 (Mar. 9, 1978).
103. *Id.* at 16.
104. 341 So. 2d 498, 502 (Fla. 1976).

mission has proposed an exemption for existing leasehold interests. The scope of this proposed exemption is rather broad. It would include property "leased for use in connection with providing air, ground or water transportation . . . ." This language seems to extend to airlines, railroads, or steamship companies that use their leasehold interests to provide transportation services directlv. The phrase "in connection with" indicates that the exemption would not be limited to those portions of the leasehold actually necessary to provide transportation services. Thus, potentially, an airline could claim an exemption not only for its leasehold interests in landing rights or plane storage, but for its corporate offices as well. Of course, the breadth of the phrase "in connection with" would ultimately depend on judicial construction.

Similarly, the courts may be called on to determine the scope of the phrase "leased for use in connection with providing services to the public engaged in air, ground or water transportation . . . ." It is unclear exactly what services the commission had in mind. Arguably, the language is broad enough to include any lessee who sets up business in a transportation-related facility. Is a car rental company, for example, engaged in transportation within the meaning of the proposal?[105] What about a cafeteria? An ice cream parlor? A bar? A clothing store? All these lessees could argue that they are fulfilling the requirement if they are located in a transportation facility. Whether the commission intended this result is questionable, for the commissioners could hardly have meant to encourage a case-by-case consideration of every lessee in every transportation-related facility. The potential problems raised by the broad language in this section might have been avoided had the cornmission drafted a per se exemption for all lessees in transportation-related facilities, in the alternative, or been more specific as to the nature of the supplied services that would qualify for an exemption.

The third and final exemption proposed by the commission is embodied in a grant of power to the legislature to exempt by law all leasehold interests in governmentally owned property when the property is leased for a public purpose and used in connection with providing air, ground, or water transportation or used in connection with providing services to the public engaged in air, ground, or water transportation.[106] This proposed exemption was separated

105. Walden v. Hertz Corp., 320 So. 2d 385 (FLA. 1975). The Florida Supreme Court affirmed per curiam the decision of the Second District Court of Appeal that a rental facility attached to the airport terminal building was public in nature and entitled to an exemption but that the remote facility used for storing automobiles was not

106 *See* text accompanying note 10.12 *supra*

from the exemption relating to existing leasehold interests in transportation-related facilities because of a philosophical difference among members of the select committee which drafted the final proposal. Commissioners Plante and Thayer felt that the exemptions for existing and future leasehold interests in the transportation area could be dealt with in a single exemption provision.[107] In contrast, Commissioner James Apthorp maintained that an exemption for existing leasehold interests in transportation facilities was acceptable but that granting a prospective exemption to transportation-related leasehold interests would extend an unwarranted advantage to the transportation industry.[108] To retain Apthorp's support for the bulk of the proposal, the prospective exemption was placed in a separate section.[109]

Although the language in the amendment relating to the exemption for existing transportation-related leaseholds is similar to that for prospective transportation-related leaseholds, there was originally a significant difference between the two. The exemption for prospective leaseholds contains the requirement of use for a public purpose, a requirement, which was not in the amendment as originally proposed by Cornmissioner Plante.[110] Plante intended to allow the legislature to exempt, by law transportation-related facilities created in the future on exactly the same grounds as those stated in the exemption for existing leasehold interests.

The underlying intent of the Plante proposal was to allow the legislature to offer a tax break to the transportation industry, an industry which Plante termed "vital . . . to the economy of the State of Florida . . . ."[111] Without the legislature's ability to grant future exemptions, the transportation industry would surely be faced with ad valorem taxation as soon as existing leases expired. Faced with the threat of taxation, in addition to the fact that adjoining states impose no such leasehold taxes,"[112] Plante believed that the transportation industry would likely move all their non-essential maintenance facilities and corporate offices to other states, thus dealing a significant blow to Florida's economy. This economic loss could be avoided, Plante argued, by allowing the legislature to exempt future leasehold interests.[113]

107. 2 Transcript of Fla. C.R.C. proceedings 98-99 (Mar. 9, 1978) (remarks of Commissioner Kenneth Plante).
108. *Id* at 127 (remarks of Commissioner James Apthorp).
109. *Id* at 98-99 (remarks of Commissioner Kenneth Plante).
110. *Id*. at 99.
111. *Id*
112. The Center for Governmental Responsibility, Public Testimony Before the Fla C.R.C., Summaries of Points Raised at Hearings Feb. 21-23, 1978, at 49 (Mar. 2, 1978)
113. 2 Transcript of Fla. C.R.C. proceedings 100-01 (Mar. 9, 1978).

In offering the "public purpose" requirements as an amendment to the Plante proposal, Chairman D'Alemberte argued that such an addition limited the legislative power only slightly and would prevent any and all lessees in a transportation-related facility from qualifying for an exemption."[114] According to D'Alemberte:

> [T]he public purpose test is broad enough to cover those things which you want to see **covered** and yet **will** provide us with some protection to **make** sure that **we** are not granting the ability to government to get itself involved in giving tax exemptions to one form of business and discriminate against other businesses.[115]

D'Alemberte suggested that the "public purpose" language would serve as only a minor check on legislative authority.

The problem with adoption of the public purpose language is, of course, that article VII, section 3(a) of the present constitution already contains an exemption for leasehold interests used for public purposes. And "public purpose" has been interpreted by the supreme court in *Volusia County* in such a way that it does not extend to proprietary, profitmaking leasehold interests.[116] To the extent that the legislature's power to grant future exemptions is circumscribed by the *Volusia County* definition of public purpose, the power would be virtually meaningless despite the revision. If the legislature could not exempt profitmaking leasehold interests in transportation-related facilities, it could not grant future exemptions to the transportation industry.

During debate, Commissioners D'Alemberte and Ben Overton staunchly maintained that addition of the public purpose language did not render the prospective exemption section ineffective. Commissioner Overton, a member of the Supreme Court, insisted that *Volusia County* does not mandate taxation of all leasehold interests used for profit. Rather, he interpreted *Volusia County* as being simply an application of the Pun *American* definition of public purpose—a project primarily and predominantly for the public benefit despite some incidental private purposes as well.[117] Overton argued that in *Volusia County*, the private purposes involved in the speedway had gone beyond an incidental nature and had become controlling. The presence or absence of a profit motive was not decisive.[118]

114. *Id.* at 103.
115. *Id* at 131.
116. See **note** 55 supra and accompanying **text**
117 Justice Overton participated in the *Volusia* County decision. 341 So. 2d at 502.
118. 2 **Transcript** of Fla. **C.R.C.** proceedings 128-29 (Mar. 9, 1978) (remarks of Commissioner Ben **Overton).**

Although this reading of the *Volusia County* case is tenable, the language of the opinion, coupled with language from *Williams v. Jones*,[119] lends more support to the theory that leasehold interests used to make a profit will be classified in the future as proprietary and nonexempt.[120]

To avoid application of the *Volusia County* court's narrow definition of "public purpose" to the grant of legislative power, the commission simply appended to the term "public purpose" the phrase "whether or not for private profit."[121] By so doing, the commission made clear its intent to allow the legislature to exempt transportation-related facilities that benefit the public and make a profit as well. With the addition of this language, the same transportation facilities that would qualify for the exemption provided for existing leasehold interests would apparently also qualify for an exemption granted by the legislature. Clearly, all lessees who provide air, ground, or water transportation directly to the public serve a public purpose in providing a benefit to the public. The elimination of the profit motive tests yualifies all lessees which serve the public while still making a profit for an exemption from leasehold taxation.

In contrast, to lessees which provide transportation directly are lessees which provide services to a transportation facility. As noted earlier, the proposed revision offers an exemption to any lessee which provides services to a transportation facility with no qualifications or standards imposed. The power of the legislature to exempt service-oriented lessees in the future, however, has been narrowed to the extent that, a service-oriented lessee must. prove that it. provides a service to a public purpose whether or not for private profit. The relevant question, then, becomes: which lessees in an airport, for example, provide services to the public engaged in transportation that primarily and predominantly benefit the general public as well? It seems unlikely that an airport clothing store or a bar could satisfy this requirement. A car rental agency or a cafeteria, on the other hand, might, very well be able to demonstrate that

119. 326 So. 2d 425, 433 (Fla. 1975).

120. Commissioner Plante was so convinced that the *Volusia County* holding mandated taxation of leasehold interests used to make a profit that upon the commission's favorable vote to add the "public purpose" language. he moved to kill the entire amendment provision relating to legislatively granted exemptions. Plante maintained that the additional language rendered the proposal meaningless nnd an unnecessnry addition to the constitution. The commission passed the legislative exemption section, with the "public purpose" phrase included. by a vote of 20-15. 2 Transcript of Fla. C.R.C. proceedings 121-23 (Mar 9, 1978).

121. 30 Fla. C.R.C. Jour. 566 (Apr. 14. 1978). The inserted language was proposed by Commissioner Donald H. Reed.

it provides services and benefits the public at the same time.[122] The scope of the legislature's power to grant exemptions under this portion of the proposed amendment would depend ultimately on how broadly the court would be willing to construe the term "public purpose."

IV. CONCLUSION

Whether these three exemption provisions become law is, of course, up to the voters in November. The first proposed exemption, granting an exemption to lessees who entered into their leases in reliance on an exemption, is perhaps the most appealing of the three. Although opponents argue that these lessees should be made to pay their fair share of the cost of governmental services, there is a strong argument in favor of granting this exemption. The argument can be made here that the state has a moral obligation to these lessees. The second proposed exemption, which pertains to exemption of existing leasehold interests in transportation-related facilities, is slightly less appealing in that the reliance of the lessee cannot be demonstrated as clearly as in the first case. This exemption, however, can be justified by finding an implied reliance by the lessee on the tax exempt status of the interest. The third proposed exemption, the grant of power to the legislature to exempt future transportation-related leasehold interests, is based primarily on the fear of economic loss to the state should the transportation industry abandon the state in order to avoid leasehold taxation. This final exemption seems appealing only to those who share this fear that a failure to provide the tax break would result in a loss of industry to the state.

122. See 2 Transcript of Fla. C.R.C. proceedings 104, 129-31 (Mar. 9, 1978) (remarks of Chairman Talbot "Sandy" D'Alemberte).