OA 5-4-94

FILED
SID J. WHITE
MAR 14 1994
CLERK, SUPREME COURT
By ______
Chief Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF FLORIDA

THE SEBRING AIRPORT AUTHORITY,
and SEBRING INTERNATIONAL
RACEWAY, INC.

Appellants,

vs.

CASE NO. 82,489
2ND DCA CASE NO. 92-04403

C. RAYMOND MCINTYRE,
ET AL.,

Appellees.
------------------------/

ANSWER BRIEF ON THE MERITS OF APPELLEE,
DEPARTMENT OF REVENUE, STATE OF FLORIDA

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

RALPH R. JAEGER
FLA. BAR #326534
ASSISTANT ATTORNEY GENERAL
TAX SECTION, CAPITOL BLDG.
TALLAHASSEE, FL 32399-1050
Ph. 904/487-2142
FAX 904/488-5865

COUNSEL FOR APPELLEE
DEPARTMENT OF REVENUE

TABLE OF CONTENTS

	PAGE
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	v
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	5
ARGUMENT	9
POINT I -- PROPERTY OWNED BY A GOVERNMENTAL ENTITY AND LEASED TO A PRIVATE NON-GOVERNMENTAL ENTITY WHICH USES IT FOR A PRIVATE, PROFIT-MAKING PURPOSE IS TAXABLE UNDER FLORIDA LAW.	9
A. The decision of the Supreme Court in Capital City Country Club v. Tucker, 613 So. 2d 448 (Fla. 1993); Williams v. Jones, 326 So. 2d 425 (Fla. 1975), appeal dism., 429 U.S. 803, 97 S.Ct. 34, 50 L.Ed. 2d 63 (1976); and Volusia County v. Daytona Beach Racing & Recreational Facilities District, 341 So. 2d 498 (Fla. 1976), appeal dism., 434 U.S. 804, 98 S.Ct. 32, 54 L.Ed. 2d 61 (1977), are controlling.	9
B. The property is not being used by the Raceway for a governmental-governmental purpose so as to entitle it to exemption.	12
C. The predominant public use test relied on by Appellants is not applicable.	21
CONCLUSION	26
CERTIFICATE OF SERVICE	27

TABLE OF CITATIONS

CASES	PAGE
Bancroft Inv. Corp. v. City of Jacksonville, 157 Fla. 546, 27 So. 2d 162 (1946)	22
Bell v. Bryan, 505 So. 2d 690 (Fla. 1st DCA 1987)	11
Capital City Country Club v. Tucker, 613 So. 2d 448 (Fla. 1993)	4,9,10,11,12
Chardkoff Junk Co. v. City of Tampa, 102 Fla. 501, 135 So. 457 (Fla. 1931)	17,18
City of Bartow v. Roden, 286 So. 2d 228 (Fla. 2nd DCA 1973)	23,25
City of Orlando v. Hausman, 534 So. 2d 1183 (Fla. 5th DCA 1998), review denied, 544 So. 2d 199 (Fla. 1989)	10,12
Dade County v. Pan American World Airways, Inc., 275 So. 2d 505 (Fla. 1973)	21
Daly v. Stokell, 63 So. 2d 644 (Fla. 1953)	17
Lykes Bros., Inc. v. City of Plant City, 354 So. 2d 878 (Fla. 1978)	5,9
Mastroianni v. Memorial Medical Center 606 So. 2d 759 (Fla. 1st DCA 1992)	5,9
Miller v. Higgs, 468 So. 2d 371 (Fla. 1st DCA), rev. denied, 479 So. 2d 117 (Fla. 1985)	10,11
Orlando Utilities Comm. v. Milligan, 229 So. 2d 262 (Fla. 4th DCA 1970) cert. denied, 237 So. 2d 539 (Fla. 1970)	21
Ocean Highway & Port Auth. v. Page 609 So. 2d 84 (Fla. 1st DCA 1992)	5,9

Page v. Fernandina Harbor Joint Venture,
608 So. 2d 520 (Fla. 1st DCA 1992)
rev. denied, 620 So. 2d 761 (Fla. 1993) 4,11,12

Saunders v. City of Jacksonville,
157 Fla. 240, 25 So. 2d 648 (1946) 19

St. John's Associates v. Mallard,
366 So. 2d 34 (Fla. 1st DCA 1978) 16,21

Straughn v. Camp,
293 So. 2d 689 (Fla. 1974) 1,10,12,14

Tre-O-Ripe Groves, Inc. v. Mills,
266 So. 2d 120 (Fla. 1st DCA 1972) 22

U.S. v. Brown,
41 F. Supp. 838 (D.C. 1942) 22

Volusia County v. Daytona Beach Racing & Recreational Facilities District,
341 So. 2d 498 (Fla. 1976), appeal dism.,
434 U.S. 804, 98 S.Ct. 32,
54 L. Ed. 2d 61 (1977) 1,7,9,10,11,12,14,20,27

Williams v. Jones,
326 So. 2d 425 (Fla. 1975), appeal dism.,
429 U.S. 803, 97 S.Ct. 34, 50 L.Ed. 2d 63
(1976) 1,7,9,10,12,14,15,21,25,27

TABLE OF AUTHORITIES

	PAGE
FLORIDA STATUTES	
§ 196.001	9
§ 196.001(2)	15
§ 196.199	3,9,12,15,27
§ 196.199(1)	5,9
§ 196.199(1)(c)	25
§ 196.199(4)	6,7,8,12,13,27
§ 196.199(2)(a)	6,7,8,9,10,12,27
§ 196.012(6)	6,7,12,13,27
§ 196.012(5)	6,7,10,13
§ 332.03	23
OTHER AUTHORITIES	
Art. VII, § 3, Fla. Const.	23
Art. VII, § 3(a), Fla. Const.	25
Art. VII, § 4, Fla. Const.	15
Ch. 67-2070, Laws of Fla.	2
Ch. 71-133, Laws of Fla.	7,21,25

PRELIMINARY STATEMENT

Appellants, The Sebring Airport Authority and Sebring International Raceway, Inc., will be referred to herein as the "Appellants." The Sebring Airport Authority individually will be referred to herein as the "Authority," and the Sebring International Raceway, Inc., will be referred to herein individually as the "Raceway." Appellee, C. Raymond McIntyre, Property Appraiser of Highlands County, Florida, will be referred to herein as the "Appraiser." Appellee, Department of Revenue, State of Florida, will be referred to herein as the "Department." J. T. Landress, Tax Collector of Highlands County, Florida, will be referred to herein as the "Collector." References to the record on appeal will be designated as (R-) followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

In their Statement of the Case and Facts, Appellants, at bottom of page 5 of Initial Brief, state that the Second District announced the rule of law as follows, and then set out a partial quote with citations omitted. What should be made clear is that the language quoted was in turn a quote by the Second District of this court's holding in Volusia County v. Daytona Beach Racing and Recreational Facilities District, 341 So. 2d 498 (Fla. 1976), appeal dism., 434 U.S. 804, 98 S.Ct. 32, 54 L.Ed. 2d 61 (1977) [hereinafter "Volusia County"]. The holding in Volusia County, supra, in turn, relied heavily on the Supreme Court's holdings in Straughn v. Camp, 293 So. 2d 689 (Fla. 1974) [hereinafter "Straughn v. Camp"], and Williams v. Jones, 326 So. 2d 425 (Fla. 1975), appeal dismissed, 429 U.S. 803, 97 S.Ct 34, 50 L.Ed. 2d 63 (1976) [hereinafter "Williams v. Jones"].

Finally, in the next to last sentence of Appellants' Statement of the Case and Facts, Appellants twist the holding of the Second District by saying, "the Second District permits a lessee serving a public function to take advantage of the ad valorem tax exemption only if the lessee is a not-for-profit corporation. This is not the holding of the Second District at all. The Second District's opinion merely recognized the fact that operation of a racetrack for profit is not even arguably the performance of a "governmental-governmental" function. This was the same conclusion reached by the Supreme Court in Volusia County, supra.

This case arose with the filing of a complaint by the Appellants in circuit court challenging the 1991 real property tax assessment (R. 1-6). The Appraiser denied exemption for ad valorem taxes on the subject property which the Authority owns and leases to the Raceway. As of January 1, 1991, a portion of the property described in paragraph 2 of the complaint was leased to the Raceway. The Appraiser assessed all property owned by the Authority, leased to the Raceway, and either used by the Raceway for the operation of the Sebring International Raceway or subleased by the Raceway to various profit-making entities who use the property for profit-making purposes. Certain parcels of the property were leased to state agencies such as the Department of Agriculture or other public bodies, and the Appraiser granted exemption for these parcels.

The Authority was created initially by Ch. 67-2070, Laws of Fla., Special Acts. (R-2) Originally all such property was owned by the City of Sebring, but it was transferred to the Authority, a body politic and corporate whose members are appointed by the City pursuant to Ch. 67-2070, Laws of Fla., Special Acts.

The complaint alleges that the Raceway uses the property in furtherance of public purposes "in that they promote the economic, commercial and residential development of the City of Sebring and Highlands County." (R-3) The complaint further alleges that the "automobile racing, testing and ancillary uses of the portion of the Authority's property leased by the Raceway both increases trade to the City of Sebring and Highlands County

by attracting tourist and participants and also provides recreation for the citizens of those communities." (R-3) The complaint alleges that, as a matter of Florida law, such uses entitle the property to exemption. Appellants allege in paragraph 7 of their complaint that the property leased to the Raceway is "predominantly operated for a public purpose and is therefore exempt from ad valorem taxation pursuant to §196.199, Florida Statutes." (R-3)

Depositions were taken of the Appraiser and three representatives of the Appellants. The depositions were filed with the court. (R-138-153; 154-192; 193-211).

The Appraiser filed a motion for summary judgment, with attachments consisting of the "Lease Agreement" entered into July 11, 1990, between Sebring Airport Authority, and politic and Sebring International Raceway, Inc., contending that the property was not exempt from taxation. (R-50-81) The lease agreement contained the following in paragraph 21:

> Real Property Taxes. The AUTHORITY warrants that at the time of execution of this Lease Agreement, the Leased Premises are not subject to real property taxes. Notwithstanding the above, LESSEE shall be responsible for the payment of any and all real property taxes which may hereafter be assessed on the Leased Premises including any and all improvements set forth thereon during the term of the Lease Agreement.

(R-65) After oral argument on the motion for summary judgment, the trial judge entered an Order of Final Summary Judgment in favor of the Appraiser. (R-123-127) The Appellants filed a motion for rehearing and the trial court denied the motion. (R-

28-130; 133). The Appellants timely filed an appeal to the Second District. (R-134-135) The Second District affirmed the decision of the trial court saying:

> Appellants, however, rely upon Page v. Fernandina Harbor Joint Venture, 608 So. 2d 520 (Fla. 1st DCA 1992), rev., denied, ____ So. 2d ____ (Fla. May 6, 1993). Page, which does not refer to Volusia County and was prior to the decision in Capital City, does appear to be contra to the holdings in those cases and we are unable to properly distinguish Page. We are bound by the decisions of our supreme court which appear to us to be on point. See Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973). Inasmuch as the supreme court in Volusia County has held that "[o]perating an automobile racetrack for profit is not even arguably the performance of a 'governmental-governmental' function," we are prohibited from holding otherwise.

Based on the above, all parties agreed that the decision of the Second District in this case apparently conflicted with the decision of the First District in Page v. Fernandina Harbor Joint Venture, 608 So. 2d 520 (Fla. 1st DCA 1992), rev. denied, 620 So. 2d 761 (Fla. 1993) [hereinafter referred to as the Page decision]. Therefore all parties requested that the Supreme Court accept jurisdiction, which it did by order dated January 21, 1994.

SUMMARY OF ARGUMENT

In the Summary of the Argument of the Appellant's Initial Brief, the Appellants refer repeatedly to undisputed or uncontradicted evidence, and they are right. There are no disputed facts and that is why final summary judgment was appropriate in this case.

Originally, the Sebring Airport Authority (Authority), a public entity created by special law, operated the airport and operated and promoted the "Twelve Hours of Sebring" race. As such, the Appraiser deemed its property to be exempt under the provisions of § 196.199(1), Fla. Stat. This subsection has repeatedly been interpreted to require that the property be both owned and used by the governmental unit in order for an exemption to be warranted. See, Lykes Bros., Inc. v. City of Plant City, 354 So. 2d 878 (Fla. 1978); Ocean Highway & Port Authority v. Page, 609 So. 2d 84 (Fla. 1st DCA 1992); and Mastroianni v. Memorial Medical Center, 606 So. 2d 759 (Fla. 1st DCA 1992).

However, in 1990, the Authority leased the property in question to Sebring International Raceway, Inc. (Raceway), a for-profit private entity. Because the property was no longer being used by the Authority (a governmental entity), but was being leased by a private entity, the provisions and exemption set out in § 196.199(1), Fla. Stat., were no longer applicable and the Appraiser assessed the property so leased on January 1, 1991. With this signing of a lease and cessation of use by the Authority, all parties appear to agree that the provisions of

§ 196.199(4), Fla. Stat., become applicable. That subsection provides as follows:

> (4) Property owned by any municipality, agency, authority, or other public body corporate of the state which becomes subject to a leasehold interest or other possessory interest of a nongovernmental lessee other than that described in paragraph (2)(a), after April 14, 1976, shall be subject to ad valorem taxation unless the lessee is an organization which uses the property exclusively for literary scientific, religious, or charitable purposes. (e.s.)

This is exactly the situation we have in this case. The property is owned by the Authority but leased out to a nongovernmental lessee. Therefore, it may only be exempt if it is used for literary, scientific, religious, or charitable purposes, or if it complies with the requirements set out in § 196.199(2)(a), Fla. Stat., for exemption.

Again, all parties agree that the property is not being used for literary, scientific, religious, or charitable purposes, and the only question is whether it should be exempt under § 196.199(2)(a), Fla. Stat. The Appellants argue that the use of the property by the Raceway satisfies the requirement in § 196.199(2)(a) that the lessee perform "a governmental, municipal, or public purpose or function, as defined in s. 196.012(6)." However, the Appellants totally ignore or misconstrue many Supreme Court cases and District Court cases which address and interpret §§ 196.199(2)(a) and 196.012(6) [formerly 196.012(5)], Fla. Stat.

In Williams v. Jones, the Florida Supreme Court specifically said, at 433:

> The exemptions contemplated under Sections 196.012(5) [now 196.012(6)] and 196.199(2)(a), Florida Statutes, relate to "governmental-governmental" functions as opposed to "governmental-proprietary" functions. With the exemption being so interpreted all property used by private persons and commercial enterprises is subject to taxation either directly or indirectly through taxation on the leasehold. Thus all privately used property bears a tax burden in some manner and this is what the Constitution mandates. (e.s.)

At the time of Williams v. Jones, the current § 196.012(6) was numbered § 196.012(5).

Further, in the case of Volusia County, decided in 1977, the Supreme Court noted, at page 501, that the Florida Constitution had been amended and Ch. 71-133, Laws of Fla., had been passed to make it perfectly clear that merely "holding a proprietary interest in 'a community recreational asset and business stimulant'" would no longer be enough to meet the definition of municipal purpose, i.e., "the Constitution of 1968 limited the municipal purpose exemption to 'property owned by a municipality and used exclusively by it for municipal or public purposes.'" Quoting Williams v. Jones, the Volusia County court reiterated, at page 502, that the provisions set out in §§ 196.199(2)(a) and 196.012(5) [now 196.012(6)], Fla. Stat., referred to "governmental-governmental" functions, and concluded that, "Operating an automobile racetrack for profit is not even arguably the performance of a 'governmental-governmental' function."

And yet that is exactly what we have here -- operation of an automobile racetrack for profit. There being no dispute of fact, the trial court, being made aware of all the applicable statutes, special laws, constitutional provisions, and case law, reached the correct legal conclusion that no exemption was allowed under § 196.199(2)(a), Fla. Stat.

The fact that the property would be exempt if operated by the public body itself, instead of leased, is immaterial because most activities engaged in by municipalities, and other public bodies or authorities created by special act, are in fact proprietary as opposed to governmental in nature. If duly authorized by law, a public body can perform functions which could just as easily be performed by a private entity engaged in proprietary activities.

The facts in this case are not in dispute. The property is owned by the Authority and operated pursuant to lease by the Raceway. The operation of a raceway is purely a proprietary function and the Raceway is a private corporate entity engaging in such activity in the contemplation of profit. Accordingly, said property is not exempt under § 196.199(2)(a), Fla. Stat., and is taxable, under § 196.199(4), Fla. Stat.

ARGUMENT

POINT I

PROPERTY OWNED BY A GOVERNMENTAL ENTITY AND LEASED TO A PRIVATE NON-GOVERNMENTAL ENTITY WHICH USES IT FOR A PRIVATE, PROFIT-MAKING PURPOSE IS TAXABLE UNDER FLORIDA LAW.

A. The decisions of the Supreme Court in Capital City Country Club v. Tucker, 613 So. 2d 448 (Fla. 1993); Williams v. Jones, 326 So. 2d 425 (Fla. 1975), appeal dism., 429 U.S. 803, 97 S.Ct. 34, 50 L. Ed. 2d 63 (1976), and Volusia County v. Daytona Beach Racing and Recreational Facilities District, 341 So. 2d 498 (Fla. 1976), appeal dism., 434 U.S. 804, 98 S.Ct. 32, 54 L.Ed. 2d 61 (1977), are controlling.

Up through January 1, 1990, the Authority both owned and used the property in question, and the Appraiser had considered the property exempt under § 196.199(1), Fla. Stat. However, sometime in 1990, the Authority leased the property to the Raceway, and the Appraiser, interpreting § 196.001, and §§ 196.199(1), (2)(a) and (4), Fla. Stat., decided an exemption was no longer appropriate and assessed the property for ad valorem taxes. See, Lykes Bros.; Ocean Highway; and Mastroianni, supra.

Because the property is no longer both owned and used by a governmental entity, the exemption in §196.199(1), Fla. Stat., is no longer warranted, and the only real question is whether the exemption set out in § 196.199(2)(a), Fla. Stat., is now applicable. Although there is a legal dispute, the Appellants would also have the Court believe that there was actually some dispute of fact. This is just absolutely not the case. The courts (both the circuit court and the Second District Court of Appeal) knew all the players, knew their functions, and knew how

money had been allocated in the past, and how the money flowed at present. The courts were also aware of the importance of the race to the community. However, in the final analysis, the question became purely a legal question of whether the operation of a racetrack for profit by a private lessee could be considered to be a "governmental-governmental" function under the holdings of the Florida Supreme Court in Volusia County; Williams v. Jones; and Straughn v. Camp.

In Williams v. Jones, at 433, the Supreme Court specifically stated: "The exemptions contemplated under Sections 196.012(5) and 196.199(2)(a), Florida Statutes, relate to 'governmental-governmental' functions as opposed to 'governmental-proprietary' functions." Based on an analysis of the undisputed facts, both the circuit court and the district court determined that the actions of Sebring International Raceway, Inc., constituted the performance of a "governmental-proprietary" function and not a "governmental-governmental" function, and ruled that no exemption was allowed under § 196.199(2)(a), Fla. Stat.

One of the more recent decisions addressing this issue is Capital City in which the Supreme Court held that property owned by the City of Tallahassee and leased to a private entity for the operation of a golf course was taxable. In Capital City, the Supreme Court approved City of Orlando v. Hausman, 534 So. 2d 1183 (Fla. 5th DCA 1988), review denied, 544 So. 2d 199 (Fla. 1989), and disapproved of Miller v. Higgs, 468 So. 2d 371 (Fla. 1st DCA 1985), rev. denied, 479 So. 2d 117 (Fla. 1985). In approving Hausman, the Capital City court stated in pertinent part, at page 451:

> The Fifth District Court of Appeal passed directly upon the issue before us . . . . In that case, a number of private tenants leased property from the City of Orlando for nonmunicipal or nonpublic purposes. They contended that the properties were exempt from real estate taxation because their leasehold interests were subject only to intangible taxes.

Thereafter the court stated:

> The legislature is without authority to grant an exemption from taxes where the exemption does not have a constitutional basis. Archer v. Marshall, 355 So. 2d 781 (Fla. 1978). Thus, we conclude that the legislature could not constitutionally exempt from real estate taxation municipally owned property under lease which is not being used for municipal or public purposes.

In concluding that the leasehold was subject to an intangible tax by the Department, and the real property was subject to an ad valorem tax by the county, the Supreme Court disapproved both Higgs, and, implicitly, Bell v. Bryan, 505 So.2d 690 (Fla. 1st DCA 1987), rev. denied, 513 So. 2d 1060 (Fla. 1987), where the First District had held that real property improvements were taxable as an intangible and not as real property. Further, in Volusia County, a case directly on point, the Supreme Court held that operation of an automobile racetrack for profit is not even arguably the performance of a "governmental-governmental" function.

However, Appellants rely on the case of Page which was decided while Capital City was pending in the Supreme Court. In Page, the First District held city-owned property consisting of a marina and improvements constructed and used by a private lessee, to be exempt. It does not appear that the Page decision can be

reconciled with Hausman, Capital City, or Volusia County, unless the First District considered the operation of the marina in Page to be much like the operation of a public or municipal park and serving a public purpose. Since the Supreme Court has now ruled in Capital City, and has approved Hausman, it is hard to imagine how Page could be correct.

In any case, based on Capital City, Volusia County, and Williams v. Jones, the operation of a racetrack by a private entity, in contemplation of profit, does not meet the requirements for an exemption as set out in § 196.199(2)(a), Fla. Stat.

B. The property is not being used by the Raceway for a governmental-governmental purpose so as to entitle it to exemption.

The Department contends (as does the Property Appraiser) that any time governmentally-owned real property is leased to a private entity such property is taxable unless the lessee uses the property for a governmental/governmental function or exclusively for literary, scientific, religious or charitable purpose. This conclusion is mandated by §§ 196.012(6) and 196.199, Fla. Stat., and the holdings of the Florida Supreme Court in Williams v. Jones; Straughn v. Camp; and Volusia County.

Section 196.199(4), Fla. Stat., specifically says:

> (4) Property owned by any municipality, agency, authority, or other public body corporate of the state which becomes subject to a leasehold interest or other

> possessory interest of a nongovernmental lessee other than that described in paragraph (2)(a), after April 14, 1976, shall be subject to ad valorem taxation, unless the lessee is an organization which uses the property exclusively for literary, scientific, religious, or charitable purposes. (e.s.)

Section 196.199(2)(a), Fla. Stat., states in pertinent part:

> (2) Property owned by the following governmental units but used by non-governmental lessees shall only be exempt from taxation under the following conditions:
> (a) Leasehold interests in property . . . of municipalities, agencies, authorities, and other public bodies corporate of the state shall be exempt from ad valorem taxation only when the lessee serves or performs a governmental, municipal, or public purpose or function, as defined in s. 196.012(6). . . .

Section 196.012(6) [formerly 196.012(5)], Fla. Stat., states in pertinent part:

> (6) Governmental, municipal, or public purpose or function shall be deemed to be served or performed when the lessee under any leasehold interest created in property of the United States, the state or any of its political subdivisions, or any municipality, agency, authority, or other public body corporate of the state 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. (e.s.)

The above sections have been repeatedly analyzed by the Florida Supreme Court, and in every instance, the Florida Supreme Court has stated that the exemption shall be allowed only when the lessee performs a "governmental-governmental" function as opposed to a "governmental-proprietary" function.

In Volusia County, the Florida Supreme Court held, at page 502, that, "Operating an automobile racetrack for profit is not even arguably the performance of a 'governmental-governmental' function." And yet, what we have in this case is the operation of another automobile racetrack.

In Williams v. Jones,, at 432-33, the Florida Supreme Court, quoting Straughn v. Camp, at 695, stated in pertinent part:

> The proposition put forth by the appellants with respect to leaseholders of commercial property to the effect that they are exempt under Section 196.012(5) [now 196.012(6)], Florida Statutes, as performing a public purpose has, we believe, been aptly disposed of in Straughn v. Camp, supra. As stated therein at page 695:
>
> > "It is the utilization of leased property from a governmental source that determines whether it is taxable under the Constitution. Furthermore, tax exemptions should be strictly, construed against the claimant. . . .
>
> * * * * *
>
> The operation of the commercial establishments represented by appellants' cases is purely proprietary and for profit. They are not governmental functions. If such a commercial establishment operated for profit on Panama City Beach, Miami Beach, Daytona Beach, or St. Petersburg Beach is not exempt from tax, then why should such an establishment operated for profit on Santa Rosa Island Beach be exempt? No rational basis exists for such a distinction. The exemptions contemplated under Sections 196.012(5) and 196.199(2)(a), Florida Statutes, relate to "governmental-governmental" functions as opposed to "governmental-proprietary" functions. With the exemption being so interpreted all property used by private persons and commercial enterprises is subjected to taxation either directly or indirectly through taxation on the leasehold. Thus all privately used property bears a tax burden in some manner and this is what the Constitution mandates. (e.s.)

The Florida Constitution, in Art. VII, § 4, specifically mandates as follows:

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

The Supreme Court in <u>Williams v. Jones</u>, at 430, interpreting the above provisions and the exemptions and classifications set out in § 196.001(2) and § 196.199, Fla. Stat., said:

> The classifications created by Section 196.001(2) and Section 196.199, Florida Statutes, result in the holders of leases of publicly owned lands bearing their fair share of the tax burden, thus placing them on a parity with other real property in the private sector devoted to similar uses.

To allow Sebring International Raceway, Inc., a for-profit corporation, to escape taxation would give it an unfair advantage over other commercial enterprises such as the Daytona raceway, and go against this reasoning that all privately used property should bear a tax burden on a parity with other property in the private sector.

An automobile racetrack and raceway related businesses may be owned and operated by private persons or may be owned and operated by municipalities or public bodies duly authorized in their proprietary or municipal capacity, but the operation of a

racetrack by a private entity is not a governmental function so as to provide for tax exemption under Florida law. Such uses of property are proprietary in nature not sovereign/governmental.

The distinction between governmental and proprietary functions is a matter of law requiring an examination into the nature of the function to see if the function is one which partakes of sovereignty and can only be performed by the sovereign. Generally, if a function can be performed by a private entity as well as a municipality or county, then it cannot be a sovereign function but is instead a proprietary function. The distinction was recognized and stated by the First District in the case of St. John's Associates v. Mallard, 366 So. 2d 34 (Fla. 1st DCA 1978), at page 35:

> Legislative declarations such as those in Ch. 63-1447 do not necessarily make the function a commercial lessee performs governmental. It is rather the actual use made of the leased property which determines whether it is taxable under the constitution. Cf. Straughn v. Camp, supra. Governmental functions or duties relate to administration of government or some element of sovereignty, Daly v. Stokell, 63 So.2d 644 (Fla. 1953), while proprietary functions are those undertaken for public benefit and involve no exercise of sovereignty. City of Miami v. Oates, 152 Fla. 21, 10 So.2d 721 (1942). If the function is in fact proprietary--it matters not what statutory authorization is given the governmental unit--the leased property does not obtain its tax exempt benefit. (e.s.)

In another case considering a contract between the City Commission of Ft. Lauderdale and the operator of a wrecking and towing business, wherein the business agreed to keep the streets clear of wrecks, derelicts and other impediments to traffic, the

Florida Supreme Court, in Daly v. Stokell, 63 So. 2d 644 (Fla. 1953), stated at page 645:

> We understand the test of a proprietary power to be determined by whether or not the agents of the city act and contract for the benefit and welfare of its people; any contract, in other words, that redounds to the public or individual advantage and welfare of the city or its people is proprietary, while a governmental function, as the term implies, has to do with the administration of some phase of government, that is to say, dispensing or exercising some element of sovereignty. Illinois Trust & Savings Bank v. City of Arkansas City, 8 Cir., 76 F. 271, 34 L.R.A. 518; Tuttle Bros. & Bruce v. City of Cedar Rapids, Iowa, 8 Cir., 176 F. 86 (e.s.)

The distinction between governmental functions and proprietary functions was addressed at length in the case of Chardkoff Junk Co. v. City of Tampa, 102 Fla. 501, 135 So. 457 (1931). There the Florida Supreme Court held that the operation of an incinerator is not an exclusive governmental function as regards the City's liabilities for negligent operation and held that the municipality may be liable for damages resulting from negligent operation of such incinerator. In so holding the Supreme Court stated at page 459, as follows:

> "Governmental functions are those conferred or imposed upon the municipality as the local agency of limited and prescribed jurisdiction, to be employed in administering the affairs of the state, and promoting the public welfare generally. While in a certain sense any municipal function might be regarded as governmental, when properly applied the term 'governmental functions' should be limited to legal duties imposed by the state upon its creature, which it may not omit with impunity but must perform at its peril. Governmental functions are served by the police power and power of eminent domain; and also by those maintaining and operating a fire department,

> those furthering the administration of justice, and such other powers as are to be exercised by the corporation for the public wealth, in or for the exercise of which the municipality receives no compensation or particular benefits." (e.s.)

In Chardkoff the court also quoted decisions from other states which had recognized the distinction between a governmental function and a proprietary function. At page 460, it stated:

> In City of Denver v. Porter, the Circuit Court of Appeals of the Eighth Circuit, reported 126 F. 288, it was said:
>
> > "The gathering of refuse and waste by a city, and the establishment, maintenance and operation of dumping grounds for its ultimate disposal, under the direction of the officers of the city health department, is a duty of local or municipal concern, not performed in the exercise of any governmental function; . . . " (e.s.)

Continuing at page 460, it stated:

> In the case of City of Pass Christian v. Fernandez, 100 Miss. 76, 56 So. 329, 39 L.R.A. (N.S.) 649, the Supreme Court of Mississippi held:
>
> > "The public or governmental duties of a city are those given by the state to the city as a part of the state's sovereignty, to be exercised by the city for the benefit of the whole public, living both in and out of the corporate limits. All else is private or corporate duty, . . . The use of the cart in hauling dirt or trash for the city is for no governmental purpose, as connected in any way with the sovereign duty of the state. The state does owe the duty to all its citizens of protecting the person from assault and the property from destruction, and all done by the city in furtherance of this duty of the state is done in a governmental capacity." (e.s.)

Continuing, it stated:

> In Missano et al. v. Mayor, etc., of City of New York, 160 N.Y. 123, 54 N.E. 744, the Court of Appeals of New York said:
>
> > "The fact that the discharge of the duty of repairing and cleaning the streets of a city might incidentally benefit the public health does not make the acts of the commissioner of street cleaning a public function, so as to exempt the city from liability for personal injuries caused by employees engaged therein."

Generally, proprietary functions can be distinguished from governmental functions in that a proprietary function may be performed by a private non-public entity just as easily as being performed by a municipal corporation. Thus, a proprietary activity such as garbage collection, the operation of an incinerator, the operation of a racetrack or electric company may be performed by a public body if duly authorized or may be franchised and thus delegated through contract. Since sovereign governmental powers may not be delegated, if the function can be franchised or performed pursuant to contract by a private entity, it would not be sovereign/governmental. For instance, waste and garbage collection may be performed by a municipal corporation but may also be performed by a private, franchised collector. The cleansing of streets may be performed by a municipality, but it also may be contracted for and performed by a private entity. The operation of a municipal electric plant is a proprietary function which may be performed by a municipality duly authorized or may be performed by a non-public entity such as Florida Power & Light or Gulf Power Corporation. In this regard see Saunders v. City of Jacksonville, 157 Fla. 240, 25 So. 2d 648 (1946).

Similarly, in Volusia County, the court held that the operation of a racing facility was purely proprietary and for profit and did not serve a governmental purpose.

If the operation of a hospital, an incinerator, an airport, an electric company, or the collection of garbage are not sovereign governmental functions, then neither operation of a racetrack by the Raceway (the lessee) nor the activities performed by the sublessees (other than those already exempted by the Appraiser as state agencies or public bodies) in the case at bar could be sovereign governmental functions. Accordingly, all are taxable.

The Supreme Court in Volusia County, at 501, specifically noted that there had been a constitutional change from the 1885 Constitution and stated:

> . . . The phrase "municipal . . . purposes" was broadly interpreted to include any "public" purpose; under the Constitution of 1885, this Court decided that simply holding a proprietary interest in "a community recreational asset and business stimulant," Daytona Beach Racing & Rec. Fac. Dist. v. Paul, 179 So.2d 349, 353 (Fla. 1965), like the speedway served a "municipal purpose." Id. Perceiving decisions of this kind as creating inequities in the tax structure, the draftsmen of the Constitution of 1968 limited the municipal purpose exemption to "property owned by a municipality and used exclusively by it for municipal or public purpose." Article VII, Section 3(a), Florida Constitution 1968. The present Constitution further provides that where any project financed by revenue bonds "is occupied or operated by any private corporation . . . pursuant to . . . lease . . . the property interest created by such . . . lease shall be subject to taxation to the same extent as other privately owned property." Article VII, Section 10(c), Florida Constitution 1968. (e.s.)

C. The predominant public use test relied on by Appellants is not applicable.

Under Florida law as construed in Williams v. Jones, allegations of predominant public use do not state a cause of action. In paragraph 7 of the complaint the Appellants alleged:

> 7. The property leased by the Sebring Airport Authority to Sebring International Raceway is predominantly operated for a public purpose and is therefore exempt from ad valorem taxation pursuant to §196.199, Florida Statutes.

The Williams v. Jones case decided under the new Constitution, construed Ch. 71-133, Laws of Fla., as permitting exemption for government-owned property leased to private entities only when the lessee performed a governmental-governmental purpose. This had the effect of overruling and retreating from prior decisions arising under the old Constitution which had applied a test of "predominant public use" to determine the right to exemption.

In St. John's Associates v. Mallard, supra, the First District recognized this and held that the "predominant public use" test which was applied by the courts to the statutes that existed prior to the enactment of Ch. 71-133 in such cases as Dade County v. Pan American World Airways, Inc., 275 So. 2d 505 (Fla. 1973), and Orlando Utilities Comm. v. Milligan, 229 So. 2d 262 (Fla. 4th DCA 1970), cert. denied, 237 So. 2d 539 (Fla. 1970), no longer had any legal efficacy.

In St. John's, at page 36, the First District considered the following argument:

> St. John's argues it serves a governmental, municipal, or public purpose by performing a function which could properly be performed

> pursuant to statute by its lessor, a governmental unit; therefore, its leasehold should be exempt from ad valorem taxation. It relies upon Ch. 63-1447, Laws of Florida, a special act creating the Jacksonville Port Authority, as showing a legislative intent that the function performed by St. John's is for a public purpose.

This argument was rejected.

In Tre-O-Ripe Groves, Inc. v. Mills, 266 So. 2d 120 (Fla. 1st DCA 1972), the First District addressed the following situation:

> Appellant is the lessee in a contract with the National Aeronautics and Space Administration. The contract covers certain citrus groves in Volusia County to which the National Aeronautics & Space Administration holds fee title and which appellant rents for $49,000.00 per year which entitles it to use the land for cultivation and harvesting of citrus fruits.

Thereafter the court stated:

> . . . It is well established beyond the need for citation of cases that when Federal property is placed in the hands of private enterprises for gain by that enterprise, the immunity from taxation of the property is lost. We do not feel that appellant has sufficiently alleged facts in its petitions which would give rise to an exemption to this rule. The utilization of the property as a predominately public or private purpose, not the character or nature of its owner, is the major criteria in determining liability for taxes. There can be no doubt in the present case that the purposes to which the citrus groves are utilized are essentially private to the appellant, rather than the public. (e.s.)

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

If federally-owned property leased to a private lessee who uses same in the cultivation and harvesting of citrus is taxable,

then certainly a lessee of municipal property using same for proprietary purposes is entitled to no different treatment.

In City of Bartow v. Roden, 286 So. 2d 228 (Fla. 2nd DCA 1973), the Court held that certain property located within a municipally-owned airport complex and leased by private enterprises or held out for lease by the City was subject to ad valorem taxes. Section 332.03, Fla. Stat., which dealt with airports (known as the airport law of 1945), stated that the exercise of any other powers therein granted to municipalities ". . . are hereby declared to be public, governmental and municipal functions, exercised for a public purpose, and matters of public necessity . . . ." The court sets forth the factual circumstances in that case, at page 229, as follows:

> In 1970, for the first time the Polk County Tax Assessor assessed that portion of the airport property leased or held out for lease to private interests. There was no assessment placed upon the airport, itself, or the facilities directly supporting the operation of the airport. Likewise, the assessor did not seek to tax the property leased to governmental or quasi-governmental entities.
>
> After exhausting their administrative remedies, the City and the Authority sued for a declaration that the entire property was either exempt or immune from county ad valorem taxes. By the time of the trial, the 1971 taxes were also in issue. The lower court ruled that the property leased or held out for lease to private interests was subject to taxation. (e.s.)

After quoting Art. VII, § 3, supra, the court stated:

> For the years in question, there was applicable statutory authority for taxing municipally owned property leased to private interests for non-public uses. However, this statute could not and

> did not change the constitutional requirement that municipal property which is used exclusively for public purposes shall be exempt from taxation.
>
> The Appellants contend that even though the property is leased to private profit making ventures for activities unrelated to aviation, it is still being used exclusively for a municipal or public purpose. The Appellants' argument rests upon Chapter 332, Florida Statutes, F.S.A., known as the Airport Law of 1945. The several sections of that chapter authorize municipalities to acquire land for airport purposes and validate previous acquisitions. (e.s.)

In discussing the import of the airport authority law the court stated at page 230:

> Yet, we do not believe that when the Legislature stated that the use of property acquired for an airport was for a public purpose, it was determining that those portions of the airport property which might be leased to private enterprise for non-aeronautical activities would be tax exempt.
>
> For example, a municipality might properly acquire vast acreage for the purpose of building a large airport and later find that much of the property was not required for use in connection with the maintenance of the airport. Under those circumstances, having originally acquired the property for the airport, the municipality would be authorized under Section 332.08 to lease it to private interests, but it would be an anomaly to permit such property to remain off the tax rolls. This would either have the effect of giving a preference to a lessee of airport property over his competitors or of permitting the municipality to charge more rent than the ordinary landlord because the lessee would not have to pay taxes. (e.s.)

With regard to the property which was "held out for lease" the court stated:

> A secondary point urged by Appellants is that even if the property actually being leased is subject to taxation, the county cannot tax that property which is only "held out for lease." The record reflects that the Authority has carved out certain portions of the airport and designated these areas as being available for lease. In effect, the Authority has created an industrial

> park at the airport. Many of the buildings within this area are leased. While the balance of the buildings are empty, the Authority is actively trying to find tenants for them. The lower court was correct in determining that by virtue of holding out this property for lease, the City had changed its character to the extent that it became subject to taxation along with the properties which were actually under lease. (e.s.)

Although City of Bartow was decided before the enactment of Ch. 71-133, now codified in the ad valorem tax laws, and before the Williams v. Jones decision establishing the "governmental-governmental use" test replacing the "predominant public use" test, it is recognized that private use of municipal property renders such taxable.

Florida law applicable to municipally-owned and governmentally-owned property leased or rented to persons who use such property for private, commercial purposes is set forth in Art. VII, § 3(a), Fla. Const., and § 196.199(1)(c). Article VII, § 3(a), Fla. Const., provides in part:

> All property owned by a municipality and used exclusively by it for municipal or public purposes shall be exempt from taxation. . . .

As stated above, municipal property is not immune from taxation, but has been granted an exemption by the Florida Constitution only when it is owned and used exclusively by the municipality for municipal or public purposes. In the instant situation, the property is not being used by the municipality but is, in fact, actually being used by a private commercial lessee through lease with the City's subagency, the Authority. In any case where a private entity is using the property in contemplation of profit, then it cannot be said that the property is being used

exclusively for a public purpose. In the case at hand, the property is being used at least partially to make a profit for the Raceway. Therefore, the exemption provided for in the Constitution is no longer applicable and the Appraiser properly assessed the property.

CONCLUSION

In the final analysis, the only question is whether the property used in the operation of a racetrack by the Raceway, a for-profit corporation, can be said to be used exclusively for a public purpose as set out in the Florida Constitution. In interpreting the provisions of §§ 196.199(2)(a) and 196.012(6), Fla. Stat, the Supreme Court has repeatedly addressed this question, and has stated consistently that the above-noted sections allow for an exemption only when the lessee is using the property for a "governmental-governmental" function as opposed to a "governmental-proprietary" function.

There has been no material change to the above-noted sections (other than renumbering), and so the holdings in Williams v. Jones and Volusia County are still applicable and directly on point. There is no way that the operation of a race-track can be considered to be a performance of a "governmental-governmental" function. No matter how much benefit the operation may bring to Sebring or Highlands County, and there is no dispute as to the benefits, the operation of a racetrack is not exclusively for public purposes and not even "arguably" the performance of a "governmental-governmental" function. Therefore, since there is no dispute of fact, as alluded to by Appellants, the circuit court and district court were correct in that the only decision to be made was a legal conclusion, and correctly concluded that, under the facts as stated, no exemption was warranted under § 196.199, Fla. Stat. Therefore, the Florida Supreme Court should uphold the decision of the Second District in this case, and overrule Page if it is in conflict.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief on the Merits of the Appellee, Department of Revenue, has been furnished by U.S. Mail this 11th day of March, 1994, to: LARRY E. LEVY, Esq., P.O. Box 10583, Tallahassee, FL 32302; HALA A. SANDRIDGE, Esq., P.O. Box 1438, Tampa, Florida 33601; CLIFFORD M. ABLES, III, Esq., 457 S. Commerce Ave., Sebring, Florida 33870 and ROBERT K. ROBINSON, Esq., P.O. Box 3269, Sarasota, Florida 34230.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Ralph R. Jaeger
Fla. Bar #326534
Assistant Attorney General
Tax Section, Capitol Bldg.
Tallahassee, FL 32399-1050
Ph. 904/487-2142
FAX 904/488-5865

Counsel for Appellee
Department of Revenue