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SUPREME COURT OF FLORIDA

CASE NO: 85,434

PORT OF PALM BEACH DISTRICT,

Petitioner,

vs.

DEPARTMENT OF REVENUE. et al.,

Respondents.

BRIEF OF AMICI CURIAE

JOHN R. JONES, ESCAMBIA COUNTY PROPERTY APPRAISER

AND

JAMES PAGE, NASSAU COUNTY PROPERTY APPRAISER

Larry E. Levy
Fla Bar No. 047019
Loren E. Levy
Fla Bar No. 0814441
The Levy Law Firm
Post Office Box 10583
Tallahassee, Florida 32302
904/222-7680

Counsel for amici curiae

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INTRODUCTION

The Honorable John R. Jones, in his official capacity as Escambia County Property Appraiser (Jones), and the Honorable James Page, in his official capacity as Nassau County Property Appraiser (Page), submit this brief as amici curiae in support of the respondents, Department of Revenue, et al. Jones is the duly elected property appraiser of Escambia County, Florida, and Page is the duly elected property appraiser of Nassau County, Florida, and are interest in this case because it involves the taxation of governmentally-owned property leased to private entities. Jones and Page adopt the briefs and arguments of the respondents and respectfully urge this Court to disapprove the decision in Sarasota-Manatee Airport Auth. v. Mikos, 605 So.2d 132 (Fla. 2d DCA 1992), review denied, 617 So.2d 320 (Fla. 19931, and approve the decision in Florida Dent. of Revenue v. Canaveral Port Auth., 642 So.2d 1097 (Fla. 5th DCA 1994), and hold that the "function by utilization" test applies to property owned by the state, counties, cities, and other public bodies which is leased to private individuals for proprietary purposes.

PRELIMINARY STATEMENT

The petitioner, Port of Palm Beach District will be referred to herein as the "district." The respondent, Department of Revenue will be referred to herein as the "department," and respondent Palm Beach County Property Appraiser will be referred to herein as the "appraiser." The amici curiae, John R. Jones, Escambia County Property Appraiser and James Page, Nassau County Property Appraiser, will be referred to herein as "amici."

STATEMENT OF THE CASE AND OF THE FACTS

The amici adopt the Statement of the Case and of the Facts as set forth in the brief of the appraiser.

SUMMARY OF ARGUMENT

The amici, Jones and Page submit that the property of the district leased to private commercial lessees is taxable and that the district court was correct in so holding. The amici also submit that Sarasota-Manatee Airport Auth. v. Mikos, 605 So.2d 132 (Fla. 2d DCA 19921, review denied, 617 So.2d 320 (Fla. 1993), was incorrect for two reasons which are: (1) SMAA is not a political subdivision of the state, and (2) the SMAA court was incorrect in not applying the "function by utilization" test recently reaffirmed by this Court in Sebring Airport Auth. v. McIntyre, 642 So.2d 1072 (Fla. 1994).

The amici also submit that the district court's decision in Bell v. Bryan, 505 So.2d 690 (Fla. 1st DCA), review denied, 513 So.2d 1060 (Fla. 1987), is incorrect and should be disapproved of to eliminate any lingering confusion for the same reasons this court disapproved of Miller v. Higgs, 468 So.2d 371 (Fla. 1st DCA), review denied, 479 So.2d 117 (Fla. 1985). Bryan, like Miller, held that leasehold improvements (buildings, structures, etc.) were part of the intangible and taxable as such.

The concept of immunity rests on public policy grounds that avoids using taxpayer dollars to pay taxes to the government on government property used as an integral part of the government. When such property is no longer used as an integral part of government, the linchpin for immunity ceases to exist, and the property and persons using same are not entitled to the

benefit of such immunity. Then such property and the users of same should be treated like all other privately owned and used property in the taxing entity.

This Court recognized this in William v. Jones, 326 So.2d 425 (Fla. 1975), when it held that the Florida Constitution required taxation of all governmental property where lessees of same did not perform a governmental-governmental purpose. This "function by utilization" test is proper because immunity has ceased to exist where the property is no longer used as an integral part of the function of government. The county or city is not paying taxes to itself because the fiscal burden falls on the lessee, and taxing such property and the users of same, is not inconsistent with the underlying linchpin for immunity, because immunity no longer exists.

Section 196.199, Florida Statutes (1993), recognizes this concept by requiring for all governmental entities, that their property must be both owned and used by the governmental entity to be exempt. Section 196.199(2) (a), Florida Statutes (1993), allows for exemption to continue if leased but only if the lessee of government owned property uses it as an integral part of the government, or as stated in Williams, and reaffirmed numerous times since, most recently in Sebrins Airport Auth., used for a governmental-governmental purpose as opposed to a governmental-proprietary purpose. This established the "function by utilization" test. Section 196.199 also recognizes this.

No constitutional exemption exists for private

commercial lessees of government-owned property. No statutory distinction is made for property whether county-owned or city-owned. All private lessees are treated the same.

Any attempt by the district to duplicate the Sarasota-Manatee Airport Authority's feat of amending its special act to declare itself a "political subdivision" should be rejected. The only "political subdivisions" in Florida are the 67 counties. The true nature of the entity determines its character and the district possesses no general governmental powers and performs no general governmental administration. It should be the true nature of the entity created which determines its identity not a legislative designation. Although such may be helpful in some instances, it is a judicial function to examine such entity's powers and purposes to determine its nature. The enabling legislation of the district clearly shows it to be created to engage in proprietary activities in a port operation. It functions in large part as a financing vehicle to secure development of the port area as a purely private commercial undertaking.

ARGUMENT

The property of the district leased to private lessees engaged in commercial profitmaking undertakings is taxable.

At issue is the taxable status of certain property titled in the name of the district, but leased and used by private lessees for private, profitmaking purposes in Palm Beach County, Florida. The district is a port authority as defined in section 315.02, Florida Statutes (1993). It is not a municipality as referred to in article VIII, section 2, Florida Constitution, and is not a "county" as referred to in article VIII, section 1. The specific property involved in this suit is owned in fee simple by the district, and leased to Florida Sugar Marketing & Terminal Association, Inc., Florida Molasses Exchange, Inc., and Birdsall, Inc. Although the Fourth District Court of Appeal in its decision, Department of Revenue v. Port of Palm Beach District, 650 So.2d 700 (Fla. 4th DCA 1995), after finding that the district was not immune from taxation, remanded the case back to the trial court for determination as to whether any statutory exemptions would apply, the amici submit that no statutory exemptions would apply for the use of the property made by the lessees and accordingly, the property is taxable and no remand is necessary. No attempt was ever made by the appraiser to assess the leasehold interest and such leasehold interests are taxable only as intangibles by the department pursuant to chapter 199, Florida Statutes (1993). The assessment was an assessment

directly against the property itself which the appraiser assessed because it was not being used for a legitimate governmental-governmental purpose as opposed to a governmental-proprietary purpose in this view.

The district makes four arguments which may be summarized as follows:

1. First, the district argues that it should be immune under the decision announced in Sarasota-Manatee Airport Auth. v. Mikos, 605 So.2d 132 (Fla. 2d DCA 1992), review denied, 617 So.2d 320 (Fla. 1993). It contends that it is a "political subdivision" and thus is immune from taxation and further contends that this is evidenced by a special act which was enacted during the 1995 session of the Florida Legislature, said special act being chapter 95-467, Laws of Florida (1995). Under this point the district likens itself to the Sarasota-Manatee Airport Authority which also had procured an amendment to its special act declaring it to be a political subdivision within the purview of section 196.199, Florida Statutes (1993). Essentially, the district is contending that because it raced to the legislature in 1995 and caused an amendment to its special act to be adopted, that this evidences legislative intent that all port authority property leased to private companies and individuals who use same for private, profitmaking purposes is exempt. The statutes are replete with special acts where various governmental entities which possess no general governmental powers are declared to be political subdivisions and a

"race/race" to the legislature to amend a special act which few legislators pay any attention to should never suffice to make a lesser governmental entity a "true" political subdivision. The amici submit that political subdivisions as the term is used in section 196.199, Florida Statutes (1993), has reference only to "those political subdivisions referred to in article VIII, section 1; to wit-- the 67 counties in Florida.

2. The district next contends that since the tax reform act was enacted in 1971 through chapter 71-133, Laws of Florida (1971), and since the district charter was readopted by the legislature in 1974 through chapter 74-570, Laws of Florida (1974), that the 1971 act did not and could not have been intended to change the status of the property referred to in the district's special act of 1974.

3. The district also contends that its property is exempt under section 315.11, Florida Statutes (1993), chapter 74-570, Laws of Florida, and at page 6 of its brief quotes a section of chapter 74-570, Laws of Florida.

4. Finally, the district argues that, even if the Court finds that the property is taxable, such taxation should be made prospective only.

These contentions will be considered in order.

A. <u>Sarasota-Manatee</u> does not control.

The amici submit that the decision in <u>Sarasota-Manatee</u> was incorrect and should be disapproved. In <u>Sarasota-Manatee,</u>

while the dispute was pending, representatives of the authority had the act creating it amended to declare it to be a political subdivision within the purview of chapter 199. Indeed, the district has copied this procedure in the instant case. The nature of the entity created by special act must be examined in each instance to determine its true character and a cursory examination of the nature of the district, and Sarasota-Manatee Airport Authority reveals that neither possess any general governmental powers. General governmental powers are possessed only by the state, counties, and cities.

Traditionally, it is the function of the courts to determine upon proper examination the nature of the public entity created by special act as part of its judicial function. The name applied to the specific entity could never be controlling because special acts are replete with language which would fit most any entity's existence in Florida. For instance, the First District Court of Appeal noted this in St. John's Associates v. Mallard, 366 So.2d 34 (Fla. 1st DCA 1978), writ discharged, 373 So.2d 912 (Fla. 1978). More recently this Court's decision in Sebring Airport Auth. v. McIntyre, 642 So.2d 1072 (Fla. 1994), involved chapter 332, Florida Statutes (1993), and a special act which was replete with language declaring that the function of the Sebring Airport Authority and Sebring International Raceway was a governmental function and fulfilled a governmental purpose. In affirming the Second District Court of Appeal's decision that the involved property was taxable, this Court reaffirmed the test

announced in Williams v. Jones, 326 So.2d 425 (Fla. 1975), and followed since then, that, for exemption to inure to property leased to a private lessee, the property must be used for a governmental-governmental purpose opposed to a governmental-proprietary purpose. In doing so, this Court recognized that the distinction between governmental functions and proprietary functions which has been long recognized and briefly describes the distinction in its footnote as follows:

> Proprietary functions promote the comfort, convenience, safety and happiness of citizens, whereas government functions concern the administration of some phase of government. *Black's Law Dictionary 1219* (6th ed. 1990).

Sebring Airport Auth., 642 So.2d at 1074. Legislative language and declarations were not controlling.

Furthermore, numerous cases have recognized the limited authority and specific purpose of entities such as port districts, drainage districts, and other authorities and recognize that they generally assist to allow for government financing of such facilities and regulation thereof. See Broward County Port Auth. v. Arundel, 206 F.2d 220 (5th Cir. 1953); Hillsoboush County Aviation Auth. v. Walden, 210 So.2d 1993 (Fla. 1968): Sugar Bowl Drainage Dist. v. Miller, 162 So. 707 (1935); State v. Frontier Acres Community Dev. Dist., 472 So.2d 455 (Fla. 1988). Such type entities are special purpose entities created for limited purposes possessing no general governmental power, and performing no part of the general administration of the policy of the state. In fact, the district's own charter

recognizes this by referring to its "proprietary purposes." See ch. 74-570, Laws of Florida.

Pending in this court for review is Florida Dept. of Revenue v. Canaveral Port Auth., 642 So.2d 1097 (Fla. 5th DCA 1994). In that case this Court accepted jurisdiction based upon conflict between the district court's decision in Canaveral Port and Sarasota-Manatee.

The position of the amici is that the decision in Sarasota-Manatee was incorrect and that the property involved in Canaveral Port was taxable and that the property involved in the instant case also is taxable and that this court should adopt its reasoning as set forth in Sebring Airport Auth. The amici ask this Court to reaffirm the "function by utilization" test set forth in Straughn v. Camp, 293 So.2d 689 (Fla. 1974), and followed in Williams v. Jones; Volusia County v. Daytona Beach Racing & Recreational Facilities Dist., 341 So.2d 498 (Fla. 1976), appeal dismissed, 434 U.S. 804 (1978); Lykes Bros., Inc. v. City of Plant City, 354 So.2d 878 (Fla. 1978); Archer v. Marshall, 355 So.2d 781 (Ffa. 1978); Walden v. Hillsborough County Aviation Auth., 375 So.2d 283 (Fla. 1979); Capital City Country Club v. Tucker, 613 So.2d 448 (Fla. 1993); and Sebring Airport Auth., and hold that it is the use of governmentally owned property leased to non-governmental lessees which determines its taxable status and not the ownership thereof. Thus, governmentally owned property leased to private lessees for proprietary purposes is taxable regardless of whether the

property is owned by the state, county, municipality, authority, or other governmental entity.

It is well established that property owned and used by the state and counties for governmental purposes is immune from taxation. Dickinson v. City of Tallahassee, 325 So.2d 1 (Fla. 1975); State v. Alford, 107 So.2d 27 (Fla. 1958); Park-N-Shop, Inc. v. Sparkman, 99 So.2d 571 (Fla. 1958). Such immunity is not dependent upon statutory or constitutional provisions "but rests upon broad grounds of fundamentals in government." Alford, 107 So.2d at 29. As stated in 84 Corpus Juris Secundum, section 200 (1954) :

> While in the absence of any constitutional prohibition the state may tax its own property, the presumption is always against an intention to do so, and such property is impliedly immune from taxation unless an intention to include it is clearly manifested. This immunity, although in some jurisdictions declared by constitutional or statutory nrovisions expressly exempting such property from taxation . . . is not dependent thereon, but rests on public policy and the fundamental principles of sovernment.

The seminal case involving the immunity of property owned by the federal government from taxation by the states is McCulloch v. State of Maryland, 17 U.S. (4 Wheat.) 316 (1819). That case involved Maryland's attempted taxation of notes issued by the national bank located in Maryland. In declaring the federal government immune from state taxation, the United States Supreme Court viewed the issue in terms of the state's "power" to tax the federal government. As the Court stated:

There must be, in this case, an implied

> exception to the general taxing power of the States, because it is a tax upon the legislative faculty of Congress, upon the national property, upon the national institutions. Because the taxing powers of the two governments are concurrent in some respects, it does not follow, that there may not be limitations on the taxing power of the States, other than those which are imposed by the taxing power of Congress. Judicial proceedings are practically a subject of taxation in many countries, and in some of the States of this Union. The States are not expressly prohibited in the constitution from taxing the judicial proceedings of the United States. Yet such a prohibition must be implied, or the administration of justice in the national Courts might be obstructed by a prohibitory tax.
>
> * * * *
>
> All the property and all the institutions of the United States are, constructively, without the local, territorial jurisdiction of the individual States, in every respect, and for every purpose, including that of taxation. This immunity must extend to this case, because the power of taxation imports the power of taxation for the purpose of prohibition and destruction.

McCulloch, 17 U.S. (4 Wheat.) at 394-395 (emphasis added).

In reaching its decision, the Court rejected the argument that, because the federal government could tax state banks, the states had the concomitant power to tax federal banks. Again, the Court viewed the issue in terms of the respective powers of the federal and state governments. As the Court stated:

> But it is said, that Congress possesses and exercises the unlimited authority of taxing the State banks; and, therefore, the States ought to have an equal right to tax the bank of the United States. The answer to this objection is, that, in taxing the State

> banks, the States in Consress exercise their power of taxation. Consress exercises the power of the people. The whole acts on the whole. But the State tax is a part acting on the whole.
>
> * * * *
>
> The people of the United States, and the sovereignties of the several States, have no control over the taxing power of a particular State. But they have a control over the taxing power of the United States, in the responsibility of the members of the House of Representatives to the people of the State which sends them, and of the senators to the legislature by whom they are chosen. But there is no correspondent responsibility of the local legislature of Maryland, for example, to the people of the other States of the Union.

McCulloch, 16 U.S. (4 Wheat.) at 398 (emphasis added).

The same considerations of the respective powers of governmental entities were present in Dickinson. There, the City of Tallahassee imposed a utility tax on all purchases of electricity, water, and gas made within the city limits. The city ordinance specifically exempted purchases of the federal government and churches but contained no exemption for the state.

The state argued that it was immune from taxation. The city argued that any immunity was irrelevant because the 1968 constitution conferred municipal taxing authority without reserving sovereign immunity.

This Court stated that the determinative question was whether the state had waived its immunity in either the 1968 Constitution or the applicable statutes. This Court, however, analyzed the question in language similar to the discussion of

the respective powers to tax set forth in McCulloch. As this Court stated:

> The question of 'immunity' is more than merely a facial exercise in constitutional and statutory construction. There are compelling policy reasons for the doctrine in terms of fiscal management and constitutional harmonization. If we were to adopt the City's suggestion that the State is only exempt from taxation, the present Florida Constitution would enable the cities to tax the State and its counties without their being able to tax the cities.
>
> * * * *
>
> Thus, it is inconsistent with sound governmental principles to suggest that a state which cannot finance itself on a deficit basis would indirectly authorize an indeterminate amount of revenue to be taken from all of its citizens for the benefit of some of its municipal sovernments.

Dickinson, 325 So.2d at 4 (emphasis added, footnotes omitted).

In addition to the respective powers of federal, state, county, and municipal governments forming a basis for the concept of governmental immunity from taxation, fiscal management and policy provides a second basis for such immunity. As stated in 2 Thomas M. Cooley, The Law of Taxation section 621 (4th ed. 1924):

> All such property is taxable, if the state shall see fit to tax it; but to levy a tax upon it would render necessary new taxes to meet the demand of this tax, and thus the public would be taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed, whose compensation would go to increase the useless levy.
>
> * * * *
>
> To restate, the rule is that while a state 'may' tax its own property or the property of

> a political subdivision unless it is otherwise provided by the constitution,--and a county, city, village, town, or other local taxing district may tax its own property, provided the power to so tax has been delegated and there is no prohibition thereof either in the constitution or statutes of the state,--vet the general rule, independent of constitution or statute, is that property belonging to the state or a political division thereof is not taxable, on the theory that such taxation would merely be taking money out of one pocket and putting it in another, unless the constitution or states [sic] clearly show an intention to tax such property; and this implied exemption is generally reinforced by express provisions in the constitution or statutes exempting such property wholly or in part.

(Emphasis added.)

However, the general rule regarding immunity ceases to exist when the property ceases to be used as an integral part of the sovereign government. As stated in 84 Corpus Juris Secundum, section 198:

> Unless congress consents thereto, all property belonging to the United States, devoted to public uses, is immune from state taxation; but, when federal property is placed in a private enterprise for gain, the immunity has no application. So the state may tax private property in which the federal government may have an interest, or property the legal title to which is in the United States, but the beneficial ownership in another.

(Emphasis added.)

Accordingly, for immunity to exist the property must be used as an integral part of government. 84 Corpus Juris Secundum, section 203 states that:

> The property of municipal corporations which is immune from taxation is such as is

> owned and held by it in its capacity as an integral part of the state government, or which is necessary to enable it to administer those powers of local self-government, or to perform those public functions which have been intrusted to its care. This will include property held and used for city halls, courthouses, jails, public schools, and the like, and engine houses, and other property used by the fire department, public ferries, wharves or bridges, public markets, public parks, poorhouses, pauper cemeteries and other property devoted exclusively to public charities, and generally all such property as is used solely for legitimate municipal purposes.

(Emphasis added.)

Any determination of whether property owned by a given entity is immune from taxation, however, does not end this Court's inquiry. Instead, the inquiry turns to whether such immunity has been waived by law or by use for a non-governmental function. In Williams, this Court recognized that immunity only exists so long as the property is used as an integral part of government by adopting the governmental-governmental use test to determine exemption for private commercial lessees.

It also is well established that immunity can be waived. Dickinson; Alford. "That, within constitutional limits, the Legislature may provide for the taxation of lands or other property of the State, is readily conceded. The question arises, however, whether the subject act actually does so provide." Alford, 107 So.2d at 29. As this Court in Dickinson recognized, the "crux of this case, as it was in *Alford*, is whether the State has waived its immunity from city taxation in either the 1968 Constitution or the applicable statutes." Dickinson, 325 So.2d

at 3. C.f. § 768.28, Fla. Stat. (1993) (the legislature's waiver of immunity from tort claims).[1] Neither Canaveral Port Auth., Sarasota-Manatee, nor the Fourth District Court of Appeal's decision address the waiver of immunity issue by non use by the public entity, or by ceasing to use it for a legitimate governmental-governmental function. The Fourth District Court of Appeal's decision, having concluded that the district was not a political subdivision, remanded the case for a determination as to whether the use made by the lessee would render the property exempt.

Sarasota-Manatee merely stopped its analysis once it reached the conclusion that the property owned by SMAA was immune. Canaveral Port Auth. expressly stated that it did not need to consider the waiver of immunity issue because of its conclusion that property owned by the port authority was exempt and not immune. See Canaveral Port Auth., 642 So.2d at 1102 n.11. It is the amici's position that any inquiry of governmental immunity from taxation necessarily requires the court to determine whether that immunity has been waived by statute or use.[2]

Section 196.199, Florida Statutes (1993), states in

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[1] State v. Alford, 107 So.2d 27 (Fla. 1958), expressly observed that the principle of sovereign immunity from tort claims was analogous to the principle of immunity from taxation. See 107 So.2d at 29 n.9.

[2] Andrews v. Pal-Mar Water Control Dist., 388 So.2d 4 (Fla. 4th DCA 1980), is distinguishable in that it did not involve any non-governmental use or private lessees.

pertinent part that:

> 196.199 Government property exemption.--
> (1) Propertv owned and used by the followins qovernmental units shall be exempt from taxation under the followins conditions:
> (a) All property of the United States shall be exempt from ad valorem taxation, except such property as is subject to tax by this state or any political subdivision thereof or any municipality under any law of the United States.
> (b) All property of this state which is used for governmental purposes shall be exempt from ad valorem taxation except as otherwise provided by law.
> (c) All wrowertv of the several political subdivisions and municipalities of this state or of entities created by seneral or special law and composed entirely of qovernmental aqencies, or property conveyed to a nonprofit corporation which would revert to the qovernmental_aqency, which is used for governmental, municiwal, or wublic wurwoses shall be exempt from ad valorem taxation, except as otherwise provided by law.
> (2) Property owned by the followinq qovernmental units but used by nonqovernmental lessees shall only be exempt from taxation under the followins conditions:
> (a) Leasehold interests in property of the United States, of the state or any of its several political subdivisions, or of municipalities, aqencies, authorities, and other public bodies corporate of the state shall be exempt from ad valorem taxation only when the lessee serves or werforms a qovernmental, municiwal, or wublic wurpose or function, as defined in s. 196.012(6).

(Emphasis added).

Section 196.199 must be read in conjunction with section 196.001, Florida Statutes (1993). Section 196.001 states that:

> 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.

Also pertinent and carefully avoided by the district in its brief is section 196.199(4), Florida Statutes (1993), which provides:

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

This provision makes it clear that property of the district is taxable unless used for the exempt purposes stated therein. If the district does not fit there where does it fit?

Section 196.199(1), Florida Statutes (1993), requires both "ownership and use" for exemption to inure and section 196.199(2)(a) expressly waives immunity from taxation for property owned by the United States, the state or any of its several political subdivisions, or by municipalities, agencies, authorities and other public bodies corporate but used by nongovernmental lessees unless the lessee uses the property for governmental, municipal, or public purposes. By including the federal government along with the state, its political subdivisions, municipalities, agencies, and authorities, the

legislature has expressly indicated the test for any immunity or exemption from taxation. The test that the property must be used for a governmental, municipal, or public purpose, is identical regardless of the governmental entity owning the property. In fact, the First District Court of Appeal held taxable property owned by the federal government but leased to a commercial lessee in Tre-O-Ripe Groves v. Mills, 266 So.2d 120 (Fla. 1st DCA 1972). See also Bancroft Inv. Corp. v. City of Jacksonville, 27 So.2d 162 (Fla. 1946). Accordingly, it is the use of the property that determines its taxable status and not the ownership thereof. See Straushn; Volusia County; Orlando Utilities Comm'n. v. Milligan, 229 So.2d 262 (Fla. 4th DCA 1969).

As this Court has observed, section 196.199 was enacted in response to its decision in Park-N-Shop. See Williams, 326 So.2d at 434. Park-N-Shop involved county owned property leased to private individuals for commercial purposes. Pursuant to the lease terms, no ad valorem taxes could be levied against the property but taxes could be levied against any buildings built on the property when substantially completed. Various taxpayers challenged this arrangement, arguing that the property "in the hands of private individuals is being used for commercial enterprises that compete with other businesses, and compete unfairly because the operators using the property in question are relieved of taxes while those who compete with them must carry their share of the tax burden." Park-N-Shop, 99 So.2d 572.

This Court rejected the taxpayers' argument, holding

that the "property of the state and of a county, which is a political division of the state, Sec. 1, Article VIII, is immune from taxation, and we say this despite the references to such property in Sec. 192.0611) and (2), supra, as being exempt." Park-N-Shop, 99 So.2d at 573-574 (italics in original). Thus, this Court did not require the property to be used for a governmental purpose to retain that immunity.

By enacting section 196.199, the legislature effectively has overruled Park-N-Shop. As this Court stated:

> Section 192.62 [now 196.1991, Florida Statutes, was obviously enacted in 1961 by the Legislature in response to the Court's observation in *Park-N-Shop, Inc. v. Sparkman, supra,* that a leasehold interest in publicly owned land was neither tangible nor intangible personal property but that there was no reason why the Legislature could not set up machinery to tax such a leasehold interest. See footnote 3 to the majority opinion in Dade *County v. Pan American World Airways, Inc.,* 275 So.2d 505 (Fla. 1973). That decision also recognized, in footnote 8, that the exemption contained in Section 196.25, Florida Statutes, repealed in 1971, is covered in the present Section 196.199, Florida Statutes, enacted in 1971 as a part of Chapter 71-133, Laws of Florida 1971.

Williams, 326 So.2d at 434.

The amici submit that the proper test to be applied in determining the taxable or exempt status of governmentally-owned property, whether such be owned by the state, county, a municipality or other public entity, is whether the use being made of such property by private lessees constitutes a governmental-governmental use. Thus, all governmentally-owned property used by private lessees for profit-making purposes is

taxable. No constitutional exemption exists for private persons or entities leasing property from a governmental unit and using same for profit-making purposes.

On eight occasions since the 1968 constitution came into being this Court has addressed the situation where governmental property is being used for profit-making purposes by private lessees. E.q. Straucrhn; Williams; Volusia County; Lykes Bros.; Archer; Walden; Capital City; Sebrins Airport Auth. In each instance, this Court has applied a test centering around the use of the property by the private lessee. The amici submit that the appropriate test is that as set forth in Williams, and repeated numerous times thereafter and most recently in Sebrinq Airport Auth., i.e., for property to be exempt it must be used by the private lessee for a governmental-governmental purpose as opposed to a governmental-proprietary purpose.

In Straushn, this Court held that it "is the utilization of leased property from a governmental source that determines whether it is taxable under the constitution," and that ". . . where the predominant use of governmental leased land is for private purposes the Constitution requires that the leasehold be taxed." 293 So.2d at 695, 696.

This Court held taxable the Daytona Beach Speedway in Volusia County applying the same rationale that had been developed in Williams. In Williams, this Court made the following pronouncements:

> The operation of the commercial establishments represented by appellants'

> cases is purely proprietary and for profit. They are not governmental functions. If such a commercial establishment operated for profit on Panama City Beach, Miami Beach, Daytona Beach, or St. Petersburg Beach is not exempt from tax, then why should such an establishment operated for profit on Santa Rosa Island Beach be exempt? No rational basis exists for such distinction. The exemptions contemplated under Sections 196.012(5) and 196.199(2)(a), Florida Statutes, relate to "governmental-governmental" functions as opposed to "governmental-proprietary functions. With the exemption being so interpreted all property used by private persons and commercial enterprises is subjected to taxation either *directly* or *indirectly* through taxation on the leasehold. Thus, all privately used property bears a tax burden in some manner and this is what the Constitution mandates.

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

Lykes Bros. upheld the taxable status of a packing plant owned by Lykes Brothers which, pursuant to an agreement with the City of Plant City, was to be tax exempt in the event that the city's boundaries were enlarged so as to include the property owned by Lykes Brothers. In so doing, 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. Be 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-owned 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.

Lvkes Bros., 354 So.2d at 881 (emphasis added). This Court further 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 n.14 (emphasis added.)

Archer invalidated certain special acts which had attempted to relieve lessees of county owned property located on Santa Rosa Island from taxation. There, the property was county owned but administered by the Santa Rosa Island Authority created by special act. This Court stated that the legislature was without authority to grant an exemption from taxes where the exemption does not have a constitutional basis. 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 Walden, this Court quashed the district court's

decision and applied the rationale of Williams. That case involved various lessees of space at the Tampa International Airport from the Hillsborough Aviation Authority for the purpose of conducting commercial enterprises within the airport terminal. This Court stated that:

> 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 publicly-owned land shall bear the same tax burden as private property owners who devote their land to the same uses.

Walden, 375 So.2d at 285 (emphasis added). Walden reaffirmed the "function by utilization" test which originated in Straughn and Williams was reaffirmed in Volusia County. Walden held:

> 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 at 286.

The "function by utilization" test most recently was applied by this Court *in* Sebrins Airport Auth. with this Court quoting from Volusia County, wherein Williams also was referenced. Sebrins Airport Auth. elaborated on the public purpose requirement set forth in section 196.199(2)(a) as follows:

> Serving the public and a public purpose, although easily confused, are not necessarily analogous. A governmental-proprietary function occurs when a nongovernmental lessee utilizes governmental property for proprietary and for-profit aims. We have no doubt that Raceway's operation of the racetrack serves the public, but such service does not fit within the definition of a public purpose as defined by section 196.012(6). Raceway's operating of the race for profit is a governmental-proprietary function; therefore, a tax exemption is not allowed under section 196.199(2) (a).

642 So.2d at 1073-1074 (footnote omitted). This Court also provided a definition of "proprietary function" by stating that: "Proprietary functions promote the comfort, convenience, safety and happiness of citizens, whereas government functions concern the administration of some phase of government." *Black's Law Dictionary* 1219 (6th ed. 1990). Id. at n.1.

By referring to the constitutional requirement that all

privately-used property bear the same tax burden, the amici suggest that this Court was acknowledging in Williams, Lvkes Bros., Archer, and Walden, that no constitutional exemption existed for privately used but governmentally-owned property. The only private use exemptions which exist in the constitution are found in article VII, section 3(a), where property used for educational, scientific, literary, charitable, and religious purposes is permitted to be exempted. No exemption is found in the constitution for privately-used property owned by governmental entities.

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 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.

B. Application of the "function by utilization' test creates **fairness.**

Applying the "function by utilization" test to

determine the taxable status for all governmentally-owned property leased to non-governmental lessees so that all property is treated exactly the same is proper and fair. Applying a rationale that county-owned property is immune as opposed to exempt from taxation and that, therefore, private lessees of county-owned property also are exempt from taxation is directly contra to the "function by utilization" test established by this Court in 1975 and followed last year in Sebring Airport Auth. Furthermore, it results in unequal treatment for private users of governmental property depending on the nature of the governmental entity leasing property to a private user. The amici suggest that the focal point should be on the use of the property made by the private lessee as opposed to the identity of the governmental unit owning said property.

Many lesser public bodies are created by special act and some by ordinance throughout Florida. Some are airport authorities, special districts, or port authorities. If such a public body is created to manage property owned by a city, there is no rational or logical reason for treating the lessee of this property any different from the lessee of property owned by a county. Some public bodies may be created either by special act or ordinance, as lesser public bodies of the creating entity. If the "function by utilization" test applies, all private lessees are treated the same.

In all these situations the obligation of the lessee to pay rent is contractual. Similarly, the lessee's obligation to

pay additional taxes as rent also is contractual, and this Court recognized such in Capital City. The governmental body, as lessor, has the option of drawing the lease so as to require rent in such additional amount to cover taxes which are due and owing and to contract with the lessee requiring that the lessee pay additional taxes as part of the rent payment, or to include an amount as rent to cover taxes. The duty of the lessee to pay is contractual, but in all instances the result is that the users of public-owned land "shall bear the same tax burden as private property owners who devote their land to the same uses." Walden, 375 So.2d at 285.

C. Neither chapter 74-570, Laws of Florida, nor section 315.11, Florida Statutes (1993), operate to exempt district property leased and used for private purposes,

The district's reliance on the amendment in 1974 to its special act and the exemption found in section 315.11 is misplaced. Neither of the statutes purport to exempt the property once it ceases to be used by the district. The exemption for district property used by the district facility itself could be proper. But both exemptions must be read in light of and subject to the paramount provisions of the constitution which do not permit the legislature to exempt public property used for private purposes. The primary purpose of the exemption in section 315.11 was to allow for the preferential interest treatment on governmental borrowing to develop the property at the district. Recognizing that the operation of a

port affects the public, and provides a general public benefit, the legislature saw fit to provide some assistance where construction of port facilities was involved so that preferential interest rates can be obtained on bonds and other indebtedness to secure such construction and development. However, when the port itself ceases to use the property but instead determines that such property is to be leased and used by private commercial lessees, then any right to exemption ceases to exist both constitutionally and statutorily. It ceases to exist constitutionally because no exemption is found in the constitution for the private commercial use of government property, and it ceases to exist statutorily because statutes require both ownership and use by the governmental unit for exemption to inure.

D. Political subdivisions only include counties.

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 amici submit that "political subdivision," as used in sections 196.199(1)(c) and (2)(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 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 immunity.

E. Sarasota-Manatee was incorrectly decided.

Sarasota-Manatee reached what the amici believe 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, even though it acknowledged that 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. Language in a special act declaring SMAA to be a political subdivision within the purview of section 196.199 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," 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 SMAA can change its identity by such a special act, then it would follow that the City of Orlando, the City of Sebring, and any other city or special district, or other entity, in Florida could 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.) 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, section 196.199 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. There exists a very basic difference between SMAA, the authority, other special districts and public bodies, and counties and cities. The first group of public entities possess no general governmental powers. In contrast, counties and cities possess such powers. This Court noted this in Sugar Bowl Drainase Dist. v. Miller, 120 Fla. 146, 162 So. 707 (1935), by noting that, although the district was legitimately created, the property therein would be taxable.

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

Third, Sarasota-Manatee results in lessees of airport property paying no taxes in Sarasota and Manatee counties, while airport lessees in Orange and Highlands counties would 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. This court recently adhered to the "function by utilization" test to determine the taxable status where public property was used by private lessees for private purposes in Sebring Airport Auth. This test is fair and easily administered because of the long history of decisions of this court distinguishing governmental from proprietary services. See Daly v. Stokell, 63 So.2d 644 (Fla. 1953); Chardkoff Junk Co. v. Citv of Tampa, 102 Fla. 501, 135 So. 457 (Fla. 1931).

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 amici submit that it should not. The situation can be further complicated if all city operated airports, port districts, drainage districts, fire districts, recreational districts, and community development districts, simply chose to come to the legislature and obtain an amendment to the city charters or special acts creating same designating them 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, the general laws applying to the assessment and collection of taxes and the administration of exemptions could be severely undermined and the state's entire tax structure 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.

Fourth, no constitutional authority exists for the legislature to exempt governmental property which the 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, Sections 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 (1905); State ex

rel. Church v. Yeats, 74 Fla. 509, 77 So. 262 (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 state, or a county, city, or other public body. Thus, whether viewed as a waiver of immunity by statute or use 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 underlying linchpin of immunity is that government property devoted to the business of the government should not be taxed because it is simply using the taxpayers' dollars to pay taxes on property used in the operation of government. When such property is no longer put to such governmental use, the linchpin no longer exists, and the public policy basis for immunity ceases. Then the property has been immersed into the same use as privately owned property and the basis for immunity ceases. Williams recognized this by holding that the only way a private

lessee could obtain exemption was if it used the property for governmental purposes; that is, as part of the business of government.

The amici suggest 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. Profit-making entities using such property should pay the same taxes as private owners using private property similarly. This Court's "function by utilization" test is proper for all government property leased to private lessees using the property for proprietary functions and should be reaffirmed.

F. Collection.

Capital Citv recognized the collection procedure where leases are included as being contractual. However, the legislature has long established a collection method in section 196.31, Florida Statutes (1993). Although it addresses the state only, the amici suggest that its intended purpose reaches all property where the governmental entity has a duty to pay taxes or provide for the payment of same. Ad valorem tax revenues are too important to the operation of Florida's schools and local governments to allow cities, counties, districts, or other public entities to subvert proper remission of monies due through tax imposition, and the statute sets forth a duty enforceable through mandamus.

CONCLUSION

Final observations are in order. In Capital City this Court disapproved of Miller v. Higgs, 468 So.2d 371 (Fla. 1st DCA), review denied, 479 So.2d 117 (Fla. 1985), which had held that improvements (buildings, structures, etc.) were part of the leasehold and taxable only as intangibles. The Miller holding resulted in great confusion throughout Florida, which continued for 9 years until this Court held that the leasehold interest did not include the improvements and explained the difference.

Bell v. Brvan, 505 So.2d 690 (Fla. 1st DCA 1987), review denied, 513 So.2d 1060 (Fla.1987), followed Miller and also held that improvements were part of the leasehold taxable only as an intangible. It was not mentioned in Capital Citv and this causes confusion.

Sebring Airport Auth. disapproved of Page v. Fernandina Harbor Joint Ventures, 520 So.2d 608 (Fla. 1st DCA 1992), review denied, 620 So.2d 721 (Fla. 1993), which had exempted a marina under construction by lessees on city-owned property pursuant to a lease with the city. However, this Court did not specifically state that the operation of a marina is a proprietary purpose. Although it seems obvious to most persons, doubt exists in the minds of some as to this Court's intent with regard to same. The amici suggest that Bryan should be specifically disapproved of and its meaning clarified in Page to settle and remove the First District Court of Appeal's holdings from further controversy and confusion.

Respectfully **submitted,**

Larry E. Levy
Fla Bar No. 047019

Loren E. Levy
Fla Bar No. 0814441
The Levy Law Firm
Post Office Box 10583
Tallahassee, Florida 32302
904/222-7680

Counsel for amici curiae

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to ROBERT B. COOK, ESQUIRE, 11911 U.S. Highway 1, Suite 308, North Palm Beach, Florida 33408; STEVEN **M. KATZMAN,** ESQUIRE and BRIDGET A. BERRY, ESQUIRE, 777 S. Flagler Drive, Suite 310 East, West Palm Beach, Florida 33401; DAVID P. ACKERMAN, ESQUIRE and JACK J. AIELLO, ESQUIRE, Gunster, Yoakley & Stewart, 777 S. Flagler Drive, Suite 500 E, West Palm Beach, Florida 33401; LEE R. **ROHE,** ESQUIRE, Assistant Attorney General, Department of Legal Affairs, Tax Section - The Capitol, Tallahassee, Florida 32399-1050; H. **MICHAEL** MADSEN, ESQUIRE and KIMBERLY **L.** KING, ESQUIRE, Post Office Box 1876, Tallahassee, Florida 32302; JAY R. **JACKNIN,** ESQUIRE and ERIC ASH, ESQUIRE, Christiansen, Jacknin & **Tuthill,** 1555 Palm Beach Lakes Boulevard, Suite 1010, West Palm Beach, Florida 33402; and **GAYLORD** A. WOOD, JR., ESQUIRE, Wood & Stuart, P.A., 304 S.W. 12th Street, Fort Lauderdale, Florida 33315-1549 on this the 18th day of October, 1995.

Larry E. Levy