W00A

SUPREME COURT OF THE STATE OF FLORIDA

CITY OF SARASOTA, a
municipal corporation,

Appellant/Petitioner,

v. Case No. 83,177

J. W. MIKOS, Property Appraiser
for Sarasota County, Florida,

Appellee/Respondent.
_____/

On Appeal from the
Second District Court of Appeal
In and for the State of Florida

**ANSWER BRIEF OF APPELLEE/RESPONDENT,
J. W. MIKOS, PROPERTY APPRAISER FOR SARASOTA COUNTY, FLORIDA**

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PRELIMINARY STATEMENT

JOHN W. MIKOS, the Plaintiff below, is the Appellee in the present appeal. He will be referred to in the brief as the "PROPERTY APPRAISER". The Defendant below and the Appellant in the present appeal is the CITY OF SARASOTA. In this brief it will be referred to as the "CITY".

References to the Record on Appeal will be prefixed with the letter "R" by the appropriate page number.

STATEMENT OF THE CASE

The PROPERTY APPRAISER adopts the statement of the case in the initial brief of the CITY.

STATEMENT OF THE FACTS

The PROPERTY APPRAISER believes the following facts, omitted by the CITY in its statement of facts, gives the court a better understanding of the issues. The CITY owns certain real property and improvements located in Sarasota County, known as the Ed Smith Stadium and Sports Complex (The Property) (R.304-305). The improvements consist of a baseball stadium for major league baseball spring training exhibitions together with a number of smaller fields and associated training facilities, locker rooms and offices (R.134, 304-305).

In 1988, the CITY entered into a lease agreement with the Chicago White Sox, Ltd., an Illinois Limited Partnership, with respect to The Property (R.131-159). The lease was executed prior to construction of the Ed Smith's Sports Complex (R.131-159). The term of the lease was for twenty (20) years with options to renew on the same terms for four (4) additional five (5) year periods (R.135). The design had to be approved by the White Sox and could not be changed without their consent (R.136-137). The Chicago White Sox were given other financial involvement in The Property (R.136).

During the term of the lease, the Chicago White Sox have the right to use the complex for their major and minor league baseball operations, including other activities (R.137). The White Sox have use of the major league clubhouse, the offices, as well as a number of other areas year round (R.138). They have the non-exclusive use of other portions of the complex during the year and exclusive use

of the indoor batting cages during spring training (R.138). However, during the spring training period, the major and minor league teams have priority use of the non-exclusive areas (R.138).

The White Sox have the right to set the ticket prices for games, supervise ticket sales, and establish ticket sale procedures (R.139). The CITY receives twenty (20%) percent of the gate receipts from the White Sox spring training games at the stadium (R.140). The lease also authorizes the CITY to require a surcharge upon ticket sales of fifty cents ($.50) per ticket (R.140).

The Chicago White Sox have the exclusive right to broadcast, through all forms of media, descriptions of the games or any other activities of the club at the complex (R.141). Revenues from such broadcasting belong solely to the Chicago White Sox (R.141).

The CITY retains the right to license concessionaires at the stadium, subject to approval by the White Sox (R.141). The items sold by the concessionaires at the games, together with the prices, are subject to approval by the Chicago White Sox (R.142). The lease also provides the Chicago White Sox with the exclusive right to sell advertising space on signs at the stadium (R.142).

The Chicago White Sox are paid one-half (1/2) of the net parking revenues from the games (R.143). They also have the exclusive right to one hundred spaces in a secured area of the parking lot (R.143).

All of the fields are maintained by the CITY (R.144). According to the lease, they must be maintained in accordance with the highest standards for a major league spring training facility

(R.144). This requires the CITY, at its sole cost and expense, to repair, replace and maintain the facility in a good, safe and clean condition at all times (R.144).

The lease provides that the CITY will pay all real estate, personal property and other taxes and assessments, if any, on the complex (R.147).

The CITY admits that the property is not used for educational, literary, scientific, religious or charitable purposes (R.172, 174). The Chicago White Sox are owned by for-profit entities established to make profits for their owners, and this leasehold is to further that purpose (R.172, 174). The CITY is a municipality or public body corporate within the State of Florida (R.173, 175).

SUMMARY OF ARGUMENT

Property owned by municipality is subject to taxation, unless it is used for a governmental, municipal or public purpose or other exempt purpose. Municipal property leased to a nongovernmental lessee is subject to ad valorem taxation unless it can be demonstrated the lessee serves or performs a governmental, municipal, or public purpose or function, or the property is used exclusively for literary, scientific, religious or charitable purposes. The Chicago White Sox, a major league baseball franchise, as lessee of the municipal owned property, does not use the property for any exempt purpose. The leasehold of the Chicago White Sox, a non-exempt entity, serves a proprietary function for the practice by, and exhibition of, its baseball team for profit. The CITY's property is subject to taxation to the extent of a leasehold that does not serve or perform a governmental, municipal or public purpose or function as required by Florida Statutes.

The bond validation proceeding did not determine the issue of whether the subject municipal property was entitled to an exemption from taxation on the grounds that its leasehold served or performed a governmental, municipal or public purpose or function. Final judgment of the Circuit Court in the bond validation proceeding only served to determine that it was a proper allocation of public funds to construct a baseball stadium and associated sports complex. The PROPERTY APPRAISER has not sought to tax the public's use of the stadium and sports complex. The bond validation

proceeding has no effect upon the taxability of this property and is irrelevant to this appeal.

Tax statutes operate only prospectively unless the statute evidences a clear legislative intent to the contrary. The Amendment to Section 196.012(6), Florida Statutes (1994), clearly states the amendment takes affect beginning with the 1994 and subsequent tax rolls. The amendment cannot be applied retroactively to exempt that portion of the property used for non-exempt purposes for the 1990 tax roll.

Regardless of whether the amendment operates retroactively or prospectively, a blanket exemption from ad valorem taxation for a sports facility with permanent seating and stadiums is in violation of Article VII, Section 3, of the Florida Constitution (1968). The courts of this State have held time and again that when municipal property is utilized for a governmental proprietary function, it is not exempt from taxation. The Legislature is without power to grant exemptions from ad valorem taxation when not authorized by the Florida Constitution.

ARGUMENT

I. THE APPELLATE COURT CORRECTLY AFFIRMED THE FINAL SUMMARY JUDGMENT IN FAVOR OF THE PROPERTY APPRAISER

A. THE CITY OF SARASOTA FAILED TO CARRY ITS BURDEN ESTABLISHING THAT THE USE OF ITS LEASED GOVERNMENT PROPERTY CONSTITUTED AN EXEMPT GOVERNMENTAL FUNCTION.

The issue in this case involves the denial of a total exemption from ad valorem taxation of real property and improvements owned by the CITY which is leased a portion of the year to the owner of the Chicago White Sox. It is basic to ad valorem tax law that certain governmental entities have immunity from taxation. This immunity was established by the Courts of Florida as opposed to the legislature.[1] Those governmental entities entitled to immunity from taxation for their property, owned and used exclusively by them, include the United States, the State and its political subdivisions (counties). Park-N-Shop, Inc. v. Sparkman, 99 So.2d 571 (Fla. 1957); Dickinson v. City of Tallahassee.

Cities are not included in this group. They are taxable entities entitled to exemptions under certain statutory conditions. The inquiry into the question of ad valorem tax exemptions must begin with Section 196.001, Florida Statutes, (1991), which provides:

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[1] See Dickinson v. City of Tallahassee, 325 So.2d 1 (Fla. 1975).

196.001. 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;
>
> (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.

The legislative intent of this statute is to recognize that all property within this state is taxable unless immune or expressly exempted by law.

Since municipalities are not immune from taxation, their property is only entitled to exemption if it is owned and used exclusively by the municipality for municipal or public purposes or other exempt purposes. Article VII, Section 3(a), of the Florida Constitution, provides:

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

The legislative implementation of this exemption of municipal property is found in Section 196.199, Florida Statutes (1991), which states:

> (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.**

(2) Property owned by the following governmental units but used by nongovernmental lessees shall only be exempt from taxation under the following conditions...

(a) **Leasehold interests in** property of the United States, of the state or any of its several political subdivisions, or **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 Section 196.012(6), Florida Statutes (1991). In all such cases, all other interests in the leased property shall also be exempt from ad valorem taxation. However, a leasehold interest in property of the state may not be exempted from ad valorem taxation when a nongovernmental lessee uses such property for the operation of a multipurpose hazardous waste treatment facility...

(c) Any governmental property leased to an organization which uses the property exclusive for literary, scientific, religious, or charitable purposes shall be exempt from taxation...

> (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 other charitable purposes. (emphasis added)

Section 196.199(1)(c), Florida Statutes (1991), specifically implements the above constitutional provision that property of a municipality is entitled to an exemption from taxation when used for governmental, municipal or public purposes.

Section 196.199(2)(a), Florida Statutes (1991), applies only to leasehold interests in the property of all governmental entities. It provides that the leaseholds may become exempt when the lessee serves or performs a governmental, municipal, or public purpose or function.

The PROPERTY APPRAISER has not sought to assess the leasehold interest of the White Sox. He is assessing the "fee or reversion" interest of the CITY which is subject to the lease with the White Sox and only for the proportionate time of their use. Therefore, Section 196.199(2)(a), Florida Statutes (1991), is not directly involved. The PROPERTY APPRAISER denied the total exemption and granted only a partial exemption when he determined at least fifty percent of the use was exempt. See Section 196.192, Florida Statutes (1991). He acted pursuant to Subsection 196.199(4), Florida Statutes (1991).

Subsection (4) provides that when a municipality leases its property to a nongovernmental lessee, that property is subject to taxation. This provision provides an exception when the leasehold is one described in paragraph (2)(a) above.[2]

Therefore, the property of the CITY is subject to taxation under Section 196.199(4), Florida Statutes (1991), unless it can be demonstrated that the leasehold interest of the Chicago White Sox is found to serve or perform a governmental, municipal, or public purpose or function as described in Subsection (2)(a). Section 196.199(2)(a), Florida Statutes (1991).

The definition for governmental, municipal or public purpose or function in Section 196.199(2)(a), Florida Statutes (1991), is defined in Section 196.012(6), Florida Statutes (1991), which provides:

> 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 it 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...

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[2] This subsection also provides for exemption if the lessee uses the property for other exempt uses; however, the CITY has conceded the use by the White Sox is not for a literary, scientific, religious or charitable purpose. (R.172, 174).

The above statutory section has been construed by the courts to determine its appropriate application for entitlement to exemption.[3] It is the CITY's position that the White Sox' use of its property is such an exempt use, that the CITY's method of financing and construction determined its exempt status and that a recent amendment to Section 196.012(6), Florida Statutes (1991), should be construed retroactively to exempt this property from taxation.

It is axiomatic in tax law that the burden is on the one claiming the exemption to clearly show an entitlement to the tax exemption. As enunciated in Williams v. Jones, 326 So.2d 425 (Fla. 1975), all property is subject to taxation unless expressly exempt, and such exemptions are strictly construed against the party claiming them. See also State v. Inter-American Center Authority, 84 So.2d 9 (Fla. 1955).

The CITY argues that the general rule of construing claims for exemptions strictly against a claimant does not apply when a municipality is claiming the exemption. In support of its position, the CITY cites three cases which include Saunders v. City of Jacksonville, 25 So.2d 648 (Fla. 1947); R. K. Overstreet v. Indian Creek Village, 239 So.2d 149 (Fla. 3rd DCA 1970) and State ex rel Green v. City of Pensacola, 126 So.2d 566 (Fla. 1961).

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[3] Section 196.012(6), Florida Statutes, was amended in 1994 to grant ad valorem tax exemptions to sports facilities with permanent seating and stadiums. The application of this amendment and its constitutionality will be discussed later in this brief.

These cases are inapplicable to this appeal because they do not involve the lease of government property by a non-governmental lessee. There are, however, several ad valorem tax cases which hve applied the rule of strict construction to governmental entities.

In an ad valorem tax case, taxation is the rule unless an exemption can be shown as contained in Section 196.199, Florida Statutes (1991). The case of Volusia County v. Daytona Beach Racing and Recreational Facilities District, 341 So.2d 498 (Fla. 1976), demonstrates the application of this strict construction rule.

The District was created by special act of the Florida legislature in 1955. This governmental body acquired certain lands in the City of Daytona Beach and in turn leased its entire acreage to a private corporation to construct a race track facility at the corporation's own expense. The District claimed an exemption from taxation on the leasehold interest under Section 196.199(2)(a), Florida Statutes (1991).

The Florida Supreme Court placed the burden on the claimant, i.e., the District, to show clearly an entitlement to tax exemption. The Court stated "the rule is that all property is subject to taxation unless expressly exempt and such exemptions are strictly construed against the party claiming them". Id. at 341. Thus, the Florida Supreme Court applied the rule of strict construction to a governmental body similar to a municipality.

Two other cases involving municipalities and the lease of governmental property have failed to apply the rule argued by the

CITY that strict construction is inapplicable when a question of an exemption is raised by a municipality. See City of Orlando v. Hausman, 534 So.2d 1183 (5th DCA 1988); City of Bartow v. Roden, 286 So.2d 228 (Fla. 2d DCA 1973).

In Williams, the Supreme Court outlined the test to determine whether a nongovernmental lessee of government property is performing the requisite public purpose. As stated therein:

> ...[i]t is the utilization of leased property from a governmental source that determines whether it is taxable under the constitution. citing Straughn v. Camp, 293 So.2d 689 (Fla. 1974). Williams, 326 So.2d at 433.

and the Supreme Court later in the opinion stated:

> [T]he exemptions contemplated under Sections 196.012(5) (now (6)) and 196.199(2)(a) Florida Statutes (1991), relate to "governmental-governmental" functions as opposed to "governmental proprietary" functions.... Thus all privately used property bears a tax burden in some manner and that is what the constitution mandates. Williams, 326 So.2d at 432.

The PROPERTY APPRAISER's motion for summary judgment, the CITY's responses to The PROPERTY APPRAISER's request for admissions, and the remaining record before this Court demonstrate that the CITY failed to carry its burden in establishing entitlement to a 100% exemption from ad valorem taxation for the subject property. The PROPERTY APPRAISER adequately demonstrated that it had assessed only that portion of the subject property used by the Chicago White Sox for a governmental-proprietary function pursuant to Section 196.192(2) and Section 196.012(3), Florida Statutes (1991).

B. THE CHICAGO WHITE SOX' USE OF THE STADIUM BUILDINGS AND OTHER FACILITIES IS A GOVERNMENTAL-PROPRIETARY FUNCTION AND DOES NOT ENTITLE THIS PROPERTY TO TOTAL EXEMPTION FROM AD VALOREM TAXATION.

To determine the extent of the exemption of the subject property when leased to a non-governmental lessee and also used by the public for other recreational purposes, we must examine the abundant case law to determine the status of the use by the lessee. The examination must begin with the land mark decision in Williams. This case concerns a class of taxpayers consisting of commercial and residential leaseholders of property from the Santa Rosa Island Authority. These taxpayers challenged the assessment of their leasehold for ad valorem tax purposes.[4] The Circuit Court rendered judgment for the county property appraiser and the lessees appealed.

These commercial taxpayers operated barber shops, plumbing businesses, beauty shops, laundries, rental cottages or rental units, motels, restaurants and camp grounds. They argued the operation of this facility constituted a governmental or public purpose or function defined in the statute which preceded Section 196.012(6), Florida Statutes (1991). The Court held that the operation of these commercial establishments was proprietary and for profit and not for exempt governmental functions or purposes.

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[4] This decision was rendered on the prior statute which did not break out some leaseholds for separate treatment as intangibles as provided in the current version of this section and its subsection.

The CITY would distinguish Williams v. Jones on the grounds that it did not involve a municipal stadium and sports complex. Such an interpretation fails to acknowledge the distinction established by the court; i.e., governmental-governmental vs. governmental-proprietary. The CITY misses the point in Williams v. Jones, that the leasehold interests previously held exempt, see Daytona Beach Racing and Recreational Facilities District v. C.S. Paul, 179 So.2d 349 (Fla. 1965) as compared to Volusia County v. Daytona Beach Racing and Recreational Facilities District, 341 So.2d 498 (Fla. 1976), are no longer entitled to an exemption from taxation because of their proprietary nature. There is no difference in the proprietary use by these commercial establishments and that of the Chicago White Sox. Therefore, the leasehold interest of the Chicago White Sox does not serve to establish a governmental-governmental function, entitling the CITY to an exemption from taxation for its fee or remainder interest.

The CITY's argument that the lease of the municipal stadium and sports complex to the Chicago White Sox promotes tourism is equally misplaced. In Williams, the commercial establishments supported tourism on the island, but they primarily were to profit their owners. The "predominant public use" test died and the actual use of the lessee is controlling. St. Johns Assoc. v. Mallard, 366 So.2d 34 (Fla. 1978).

The Supreme Court followed the Williams decision with Volusia County v. Daytona Beach Racing and Recreational Facilities District, 341 So.2d 498 (Fla. 1976). The court was faced with

whether the use of leased governmental property as an auto race track was a governmental purpose and thus exempt from taxation under Section 196.199(2)(a), Florida Statutes (1991). The Supreme Court specifically held again that the lessee did not serve an exempt governmental purpose, and that the corporation's operation of the speedway was purely proprietary and for-profit. Id. at 502. This decision reversed earlier decisions prior to the 1968 Constitution granting exemption to the same raceway in Daytona Beach Racing and Recreational Facilities District v. C.S. Paul, 179 So.2d 349 (Fla. 1965).

The CITY suggests this case is inapplicable because the sole use of the leasehold was the operation of an automobile race track for profit by the lessee. It argues that their recreational activities, in conjunction with the major league spring training by the Chicago White Sox, is sufficiently different to gain exemption. A major league baseball game and a major racing event are no different. Both charge a fee for spectator admission to a sporting event to earn owner profits. As the Supreme Court reiterated in Volusia County v. Daytona Beach Racing and Recreational Facilities District, it is the use of the property which governs whether it is entitled to an exemption from taxation under Section 196.199(2)(a), Florida Statutes (1991), not the degree. Whether it is an exclusive use or a partial use, the fact remains, the operation of the stadium and sports complex under lease by the Chicago White Sox is purely proprietary and for profit.

If promotion of tourism was a sufficient valid public purpose, the Florida Supreme Court would have held differently in the Volusia County v. Daytona Beach Racing and Recreational Facilities District case. The tourism that is brought to the Daytona Beach area as a result of the motor car and motorcycle racing at the facility would certainly equal or exceed that tourism generated by the Chicago White Sox annual spring training. Yet, the Florida Supreme Court held the racing facility taxable despite the apparent advantages to Daytona Beach and Volusia County. The "predominant public test" remains dead.

Since the leasehold interest of the White Sox does not serve a governmental, municipal or public purpose or function, the underlying property owned by the CITY is not entitled to an exemption from taxation for the time of the year it is used by the Chicago White Sox. Section 196.192(2), Florida Statutes (1991), specifically allows for the assessment of that portion of the use which is nonexempt.

The next case to follow on this issue was Walden v. Hillsborough County Aviation Authority, 375 So.2d 283 (Fla. 1979). The Supreme Court was faced with the lease of Hillsborough County Aviation Authority property to various tenants who sold food, beverages, newspaper, tobacco products, magazines, books, and other types of merchandise. The Court applied the Williams utilization test to hold that the leaseholds of the tenants were properly subject to ad valorem taxation. The deciding factor again was the

use of government property for a proprietary purpose, i.e., commercial businesses. The court stated:

> The corporation exists in order to make profits for its stockholders and uses the leasehold to further that purpose. This use is determinative. citing Volusia County v. Daytona Beach Racing and Recreational Facilities District. Walden, 375 So.2d at 286.

The CITY again attempts to distinguish a Florida Supreme Court case directly on this issue on the basis that it is factually distinguishable because it does not concern a public recreational facility. Surely, the CITY does not argue that the existence of a commercial airport would not serve a public purpose. As part of that overall purpose would be the need for certain facilities and vendors for use to passengers. The Supreme Court squarely considered these issues and ruled the use of governmental property by private enterprise for the purpose of making a profit did not entitle the leaseholds to exemption from ad valorem taxation.

Subsequent to the Volusia County holding, the Supreme Court reversed the Fourth District in Markham v. MacCabee Investments, Inc., 343 So.2d 16 (Fla. 1977). It refused to allow an exemption to a private corporation utilizing a governmental owned theater for theater productions. The CITY again wrongfully attempts to distinguish this Supreme Court case on the grounds that the theater company had the sole and exclusive right to operate the theater. The theater company made use of government property to make a profit just as does the Chicago White Sox.

In the case at bar, the Chicago White Sox have the sole and exclusive use of the stadium, clubhouses and practice facilities during spring training and minor league games (R.137-138). The Chicago White Sox also have first priority for use of the nonexclusive areas of the complex. (R. 138).

Likewise, the CITY makes the same argument on exclusive use with respect to Orlando Utilities Commission v. Milligan, 229 So.2d 262 (4th DCA 1969), cert. den. 237 So.2d 539 (Fla. 1970), whereby the 4th District Court held, that property owned by the Orlando Utilities Commission, which was used as a recreational area for the exclusive use of its employees and their families, was not exempt from ad valorem taxation.

In City of Orlando v. Hausman, 534 So.2d 1183 (5th DCA 1988), the City of Orlando and ten tenants at the Orlando property brought an action to contest the real property assessment of the City's fee or reversion interest made by the Orange County Property Appraiser. The City specifically argued that the tenants' leaseholds were subject only to intangible personal property taxation, and the City's underlying reversion interest was exempted from ad valorem taxation. While the Plaintiffs conceded that the tenants' use of the property was not for a municipal or public purpose, the Court appears to have made its own independent determination of that conclusion. The court stated:

> Two of the tenants' use of the properties is private and commercial and not for municipal or public purpose. Since the properties were being used for private purposes, there was not an exemption from ad valorem taxation and the trial court was correct in upholding

> the assessment of taxes against the city. Hausman, 534 So.2d at 1185.

In Hausman it is plain that the City's exemption from ad valorem taxation for the underlying fee interest in its property was lost when the tenants' use was not for a governmental, municipal or public purpose or function as defined in Williams.

All of this is supported by the recent decision of the Florida Supreme Court in Capital City Country Club, Inc., etc., v. Katie Tucker, 580 So.2d 789 (Fla. 1993). This case involves a golf course, i.e., recreational facility, owned by the City of Tallahassee. The course was leased to the Capital City Country Club.

The club's use of the property rendered the property taxable to the City, a result so obvious that all parties agreed. The Court acknowledged this result when it held that the separate taxation of the leasehold by the State was not double taxation.

Can the CITY seriously contend that the use of a baseball stadium by a professional baseball organization is dissimilar to the use of a golf course by a private club?

The CITY attempts to discredit City of Orlando v. Hausman, with the First District Court of Appeals's decision in Page v. Fernandina Harbor Joint Venture, 608 So.2d 520 (Fla. 1st DCA 1992), rev. den. 620 So.2d 761 (Fla. 1993). This is the only decision the CITY can cite in support of its claim for exemption.

The District Court of Appeal, First District, adopted the final judgment of the trial Court. The trial judge found that

construction or promotion of a public marina constituted a valid public purpose. Id. at 523. The trial Court's judgment also states the City of Fernandina Beach was never taxed while it operated the marina and the tenants' use was identical to that of the City's, i.e., a marina.

The Page decision oddly fails to site any of the Florida Supreme Court decisions on the issue of exemptions from taxation for leased government property previously cited in this brief. The Page Court attempts to distinguish the City of Orlando v. Hausman decision relied upon by the Nassau County Property Appraiser on two grounds. First, the Court believed the private entities involved in the Hausman case admitted that their use of the leased property was for private purposes. Page at 524. However, the Page Court seems to ignore later in the Hausman opinion where the Court makes its own independent determination that the property was being used for private purposes and not exempt from ad valorem taxation. Hausman at 1185.

Second, the Page Court states that it is the use of the subject property and not the institutional character of the entity using the property which determines whether an exemption applies under the statute. Page at 524. However, the Page Court here ignores Fernandina Harbor Joint Venture's proprietary use of government property as a commercial marina. Having failed to follow the utilization test found in Williams and Hausman, the Page decision is of little precedential value.

The PROPERTY APPRAISER in this case is of the opinion that municipal property is only entitled to an exemption from taxation when it is used for a governmental, municipal or public purpose or function as defined by the Supreme Court. When a municipality ventures into the private sector to compete against other businesses, its property becomes subject to taxation. In Page the property appraiser should have placed the City's marina on the tax roll if it was operated by the City as a business enterprise.

The most recent case to address these issues was Sebring Airport Authority v. McIntyre, 623 So.2d 541 (Fla. 2d DCA 1993).[5] In Sebring, the Airport Authority and International Raceway Corporation challenged the Property Appraiser's denial of a public purpose exemption from ad valorem taxation for property used as a raceway. The trial Court granted summary judgment in favor of the Property Appraiser and the Second District Court of Appeal affirmed.

In reaching this decision, the Second District Court of Appeal relied primarily upon Capital City Country Club Inc. v. Tucker and Volusia County v. Daytona Beach Racing and Recreational Facilities District. In so holding, the Court was unable to properly distinguish the Page decision based upon the decisions in Volusia County and Capital City. The Court states, "we are bound by the decisions of our Supreme Court which appear to us to be on point."

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[5] This case is also on appeal to the Florida Supreme Court styled, Sebring Airport Authority v. McIntyre, et al., Supreme Court Case No. 82,489. All briefs have been filed in the appeal and oral argument has been completed.

Sebring at 542. The Second District Court ultimately held the operation of a raceway was a proprietary function and did not entitle the property to an exemption from ad valorem taxation.

C. THE BOND VALIDATION PROCEEDING ESTABLISHED THE CONSTRUCTION OF THE STADIUM AND ASSOCIATED COMPLEX TO BE A VALID USE OF PUBLIC FUNDS, BUT IT DID NOT ESTABLISH LEASING THE STADIUM AND ASSOCIATED COMPLEX TO THE CHICAGO WHITE SOX CONSTITUTED A GOVERNMENTAL FUNCTION OR USE EXEMPT FROM AD VALOREM TAXATION.

The CITY's argument is premised on the theory that, because they used the general funds of the CITY from the general obligation bonds to create the facility, then the property is exempt, no matter to whom it is leased. That is not the law. The question they should ask and which is now before this Court is, could a municipality out of its general revenues or from a general revenue bond acquire and operate a major league baseball team and franchise?

The CITY argues at great length how the bond validation proceeding established conclusively, and as a matter of law, that construction of the stadium and complex was a valid use of public funds. It attempts to extend this concept to include the lease and potential use of this real property and improvements by the Chicago White Sox. The PROPERTY APPRAISER does not contend that construction of a baseball stadium and associated sports complex for public use is not a valid allocation of public funds. The PROPERTY APPRAISER has never taxed that percentage of the stadium and sports complex used by the people of Sarasota County. It is

only when the property was leased to private enterprise for major league baseball spring training facility, that its one-hundred (100%) percent tax exempt status was reduced.

In the record before this Appellate Court, the only document concerning the bond validation proceeding was the final judgment entered by the Circuit Court Judge in January of 1987. (R. 160-169). The judgment is absent of any language referencing or concerning the Chicago White Sox' or the Sarasota White Sox' use of the proposed facility. The final judgment does not make findings of fact or conclusions of law with regard to the exempt status of the proposed stadium and complex from ad valorem taxation in light of any existing or potential agreements with the Chicago White Sox.

In fact, the baseball facility lease, which is also part of the record, was not entered into between the CITY and the Chicago White Sox until August 3, 1988 (R.131). The parties contemplated the possibility the property might be taxed by making the CITY responsible for all ad valorem taxes in the lease. (R. 147).

In Brandes v. City of Deerfield Beach, 186 So.2d 6 (Fla. 1966), the Court was confronted with a validation of a bond issue for the construction of a baseball facility for the Pittsburgh Pirates' spring training by City of Deerfield Beach. The case demonstrates how an incidental benefit to the public from major league spring training may not be a public or municipal purpose. The court states:

> "Taxes for municipal purposes" means a public purpose as distinguished from a private or nongovernmental purpose; a purpose intended to embrace some of the functions of the

> governmental agency. The mere incidental advantage to the public resulting from a public aid in the promotion of private enterprise is not a public or municipal purpose.... Id. at 12.

Brandes negates the CITY's arguments that tourism is not just a mere incidental benefit to the public. That Court held such a use was in furtherance of a private and nongovernmental proprietary function.

The CITY vehemently argues the inapplicability of Brandes on several grounds. First, the CITY repeats its argument that the stadium was used entirely by the Pittsburgh Pirates' major league baseball organization. The CITY restates that the subject property is operated for public recreational activities in addition to the games of the Chicago White Sox. The PROPERTY APPRAISER has previously responded that he is only taxing the percentage of the property used for the proprietary use (R.56).

Second, the CITY argues the City of Deerfield Beach loaned its credit to a private corporation through the guise of revenue bonds. While this may be true, it has nothing to do with taxation. However, an examination of the current baseball facility lease demonstrates that the White Sox' use and control were not incidental to the creation and operation of this facility. The Chicago White Sox had both architectural and constructural control over the building of the stadium, clubhouse, office and associated training facilities. (R. 136). The Chicago White Sox reimbursed the CITY for a portion of the expenses relating to the building, offices and training facilities. (R. 136). The CITY would not have

constructed a stadium of this size, or the clubhouse and offices, without some agreement that the Chicago White Sox would use and help pay for them.

The CITY makes the argument the PROPERTY APPRAISER is bound by the determination of the Circuit Court with regard to the bond validation proceedings. Section 75.09, Florida Statutes (1967), provides that any judgment validating a bond is conclusive as to all matters adjudicated against the Plaintiff and all parties affected thereby including taxpayers and all others having or claiming any right, title or interest in the property to be affected by the issuance of said bond. MIKOS is not bound by the Final Judgment validating the general obligation bonds to build the subject stadium because he claims no right, title or interest in the property. He merely has placed the property on the tax roll for that portion of the use by the Chicago White Sox which constitutes a governmental-proprietary function, a use thus not exempt from taxation. The CITY has cited no case law estopping a property appraiser from placing upon the tax roll municipal property leased to a nongovernmental lessee whose use serves a governmental proprietary function.

II. THE 1994 AMENDMENT TO SECTION 196.012(6) OPERATES ONLY PROSPECTIVELY APPLYING TO THE 1994 AND SUBSEQUENT TAX ROLLS

In 1994, the Florida legislature amended Section 196.012(6), Florida Statutes (1991), to exempt from ad valorem taxation certain uses by a lessee including a sports facility with permanent seating

or stadium.[6] The CITY argues this amendment does not create new law but, in fact, clarifies the original legislative intent that recreational facilities such as sports facilities with permanent seatings and stadiums are exempt from ad valorem taxation.

Tax statutes operate only prospectively unless legislative intent to the contrary clearly appears. Hausman v. VTSI Inc., 482 So. 2d 428 (Fla. 5th DCA 1985); State v. Green, 101 So.2d 805 (Fla. 1958).

A careful review of the amendment to Section 196.012(6), Florida Statutes (1991), finds no clear legislative intent for this amendment to operate retroactively. In fact, the clear language of the statute reveals a legislative intent for the statute to operate only prospectively. Section 59 of House Bill 2557, at Page 63, provides, in part:

> Section 59. Effective upon this act becoming law and applying to the 1994 and subsequent tax rolls Subsection 6 of Section 196.012, Florida Statutes, is amended to read ....

The clear legislative intent of this section is for the amendment to apply to the 1994 and subsequent tax rolls. The CITY has argued, however, the statute should be applied retroactively to exempt this property from the 1990 Sarasota County tax roll.

In Hausman v. VTSI, Inc., the Property Appraiser attempted to rely upon a revision in the Florida Statutes concerning assessment

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[6] This amendment is unconstitutional since the exemption is not authorized by the present State Constitution. For a further discussion of this issue, see III of Appellee's Answer Brief.

of time share properties to validate his assessment for a prior year. The Court held "tax statutes, however, operate only prospectively unless legislative intent to the contrary clearly appears." Id. at 430. The Court refused to allow Hausman to validate his assessment, having found no legislative intent to have the time share statute to operate retroactively. Id. at 430.

In support of their position, the CITY relies primarily upon State ex rel Szabo Food Services Inc. of N. C. v. Dickinson, 286 So.2d 529 (Fla. 1974). In Szabo, the amendment to the statute sought to confirm that sales taxes were owed on food and drink sold from vending machines. In other words, sales tax was owed on the food and drink from vending machines both before and after the amendment to the sales tax statute.

Szabo is clearly distinguishable from facts of the case sub judice. Section 196.012(6), Florida Statutes (1991), works to grant an exemption from ad valorem taxation to property which was previously taxed. In Szabo, the amendment confirmed that food and vending machines were subject to sales tax. Szabo does not stand for the proposition that tax statutes should be applied retroactively as has been argued by the CITY.

The CITY acknowledges the general rule of prospective application of legislation in discussing the second exception to this general rule. New legislation can be applied retroactively if enacted soon after a controversy created by the courts. The only case the CITY has cited in support of its proposition that the use of municipal property for a baseball stadium serves a public

purpose or function is Page. As this Court is well aware, Page involved the taxation of property owned by a municipality and operated as a marina. If the Page decision had caused a controversy such that the Florida legislature amended Section 196.012(6), Florida Statutes (1991), to exempt such a use, it is ironic that House Bill 2557 amending Section 196.012(6), Florida Statutes, does not contain an exemption for marinas. The CITY's argument in this regard, therefore, holds little water.

III. THE 1994 AMENDMENT TO SECTION 196.012(6), FLORIDA STATUTES VIOLATES ARTICLE VII, SECTION 3, OF THE FLORIDA CONSTITUTION (1968)

Prior to 1968, the Constitution of 1885, Article XVI, Section 16, provided that property owned by corporations (municipalities), "shall be subject to taxation unless ... used exclusively for religious, scientific, municipal, educational, literary or charitable purposes". The phrase, municipal purpose, was interpreted to include any public purpose including a community recreational asset and business stimulus like the Daytona Speedway. Daytona Beach Racing and Recreational Facility District v. Paul, 179 So.2d 349 (Fla. 1965).

The broad interpretation of municipal purpose in the Constitution of 1885 created inequities in the tax structure by exempting municipal property used for private purposes while taxing privately owned property used for those same purposes. The drafters 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 purposes". Article VII, Section 3,

Florida Constitution (1968). The Legislature has attempted on many occasions since the drafting of the 1968 constitution to create municipal exemptions which have no constitutional basis.

In Williams v. Jones, discussed previously in this brief, the Supreme Court was faced with a constitutional challenge by taxpayers to Sections 196.011(2), 196.199(6) and 196.199(7), Florida Statutes (1991). These statutes were enacted as part of Chapter 71-133, Laws of Florida 1971, commonly referred to as the "Tax Reform Act". Part of this Act explicitly eliminated the exemption from taxation for leaseholders of government property on Santa Rosa Island.

The leaseholders argued that the taxation of leasehold interests as real property violated the provisions of Article VII, Sections 2 and 4, Florida Constitution, as being an unreasonable classification under the "just valuation" mandate of such article. The Court noted as a general rule that the Legislature is precluded from classifying property for valuation purposes at less than just valuation except in the instances of the provisos to Article VII, Section 4, Florida Constitution (1968). See also Interlachen Lakes Estates Inc. v. Snyder, 304 So.2d 433 (Fla. 1973).

The Supreme Court noted these statutes were an attempt to uniformly tax municipal and private property devoted to private use thus ensuring an equitable distribution of tax burden. On the Appellant's argument, the Supreme Court stated,

> Basically the Appellants contend for a constitutional exemption from ad valorem real estate taxation where none exists and, if it did, such an exemption would undoubtedly be

> discriminatory and violative of the equal protection provisions of the Florida and United States constitutions.

Thus the decisions in Williams v. Jones enforced the intentions of the drafters of the Constitution of 1968 in ensuring uniformity of taxation including those who lease government property.

In Archer v. Marshall, 355 So.2d 781 (Fla. 1978), the Supreme Court was faced with yet another attempt to grant the leaseholders on Santa Rosa Island an exemption from ad valorem taxation. Specifically, the special act called for a reduction in rent to be paid by leaseholders to the Santa Rosa Island Authority in an amount equal to the ad valorem taxes paid on that leasehold interest for County and school purposes during the previous year.

The Florida Supreme Court affirmed the decision of the trial Court in holding the above statute unconstitutional. The Court stated,

> Regardless of the term used to describe the set-off, the reduction in rent afforded the leaseholders has the effect of a tax exemption and as such is unconstitutional since such exemption is not within the provisions of our present State constitution.

Williams v. Jones and Straughn v. Camp.

A companion case to Archer v. Marshall was Am Fi Investment Corporation v. Kinney, 360 So.2d 415 (Fla. 1978). In Am Fi Investment Corporation, the Florida Legislature again attempted to provide for repayment by the County to leaseholders on Santa Rosa Island an amount equal to all ad valorem taxes for County and school purposes paid by them on their possessory interests from 1972 through 1974. The Supreme Court noted that in Archer v.

Marshall they had previously determined that a similar special act was unconstitutional because it unlawfully provided for an indirect exemption from ad valorem taxes to certain leaseholders on Santa Rosa Island. The reason such special acts violated the Florida Constitution were that previous Court decisions in Williams v. Jones and Straughn v. Camp held that Santa Rosa Island leaseholder interests were not performing or serving a public purpose. The two special acts in question relieved the Island leaseholders from ad valorem tax burdens in violation of Article VII, Section 3, Florida Constitution (1968). The Florida Supreme Court again stressed a need for all properties used for private purposes to bear its just share of the tax burden for support of local government and education.

The next case to follow was Lykes Brothers Inc. v. City of Plant City, 354 So.2d 878 (Fla. 1978). In an attempt to make use of undeveloped land Plant City invited Lykes Brothers to move its meat packing plant from Tampa to a proposed industrial park. As part of the contract, Plant City agreed never to annex or to impose municipal taxes on the Lykes' property.

When the Florida Legislature by special act incorporated the industrial park within Plant City's boundaries, the Lykes' property was placed upon the tax roll despite Lykes' attempt to prevent the assessment of ad valorem taxes.

The trial Court held the City's contractual agreement for tax exoneration was beyond the City's authorized power and that the so-called savings law for pre-1972 leasehold interests, Section

196.199(3), Florida Statutes (1991), is inapplicable to this case or, insofar as it pertains to private lessees on governmental lands who use the property for non-public purposes, is invalid. Id. at 879.

The Florida Supreme Court first held that a municipality lacks power to contract away its taxing authority and any such acts are "ultra vires" and void in the absence of specific legislative authority. Id. at 880.

In holding that the savings clause for pre-1972 contracts did not benefit Lykes, the Court stated:

> Lykes' contention with respect to the application and validity of Section 196.199(3) - that an ultra vires municipal contract can be legislatively ratified if it could have been authorized initially - is generally correct, but it neglects an additional requirement. The legislative attempt at gratification must itself be consistent with the Constitution. At the time Section 196.199(3) was enacted, the Legislature no longer possessed the Constitutional power to authorize tax exoneration of property owned by a municipality and used by a private lessee predominantly for non-public purposes.

The Court refused to read such an attempt into the statute and upheld its constitutionality. The Court noted in Footnote 12 that the trial Court was correct in concluding that "Florida's 1968 Constitution requires the taxation of private leaseholds in government owned property used for non-public purposes". Lykes' use of the property therefore served a non-public purpose.

More recently, the Florida Supreme Court in Capital City Country Club Inc. v. Tucker, 613 So.2d 450 (Fla. 1993), was faced

with invalidating a State statute on the grounds that it violated Article VII, Section 3, of the Florida Constitution.

The Capital City Country Club, a not profit corporation, leased property from the City of Tallahassee for use as an exclusive country club. In attempting to avoid payment of ad valorem taxes, the Club argued that Section 196.199(4), Florida Statutes (1991), intended to exempt from real estate taxation leases entered into before April 15, 1976. As in Lykes, the Florida Supreme Court in order to uphold the constitutionality of the statute did not read into its language any attempt to exempt from taxation leases entered into before April 15, 1976. The Court stated,

> 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. Id. at 451.

The Legislature is without authority to grant an exemption from taxes where the exemption does not have a constitutional basis. Archer v. Marshall; Capital City Country Club v. Tucker. The 1994 amendment to Section 196.012(6), Florida Statutes (1991), grants an exemption to taxation for the use by a lessee of real property or improvements including a convention center, visitor center, sports facility with permanent seating, concert hall, arena, stadium, park, or beach. The amendment is violation of Article VII, Section 3, of the Florida Constitution, because the use of government property as a convention center, visitor center, sports facility with permanent seating, concert hall, arena, or

stadium, has previously been determined by the Courts of the State of Florida to be a use which does not serve a governmental function or otherwise qualifies for an exemption from ad valorem taxation. See Williams v. Jones; Capital City Country Club v. Tucker; City of Orlando v. Hausman; Markham v. MacCabee Investments Inc.; Orlando Utilities Commission v. Milligan; Straughn v. Camp; Volusia County v. Daytona Beach Racing and Recreational Facilities District and Walden v. Hillsborough County Aviation Authority and Sebring Airport Authority v. McIntyre.

CONCLUSION

Based on the foregoing, Appellee/Respondent, J. W. MIKOS, Property Appraiser for Sarasota County, Florida, requests this Court to affirm the decision of the Second District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to Sarah A. Schenk, Attorney for City of Sarasota, Taylor, Lawless and Singer, P.A., 46 N. Washington Blvd., Suite 21, Sarasota, FL 34236, and upon attorneys for Amicus, Michael S. Davis, P.O. Box 2842, St. Petersburg, FL 33731, and Harry Morrison, Special Counsel, Florida League of Cities, P. O. Box 1757, Tallahassee, Florida 32302, this 29 day of July, 1994.

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