SUPREME COURT OF FLORIDA

CASE NO. 82,489

THE SEBRING AIRPORT AUTHORITY, et al.,

Petitioners,

vs.

C. RAYMOND MCINTYRE, et al.,

Respondents.
_____/

ANSWER BRIEF OF RESPONDENT C. RAYMOND MCINTYRE, HIGHLANDS COUNTY PROPERTY APPRAISER

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PRELIMINARY STATEMENT

Petitioners are The Sebring Airport Authority and the Sebring International Raceway, Inc., and will be referred to herein as the "petitioners." The petitioners were the plaintiffs in the court below and the appellants before the Second District Court of Appeal. The respondents are C. Raymond McIntyre, Highlands County Property Appraiser, and the Department of Revenue and they will be referred to herein respectively as the "appraiser" and the "department." The amicus, John Mikos, Sarasota County Property Appraiser, will be referred to herein as the "amicus."

STATEMENT OF THE CASE AND OF THE FACTS

The appraiser does not disagree with the Statement of the Case and of the Facts and their chronology as set forth in initial petitioners' brief. The appraiser, however, disagrees with the petitioners' characterization of the district court's decision.

At the trial court, both the petitioners and the appraiser filed motions for summary judgment. After argument, the trial court granted final summary judgment in the appraiser's favor. It was this final summary judgment which the petitioners appealed to the district court.

At page 6 of their brief, petitioners discuss their petition to this Court and state:

> Conversely, 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. Based upon this express conflict, this Court accepted jurisdiction.

The appraiser submits that this is not a correct characterization of the district court's holding. The district court held that the lessee was not performing a "governmental-governmental" function and, therefore, was not entitled to exemption from taxation. The district court did not, either by holding or dicta, suggest that governmentally-owned property only could be exempt if the lessee was a not-for-profit corporation as petitioners assert.

SUMMARY OF ARGUMENT

The district court's decision in the instant case should be approved. In reaching its decision that the petitioners' property was not exempt from ad valorem taxation, the district court correctly applied Capital City County, Inc. v. Tucker, 613 So.2d 448 (Fla. 1993); and Volusia County v. Daytona Beach Racing & Recreational Facilities Dist., 341 So.2d 458 (Fla. 1976), appeal dismissed, 98 S.Ct. 32, 434 U.S. 804, L.Ed.2d. 61 (1977); and followed Williams v. Jones, 326 So.2d 425 (Fla. 1975); City of Bartow v. Roden, 286 So.2d 228 (Fla. 2d DCA 1973); St. Johns Associates v. Mallard, 366 So.2d 34 (Fla. 1st DCA 1978), writ discharged, 373 So.2d 912 (Fla. 1978). Each of these decisions held that governmentally-owned property leased to lessees using said property for proprietary purposes was not

exempt from ad valorem taxation. In the instant case, the authority leased the property to a private, for-profit entity which used the property for proprietary proposes. Thus, because the use of the property was not governmental-governmental, the district court correctly held that the property was not exempt from taxation.

The petitioners misplace reliance upon Page v. Fernandina Harbor Joint Venture, 608 So.2d 520 (Fla. 1st DCA 1992), review denied, 620 So.2d 761 (Fla. 1993). Page involved the exempt status of property consisting of a marina, which had previously been owned and operated by the City of Fernandina Beach that had been leased to a private, for-profit entity to improve the property and use and operate the marina, and construct a restaurant and shops. Page held that the property was exempt from taxation.

In reaching its decision, Page failed to cite this Court's decisions in Volusia County, Williams, or Capital City. Instead, it relied upon decisions utilizing the "predominate public purpose test" which existed in cases decided prior to 1971. These cases have since been overruled, as noted in Walden v. Hillsborough County Aviation Auth., 375 So.2d 283 (Fla. 1979). Thus, Page was incorrectly decided and should be quashed.

Likewise, the petitioners misplace reliance upon Sarasota-Manatee Airport Auth. v. Mikos, 605 So.2d 132 (Fla. 2d DCA 1992), review denied, 617 So.2d 320 (Fla. 1993). Sarasota-Manatee held that the Sarasota-Manatee Airport Authority (SMAA)--

admittedly a special district--was a political subdivision and immune from taxation. The petitioners rely upon Sarasota-Manatee for the proposition that the authority is a political subdivision and, therefore, is immune from taxation.

Sarasota-Manatee was incorrectly decided. The term "political subdivision," as used in section 196.199, Florida Statutes (1993), is limited to counties under Article VIII, Section 1 of the Florida Constitution. Political subdivisions do not include special districts and municipalities. Furthermore, section 196.199(1), Florida Statutes, clearly treats lessees of county-owned property the same as lessees of city-owned property. Thus, all private lessees of governmental property using same for private commercial purposes are treated identically for tax purposes. Moreover, the constitution is a limitation of power and no provision exists permitting the legislature to exempt property not enumerated in the constitution. Privately used governmental property is not included in the enumerations found in the constitution.

Thus, this Court should approve the district court's decision in the instant case and quash Page. In addition, this Court should disapprove of Sarasota-Manatee.

ARGUMENT

PROPERTY OWNED BY A GOVERNMENTAL ENTITY, SUCH AS THE CITY OF SEBRING AND THE SEBRING AIRPORT AUTHORITY, AND LEASED BY A PRIVATE, FOR-PROFIT LESSEE IS NOT ENTITLED TO AD VALOREM TAX EXEMPTION UNDER SECTION 196.199, FLORIDA STATUTES (1991), WHERE SUCH LESSEE IS USING SUCH PROPERTY FOR A PROPRIETARY PURPOSE.

A. Entry of final summary judgment was proper because no disputed issues of material fact.

Petitioners devote pages 12 and 13 of their brief to the contention that the trial court should not have entered summary judgment because disputed issues of material fact exist. The depositions which were taken of the appraiser and persons representing or employed by the petitioners demonstrated clearly all material facts which were needed for the entry of final summary judgment. The City of Sebring originally owned the property and transferred it to the Sebring Airport Authority. The authority then leased the property to Sebring International Raceway, Inc., a private, for profit corporation. The uses of the property were set forth in the depositions which show that the lessee was engaging in a for-profit undertaking and that the use of the property was no different than a private person using the property for the same purpose on privately-owned property. Furthermore, the petitioners' argument is identical to that made and rejected in Volusia County centering around the use of public funds and no change in the use of the property.

The petitioners direct the court to no disputed issues

of material fact in their brief, and in fact, none existed. Thus, the trial court properly granted summary judgment as a matter of law.

B. The lessee's use of the property was not for a governmental-governmental purpose so as to entitle it to exemption.

The appraiser submits that the district court correctly applied the law to the operation of the raceway by petitioners. The district court's decision is squarely consistent with this Court's recent decision in Capital City and its earlier decision in Volusia County. The petitioners argue that the operation of a racetrack with attendant private commercial activities is a public purpose. Petitioners also argue that the Sebring operation is factually different from Volusia County's operation and that somehow the funding of same through public funds is different.

The petitioners' argument should be rejected. Both Volusia County and the instant case involve raceways with attendant private commercial use of the property; both relied on enabling legislation declaring same to be a public purpose; and, in fact, the Volusia County raceway had been supported by an approved sale of bonds. See Daytona Beach Racing & Recreational Facilities Dist. v. Paul, 179 So.2d 349 (Fla. 1965). Further, both cases involve legislation proclaiming same to be a public purpose. The appraiser submits that there exists neither factual nor legal differences. The district court's decision is a

correct expression of the law.

Importantly, the petitioners repeatedly point out that the raceway was an integral part of the community's reputation, is marketed to other counties and companies to attract business, and that local businesses were dependent upon the raceway for their survival. See (IB-2, 19) Volusia County, however, expressly held that such "business stimulant" characteristics of a raceway cannot constitute a governmental purpose. Volusia County, 341 So.2d at 501.

The district court's decision also is consistent with Williams and its own prior decision under the pre-1971 law and 1885 Constitution in City of Bartow. City of Bartow involved a municipally-owned airport complex and property which was owned by the city and either leased, or held out for lease to private lessees for private commercial use attendant to air travel and commerce. Such property was held to be taxable.

The district court's decision also is consistent with the First District Court's decision in Mallard. Mallard held as taxable property such as warehouses, motor terminals, etc., used in conjunction with the Jacksonville Port Authority. The court emphasized that the predominant public purpose test was no longer applicable and that the proper test is that set forth in Williams, i.e., the "governmental-governmental" purpose as opposed to a "governmental-proprietary" purpose.

Similarly, the decision below is consistent with City of Orlando v. Hausman, 534 So.2d 1183 (Fla. 5th DCA 1988), review

denied, 544 So.2d 199 (Fla. 1988). Hausman held that municipally-owned property used for private commercial activities was taxable. This Court cited Hausman with approval in Capital City.

The petitioners, however, rely upon Page for their contention that the property in the instant case was being used for a "public purpose" and, therefore, was entitled to exemption. Petitioners also relied on Page as a basis for conflict jurisdiction. The appraiser has acknowledged that the decision in the instant case and Page conflict.

The appraiser submits that the Page decision was incorrect for two reasons which are: (1) the test used to determine public purpose in Page is inconsistent with the test established by this Court in Williams and followed in Volusia County; and (2) the decision is inconsistent with this Court's decision in Capital City, which cited with approval Hausman, in holding that a golf course operated by lessees on city-owned property was taxable. Page involved a marina and ultimately, to be built, a restaurant and stores for rentals to commercial entities such as gift shops, sale of apparel, etc.

(1) The test used to determine public purpose in Page is inconsistent with the test established by this Court in Williams and followed in Volusia County.

In the instant case, the district court stated that it was relying upon this Court's decisions in Capital City and Volusia County. The district court quoted at length from Volusia

County, which in turn quoted from Williams. Williams held that the exemptions contemplated under section 196.012(5), Florida Statutes, and section 196.199(2)(a), Florida Statutes, relate to "governmental-governmental" functions as opposed to "governmental-proprietary" functions. Williams held that:

> 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.

326 So.2d at 433 (emphasis added).

In contrast, Page declined to follow this test and held that certain property leased to a private joint venture for profit-making purposes, which intended to construct improvements thereon and operate a marina, and ultimately other shops and businesses on property adjacent to it, was exempt. In Page the First District Court adopted the trial judge's ruling which cited those cases which had arisen prior to the tax reform act of 1971 and the adoption of the new constitution in 1969, and which applied the predominant public use test. Page did not cite Williams, Volusia County, or any of its decisions which had arisen since 1971. In fact, the First District Court declined to either mention or follow its own decisions which had recognized that the "predominate public purpose test" was no longer

applicable.

In 1978, the First District Court recognized that the "predominate public purpose test" was no longer applicable in Mallard. Mallard sets forth St. John's argument as follows:

> 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.

366 So.2d at 36. Continuing it stated:

> Among other things, JPA is empowered by Section 3 of Ch. 63-1447 to make and execute leases for the use and occupation of the property and projects under its control on such terms and conditions as the authority may determine. St. John's continues that since "project", as defined by Section 2 of the act, includes shipping facilities of all kinds, warehouses, motor terminals, etc., that St. John's was delegated by JPA the same statutory authority to lease project facilities which JPA had been conferred. Moreover, St. John's continues, there is nothing in its lease with JPA inconsistent with the statutory powers granted to JPA since it was restricted by the terms of the lease from using the premises for any purpose other than export-import automobile activities relating to the development of water borne commerce in the port of Jacksonville. Therefore, <u>since a governmental, municipal or public purpose is performed when the lessee carries out a function which could properly be performed by the appropriate governmental unit</u>, Section 196.012(5), its use of the land complies with the statutory definition and its leasehold interest is exempt.

366 So.2d at 36 (emphasis added). The petitioners' argument

before this court is virtually identical to that made in Mallard.

In discussing St. John's argument, the court stated:

> St. John's relies upon *Hillsborough County Aviation v. Walden*, 210 So.2d 193 (Fla. 1968); *Dade County v. Pan American World Airways, Inc.*, 275 So.2d 505 (Fla. 1973); *Hertz v. Walden*, 299 So.2d 121 (Fla. 2d DCA 1974), affirmed 320 So.2d 385 (Fla.) and *Opa-Locka v. Metropolitan Dade County*, 247 So.2d 755 (Fla. 3d DCA 1971) for its position that if the use of the premises leased is predominantly public in nature as an indispensable facility supporting the operation of the public facility, the exemption will be allowed even if the use was for private purposes incidental to the predominant public use. Those cases set forth a public purpose test permitting a private party to qualify for an exemption if its use of the property was essential to some public purpose, and if the same functions could be performed by using public funds. For example, in *Dade County v. Pan American World Airways*, supra, the Florida Supreme Court held that Pan Am's overhaul base, reservations and accounting office, flight simulation building at Miami International Airport were tax exempt because the projects were primarily and predominantly for the public benefit, even though there may have been some incidental private purpose. And, once a project meets the test of public purpose, an incidental private purpose loses its identity and is merged within the term public purpose.
>
> It should be noted that the court in *Pan American Airways* was asked to construe statutes different from those now before us.

366 So.2d at 36, 37 (emphasis added). In rejecting St. John's argument, the First District Court stated:

> We conclude that a more recent line of cases militates against St. John's argument that an exemption exists. E. g., *Straughn v. Camp*, 293 So.2d 689 (Fla.1974); *Williams v. Jones*, 326 So.2d 425 (Fla.1975); *Volusia County v. Daytona Beach Racing, etc.*, 341

So.3d 498 (Fla.1976). Therefore the test formerly applied in those cases relied upon by St. John's i.e., predominant public use, no longer has continuing efficacy and we must look instead to the use actually made of the property leased to determine its tax exempt status.

366 So.2d at 37. Continuing it stated:

> 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 the 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. *Williams v. Jones*, supra.

366 So.2d at 37 (emphasis added).

In discharging the writ, the Florida Supreme Court stated:

> Pursuant to article V, section 3(b)(3), Florida Constitution, we accepted jurisdiction in this cause to review the decision of the District Court of Appeal, First District, reported at 366 So.2d 34 (Fla. 1st DCA 1978). By our decision in *Walden v. Hillsborough County Aviation Authority*, 375 So.2d 283 (1979), conflict has been dispelled. Accordingly, the writ heretofore issued is discharged.

St. John's Associates v. Mallard, 373 So.2d 912 (Fla. 1979).

Walden held that the Williams decision controlled and overruled prior decisions which had relied on a predominant

public purpose test stating:

> Petitioners allege that our decision in *Williams* controls and overrules, directly, or impliedly, all the pre-*Williams* cases relied upon by the trial court and the Second District Court of Appeal. They contend that under *Williams* the test to be used in determining if a public purpose exemption exists is whether the actual leasehold use constitutes a "governmental-governmental" or a "governmental-proprietary" function. It is the utilization of property leased from a governmental source, they argue, that determines if the leasehold is taxable. They maintain that these leaseholds are taxable because they are used for commercial, profit-making purposes and serve a "governmental-proprietary" function.

Walden, 375 So.2d at 285. Thereafter it stated:

> We conclude that our decision in *Williams* is controlling and that the leasehold interests of Host, Dobbs, and Bonanni are properly subject to ad valorem taxation. We reach this conclusion as a result of the following analysis. Section 196.001 provides:
>
> > Property subject to taxation.--Unless expressly exempted from taxation, the following property shall be subject to taxation in the manner provided by law:
> >
> > (1) All real and personal property in this state and all personal property belonging to persons residing in this state; and
> >
> > (2) All leasehold interests in property of the United States, of the state, or any political subdivision, municipality, agency, authority, or other public body corporate of the state.
>
> This statute evidences the legislative intent that, unless expressly exempted, the holders of leases of public-owned land shall bear the same tax burden as private property owners

> who devote their land to the same uses. The only exemption granted is that allowed by section 196.199(2), which states: . . .

375 So.2d at 285. In discussing Williams the court stated:

> Because the leased property was being utilized for commercial, profit-making purposes, we held that the function was proprietary, not governmental, and that the exemptions were inapplicable.
>
> We reaffirmed this "function by utilization" test in *Volusia County v. Daytona Beach Racing and Recreational Facilities District*, 341 So.2d 498 (Fla.1976), wherein we held that the Daytona International Speedway, which was operated by a private corporation under a lease from a public body, was not entitled to exemption under sections 196.012(5) and 196.199(2) because the operation of an automobile racetrack was not the performance of a "governmental-governmental" function.

Walden, 375 So.2d 286. Thereafter the court rejected continued reliance on various cases, concluding that such cases had been overruled by Williams stating:

> We reject respondents' argument that the present cause is substantially different from *Williams* and *Volusia County* so as to render those decisions inapplicable. We further reject the cases respondents cite as controlling. Their reliance on *Daytona Beach Racing and Recreational Facilities District v. Paul*, 179 So.2d 349 (Fla.1965), and *Dade County v. Pan American World Airways*, is misplaced in light of our decision in *Volusia County v. Daytona Beach Racing and Recreational Facilities District*, wherein we expressly overruled *Daytona Beach Racing and Recreational Facilities District v. Paul*, and also noted that the statutory provision considered in *Dade County v. Pan American World Airways* had been superseded. *Hillsborough County Aviation Authority v. Walden* is in applicable for the same reason.

Walden, 375 So.2d at 287. It then recognized the correctness of

Mallard, stating that:

> Applying the "function by utilization" test of *Williams v. Jones*, we hold that the district court and the trial judge erred in holding that the leasehold interests of Host, Dobbs, and Bonanni were not taxable. It is undisputed that these leaseholds are being utilized for commercial, profit-making purposes and for this reason they have a "governmental-proprietary" function. Having such a function, they are taxable. The First District Court of Appeal in *St. Johns Associates v. Mallard*, 366 So.2d 34 (Fla.1st DCA 1978), reached a similar result in denying an exemption from taxation claimed by a leaseholder of the Jacksonville Port Authority. The rationale of the First District Court in that case is consistent with our holding in this case.

Walden, 375 So.2d at 287. Mallard is a case which the First District not only did not follow but did not mention in Page.

Thus, in Page, the First District Court totally ignored and refused to follow not only Williams, Volusia County, and Walden but also its own decision in Mallard. The appraiser submits that the rationale in Page was incorrect and suggests that the Page court is still using the "predominant public use" test and applying a rationale which had previously been rejected in Volusia County.

In quoting from the trial judge in Page, the First District Court held:

> The Court, therefore, finds that the use of the Improvements by plaintiff for the 1988 and 1989 tax years is identical to the use of the Improvements by the City historically, and that this is a valid public purpose as that term is used in Section 196.199(2)(a). Because the City owns the Improvements and plaintiff uses them for a valid public purpose, plaintiff has carried its burden of

> demonstrating that the Improvements are not taxable to plaintiff or the City for 1988 or 1989.

608 So.2d at 523. This rationale has been rejected since Williams and Volusia County. The two bases for the holding in Page are:

> 1. That the operation of the marina is a public purpose because its use of the improvements was identical to the use of the property by the city, which was also for a marina, and since it was exempt when the city was doing it it was also exempt when the lessee was doing it; and
>
> 2. That the test set forth in this court in *Williams* and *Volusia County* and followed in the Second District Court below that that the use of the property must be for a "governmental-governmental" purpose for exemption to inure.

That the court is rejecting the "governmental-governmental" verses "governmental-proprietary" test is clearly recognized in Page where the First District Court paraphrased the affidavit taken of Mr. Page, the property appraiser:

> The gravamen of the Page affidavit appears to be paragraph 7 wherein Page states that he "does not consider the operation of a marina for profit by a non-governmental entity to be a public purpose." In his deposition testimony, Page testified that, as a life long resident of Nassau County, he was aware that plaintiff's use of the Improvements was identical to that of the City's prior to the Lease. During the City's operation of the marina Page never assessed the property or its improvements with an ad valorem tax.

608 So.2d at 524 (emphasis added). Continuing it is stated:

> The statute clearly and unambiguously states that property leased by a municipality to a non-governmental lessee is exempt from ad valorem taxation when that lessee utilizes

> the property for a valid public purpose. Page's legal interpretation of Section 196.199(2)(a) turns on the fact that the marina is now operated by a private entity. Page's view was stated more explicitly in his deposition testimony wherein he claimed that the case of *City of Orlando v. Hausman*, 534 So.2d 1183 (Fla. 5th DCA), *rev. denied*, 544 So.2d 199 (Fla. 1988), stands for the proposition that when there is a lease from a governmental entity to a private entity, the exemption allowed by Section 196.199(2)(a) is inapplicable. The court finds that this is an erroneous view of the law for several reasons.

608 So.2d at 524 (emphasis added). Thereafter the court discussed whether the case of Hausman controlled, or was even applicable, stating:

> First, in direct contrast to the undisputed facts in this case, the private entities involved in the *Hausman* case *admitted* that their use of the leased property was for private purposes. The district court of appeal found this to be dispositive of the statutory question of public purpose. Second, as the court in *Hausman* correctly pointed out, the inquiry as to whether an exemption under the statute applies is to be governed by the *use* of the subject property and not by the institutional character of the entity using the property: "A right of exemption . . . is to be determined by the use to which the property is put in the ownership of the property." 534 So.2d at 1184 (quoting *Orlando Utilities Commission v. Milligan*, 229 So.2d 262 (Fla. 4th DCA 1969), *cert. denied*, 237 So.2d 539 (Fla.1970)).

608 So.2d at 524. Orlando Utilities Commission v. Milligan, 229 So.2d 262 (Fla. 4th DCA 1969), cert. denied, 237 So.2d 539 (Fla. 1970), cited in the court's decision was decided under the old constitution and as the law existed prior to 1971. In Milligan, the court applied the "predominant public use test."

Although Page does not expressly reference Miller v. Higgs, 468 So.2d 371 (Fla. 1st DCA), review denied, 479 So.2d 117 (Fla. 1985), the decision does make clear that it is not following or recognizing the application of Hausman whose holding is squarely inconsistent with both Miller and Bell v. Bryan, 505 So.2d 690 (Fla. 1st DCA 1987), review denied, 513 So.2d 1060 (Fla. 1987). In Bell, the First District Court does not cite a single case in either the body of its decision or any footnote. This was an extremely unusual case in many regards, not only because no citation of authority or judicial decision is cited supporting the holding, but also because the court chose to invalidate the assessment of the property appraiser, even though the property appraiser was not a party to the lawsuit. It is also unusual in that the entire original opinion was withdrawn and a second opinion substituted. In the opinion which was withdrawn, the First District Court had held that the property appraiser had been in error when he extended the ad valorem real property tax rate against the improvements instead of the intangible tax rate. On petition for rehearing it was pointed out that a property appraiser does not assess intangible taxes and had not since 1970. Bell, like Miller, held that the improvements were part of the leasehold and therefore taxable as intangibles. This is clearly recognized in Bell as follows:

> However, appellants argue the novel proposition that the improvements, which are property of Escambia County, and the development of which is the express purpose of the creation of the leasehold, are not part of that leasehold. We can find no basis

> in law or reason for determining that the improvements on the real property are not as much a part of the leasehold as the real property itself.
>
> The trial court correctly determined that the assessments placed on the improvements to the subject property were erroneous and should have been determined at the intangible personal property rate pursuant to the above-quoted section.

505 So.2d at 691, 692 (emphasis added). Thus, both Bell and Miller, which was disapproved by this Court in Capital City, are inconsistent with Hausman which was relied on by the property appraiser in Page.

(2) Page is inconsistent with Capital City and Hausman

This Court, of course, disapproved of Miller in Capital City, and cited with approval Hausman stating:

> The Fifth District Court of Appeal passed directly upon the issue before us in *City of Orlando v. Hausman*, 534 So.2d 1183 (Fla. 5th DCA 1988), *review denied*, 544 So.2d 199 (Fla.1989). 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. *Id.* Relying on the prior decision in *Orlando Utilities Commission v Milligan*, 229 So.2d 262 (Fla. 4th DCA 1969), *cert. denied*, 237 So.2d 539 (Fla.1970), the court held that because the property was being used for private purposes, there was no exemption from real property taxation. *But see Miller v. Higgs*, 468 So.2d 371 (Fla. 1st DCA), *review denied*, 479 So.2d 117 (Fla.1985). In response to the argument that the leasehold interests were subject only to intangible taxation, the court pointed out that there was no evidence that the property appraiser had included the

> leasehold interests of the tenants in his assessment. *Hausman*, 534 So.2d at 1185.

Capital City, 613 So.2d at 451. Thereafter this 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.

Capital City, 613 So.2d at 451, 452 (emphasis added). This Court further explained its reasoning as follows:

> While not a perfect analogy, assume the existence of land worth $100,000 encumbered by a mortgage securing the payment of a $125,000 promissory note. The promissory note would be subject to the intangible tax based on the $125,000 face value of the note even though the value of the property securing the note was only $100,000. Under the club's theory, the real property value for ad valorem purposes would necessarily have a value of negative $25,000. The point is that the value of a person's leasehold interest has nothing to do with the value of the underlying real property for ad valorem tax purposes. In the case of a lease, the lessee's interest may or may not have value, depending on whether or not the contract rent is greater or lesser than the market or economic rent. The value of the real property for ad valorem taxation is its fair market value without regard to any leases or encumbrances on the property.

Capital City, 613 So.2d at 452, 453 (emphasis added). At the time Page was rendered the First District Court did not have the benefit of this Court's pronouncements in Capital City.

Both Miller and Bell considered real property improvements as part of the intangible leasehold and, therefore,

not taxable (exempt) by local government. By disapproving of Miller, this Court also implicitly disapproved of Bell which held that improvements to real property were part of the intangible leasehold.

Page also overlooked Tre-O-Ripe Groves, Inc. v. Mills, 266 So.2d 120 (Fla. 1st DCA 1972). There, the court held taxable certain property owned by the National Aeronautics and Space Administration, an agency of the United States, rented to a lessee who used the land for cultivation and harvesting of citrus crops. In its opinion the court stated:

> We are of the opinion that the trial court correctly dismissed the second amended petition for the reason that the same failed to state a cause of action. It is well established beyond the need for citation of cases that when Federal property is placed in the hands of private enterprise for gain by that enterprise, the impunity 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 exception to this rule. The utilization of the property as a predominantly public or private purpose, not the character or nature of its owner, is the major criteria in determining liability for taxes. There can be no doubt in the present case that the purposes to which the citrus groves are utilized are essentially private to the appellant, rather than public.

Tre-O-Ripe Groves, 266 So.2d at 120 (emphasis added). It should be noted that the court is referencing the predominant public use test, which was subsequently disapproved by this court in Williams and Volusia County. Nevertheless, even under that test, Tre-O-Ripe Groves found the property to be subject to taxation when it was used by the lessee for the private purpose of raising

citrus.

A similar conclusion was reached by the Second District Court in City of Bartow in a case which, like Tre-O-Ripe Groves, also arose under the statutes as they existed prior to 1971 and the new constitution. In City of Bartow, the city had attempted to rely upon the Airport Law of 1945, and section 332.03, thereof, which had declared that the exercise of all the powers granted therein to municipalities were ". . . declared to be public, governmental, and municipal functions, exercised for a public purpose, and matters of public necessity . . .." The court rejected this argument and held that certain property located within a municipally-owned airport complex and leased by private enterprises or held out for lease by the city to private enterprises was subject to ad valorem taxes. In rejecting this argument, and after quoting article VII, section 3, Florida Constitution, 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.

City of Bartow, 286 So.2d at 229 (footnotes omitted). At bar, the petitioners rely on similar legislative declarations to those in the airport law in City of Bartow.

City of Bartow was decided under the 1885 constitution and statutes which existed before the enaction of chapter 71-133, Laws of Florida, now codified in the ad valorem tax laws, except where modified by various attempts by the legislature to grant some exemption to privately used governmental property such as chapter 80-368, Laws of Florida, which this Court held in Capital City would not constitutionally grant such exemption by making real property improvements taxable as intangibles. At the present time the organic provision relating to the taxable status of municipal property is set forth in article VII, section 3(a), Florida Constitution which provides in part:

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

However, in section 196.199(1), Florida Statutes (1991), the legislature has elected to treat property of political subdivisions and property of other entities created by a general or special law composed entirely of governmental agencies the same as property of municipalities. That is, such property must be both owned and used by the governmental unit to be exempt from taxation. Section 196.199(1)(c), Florida Statutes (1993) provides in part:

> (1) Property owned and used by the following governmental units shall be exempt from taxation under the following conditions:

* * * *

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

(Emphasis added.) Where such property is owned by the governmental unit but the use is by a governmental lessee, such property, obviously, could not be both owned and used by the governmental unit. Exemption is still permitted, however, if the lessee performs a governmental-governmental function or purpose. See Williams; Volusia County. If such use was found to exist, the property would be considered as being both owned and used properly by the involved governmental unit.

> C. The authority is not a "political subdivision" and even if it were it would not be entitled to exemption under the rationale expressed in Sarasota Manatee Airport Authority v. Mikos, 605 So.2d 132 (Fla. 2d DCA 1992), review denied, 617 So.2d 320 (Fla. 1993).

At page 14 of their brief petitioners assert that the authority is a political subdivision of the state entitled to immunity from taxation. In support of this assertion, the petitioners rely upon Sarasota-Manatee.

The appraiser submits that the authority is not a political subdivision of the state and that any reliance on

Sarasota-Manatee is misplaced. First, political subdivisions only include counties as referred to in Article VIII, Section 1(a), Florida Constitution. Second, the holding in Sarasota-Manatee is incorrect.

As to the first reason, the constitution recognizes four distinct local governmental units which have taxing powers. Those units are counties, municipalities, school districts, and special districts. See Art. VII, § 9(a), Fla. Const. Section 196.199 deals with local government property exemption from ad valorem taxes and recognizes the same distinct entities by referencing political subdivisions which are recognized in Article VIII, Section 1 as "counties," "municipalities" are recognized in Article VIII, Section 2, and other "entities created by general or special law" (section 195.199(1)(c), Florida Statutes), and any "agency, authority, or other public body corporate," (section 196.199(4), Florida Statutes). The appraiser submits that "political subdivisions," as used in section 196.199(1)(a), means only "counties" as provided for in Article VIII, section 1, Florida Constitution, and that Sarasota-Manatee was incorrect in holding that the character or nature of a special district created by special act--as was the Sarasota-Manatee Airport Authority (SMAA)--can be changed by a "mad dash" to the legislature to amend its special act so that it can claim that it is not truly a special district as it was created, but is in reality a "county" entitled to tax exemption or immunity under section 196.199(1).

As to the second reason, the Second District Court in Sarasota-Manatee reached what the appraiser believes to be an erroneous result by misapplying the involved statutory provisions for four reasons. These reasons are as follows:

First, Sarasota-Manatee held that SMAA, which was a bi-county governmental agency created by special act of the Florida Legislature, was a political subdivision of the State of Florida within the purview of section 196.199(1), Florida Statutes (1991), even though it acknowledged that the SMAA was a "special district" as defined by section 189.403, Florida Statutes (1991). The basis for its holding was an amendment in a special act, chapter 91-358, Laws of Florida, Special Acts. It is common knowledge that special acts do not receive the same attention as general acts and language therein which expressly declared the SMAA to be a political subdivision within the purview of section 196.199(1), should not and indeed, could not change the very nature of the entity. If an amendment to a special act is all that is necessary to change the nature of an entity from a special district or other agency, authority, or other public body corporate of the state, into a "county" which is actually what a political subdivision is, Sarasota-Manatee would permit every district and every public body in Florida to change the taxable status of its property simply by an amendment to a special act declaring it to be a political subdivision within the purview of section 196.199.

If the SMAA can change its identity by such a special

act then why could not the City of Orlando, the City of Sebring, and any other city or special district in Florida do the same? Article III, section 11(a)(2), Florida Constitution, provides in part:

> (a) There shall be no special law or general law of local application pertaining to:
>
> * * * *
>
> (2) assessment or collection of taxes for state or county purposes, including extension of time therefor, relief of tax officers from due performance of their duties, and relief of their sureties from liability;

(Emphasis added). Obviously the special act involved in Sarasota-Manatee was of doubtful constitutionality in light of the constitutional prohibition against special acts or general acts of local application pertaining to the assessment or collection of taxes for county purposes.

Second, the general law, section 196.199(1), expressly recognizes the distinction between political subdivisions and municipalities of this state, and other entities created by general or special law composed of governmental agencies which would include special districts or other public bodies created by special law.

The framers of the constitution recognized the inherent difficulties which would be involved if a special act could change the assessment and collection of taxes in a particular area of the state thereby undermining the fiscal stability of the state and the county. That is why these measures were reserved

to administration by general law only. It is only through general law that it can be assured that all such measures receive the full attention of the legislature and uniformity is achieved.

Third, section 196.001, Florida Statutes (1993), and section 196.199, Florida Statutes (1993), have waived any immunity which might exist to otherwise immune property such as county property. Section 196.001 provides that unless ". . . expressly exempted from taxation, all real and personal property in this state is taxable." In State v. Alford, 107 So.2d 27 (Fla. 1958), this Court recognized that immunity from taxation by the state and its political subdivisions could readily be waived by the legislature. Section 196.001 and section 196.199(1) certainly disclose the clear intent to tax property of the several political subdivisions and municipalities of the state, unless such property is both owned and used by such governmental unit for ". . . governmental, municipal, or public purposes." A legislative intent to treat county property the same as municipal property for taxation purposes could hardly be clearer. If the language found therein is not intended to provide the parameters under which county owned property can be exempt, then what was it intended to do? The statute fixes the conditions which must exist to avoid taxation, and all public bodies including counties, are treated the same.

The holding in Sarasota-Manatee results in lessees of airport property paying no taxes in Sarasota and Manatee counties, while airport lessees in Orange County do pay taxes.

It hardly seems sensible that a result can be presumed as being intended which would have lessees of governmental property paying taxes or not paying taxes depending on the nature of the entity holding legal title to the property which is being used for private purposes. But that is the result reached if Sarasota-Manatee is correct.

It is common knowledge that, throughout the state, in some counties cities operate airports, while in other counties, airport authorities are created by special act as was the case in Sarasota-Manatee as separate authorities, or operated by authorities created by special act under the auspices of the city as has been done in the case at bar, and in Hausman. In Hillsbourgh County, the airport is operated through the auspices of the Hillsborough County Aviation Authority which was created by special act. Furthermore, what is the impact of Sarasota-Manatee where a charter or home-rule county is involved, which is recognized as both a city and a county. Some are referred to as "counties" (Dade County) and some as "cities" (Consolidated City of Jacksonville). Should the name make a difference in the taxable status of publicly-owned but privately used property? What if a city operating an airport or raceway is in a county which subsequently adopts a charter for consolidated county government, and the city ceases to exist? Should this change the taxable status of the lessees private commercial use of the government-owned property? The appraiser submits that it should not. The situation can be further complicated if all city

operated airports simply chose to come to the legislature and obtain an amendment to the city charters or special acts creating the airport authorities designated same as "political subdivisions." If all it takes to obtain a tax assessment exemption is an amendment to a special act designating an otherwise special district entity, county authority or city authority as a political subdivision then the general laws applying to the assessment and collection of taxes and the administration of exemptions, could be severely undermined and the entire tax structure of the state would be adversely affected. This is precisely what article III, section 11(1)(b), Florida Constitution, was designed to prevent. Granting an exemption by special act operates to prevent both assessment of such property and the collection of taxes thereon, and that is precisely what the constitution prohibits.

On three occasions this Court has expressed the view that Florida's constitutional scheme commands that all privately-used property be subjected to taxation. In Straughn v. Camp, 293 So.2d 689 (Fla. 1974), this Court stated that ". . . where the predominant use of governmental leased land is for private purposes the Constitution requires that the leasehold be taxed." In Hillsborough County Aviation Authority v. Walden, 210 So.2d 193 (Fla. 1968), this Court stated that the constitution ". . . is a limitation upon and not a grant of the power of the legislature to exempt property from taxation." In Lykes Bros., Inc. v. City of Plant City, 354 So.2d 878 (Fla. 1978), which case

was cited in this Court's recent decision of Capital City, this Court stated:

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

Lykes Bros., 354 So.2d at 881 (emphasis added). In footnote 14 in Lykes Bros., this Court stated:

> Although Park-N-Shop, Inc. v. Sparkman, 99 So.2d 571 (Fla.1957), had held that the 1885 Constitution did not require the Legislature to impose ad valorem taxes on private-use leaseholds in governmental property, decisions construing the 1968 Constitution make clear that taxation of such property is no longer discretionary. See note 12 above. Certainly there was no authorization in Art. XII, § 7(a), Fla. Const., which states that pre-existing contracts shall "continue" to be valid.

354 So.2d at 881 (emphasis added.)

In Williams, this Court construed the exemption language found in section 196.012(5), Florida Statutes, and section 196.199(2)(a), Florida Statute, as applying only to governmental-governmental use as opposed to governmental-proprietary use. This Court emphasized that such construction

was in accord with the constitutional mandate that all governmental property used for private purposes pay taxes.

Archer v. Marshall, 355 So.2d 781 (Fla. 1978), invalidated certain special acts which had attempted to relieve lessees of county owned property located on Santa Rosa Island from taxation. There, this Court stated that the legislature was without authority to grant an exemption from taxes where the exemption does not have a constitutional basis. This Court in Capital City quoted from Archer in its holding, stating that:

> 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.

Capital City, 613 So.2d at 451, 452 (emphasis added).

In each of the previously mentioned cases, this Court recognized the restrictions on the legislative power to grant what amounts to a private interest exemption whereby a lessee can use governmentally-owned property and still obtain the benefits of tax exemption. The effect would be that counties and cities, and government generally, which now engage more and more in proprietary activities would be permitted to allow their property to be used for private, profit-making purposes to the disadvantage of private citizens and taxpayers using private property for the identical type purpose. The constitution enumerates the purposes for which property may be exempted by the

legislature. No exemption is found in the constitution for governmentally-owned property used for a private purpose.

Fourth, no constitutional authority exists for the legislature to exempt governmental property which government has placed in the commercial realm competing with private taxpayers engaged in the same or similar proprietary activities. Except for the limited exemptions permitted in Article VII, Section 3(c), (d), and (e), Florida Constitution, Article VII, section 3(a), enumerates the only private use of property which may be exempted by the legislature. The last sentence states:

> Such portions of property as are used predominantly for educational, literary, scientific, religious or charitable purposes may be exempted by general law from taxation.

The constitution is a limitation of power and, by enumerating the type private uses of property which may be exempted, the framers have foreclosed any other. See State ex rel. Moodie v. Bryan, 50 Fla. 293, 39 So. 929 (Fla. 1905); State ex rel. Church v. Yeats, 74 Fla. 509, 77 So. 262 (Fla. 1917). When the constitution expressly provides for the manner of doing things it impliedly forbids it being done differently. Having permitted the legislature to exempt privately used property the framers have impliedly prohibited any other exemption.

Viewed from this constitutional framework, section 196.199 is entirely consistent with the cases previously cited because it treats all privately used government property the same whether owned by a county, city, or other public body. Thus, whether viewed as a waiver of immunity or a statute recognizing

the constitutional limitation, the result is the same. That is, all public property devoted to private use is taxable through the leases to the lessees and all private lessees of such government property are treated the same. This has been recognized as the constitutional command beginning with Williams and continuing through the other cases cited previously.

The appraiser suggests that Sarasota-Manatee failed to recognize this fundamental premise as well as failed to recognize the constitutional restrictions on the legislature where assessment and collection of ad valorem taxes is concerned. The second sentence of Article VII, section 3, Florida Constitution, enumerates the extent to which non-governmental property may be exempted from taxation. No exemption is found therein for any governmental owned property which is used for private purposes. Profit-making entities using such property should pay the same taxes as private owners using private property similarly.

CONCLUSION

Based upon the aforementioned arguments and authorities, this Court respectfully is requested to approve the district court's decision in the instant case and quash Page. In addition, this court should disapprove of Sarasota-Manatee and Bell.

Respectfully submitted,

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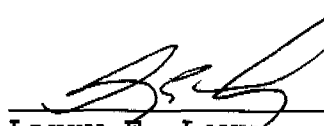
CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by U.S. Mail to **HALA A. SANDRIDGE, ESQUIRE**, Fowler, White, et al., Post Office Box 1438, Tampa, Florida 33601; **CLIFFORD M. ABLES, III, ESQUIRE**, 457 S. Commerce Avenue, Sebring, Florida 33870; **RALPH R. JAEGER, ESQUIRE**, Assistant Attorney General, Department of Legal Affairs, Tax Section - The Capitol, Tallahassee, Florida 32399-1050; and **ROBERT K. ROBINSON, ESQUIRE**, Dent, Cook & Weber, Post Office Box 3269, Sarasota, Florida 34230 on this the **22nd** day of March, 1994.



Larry E. Levy