SUPREME COURT OF FLORIDA

CASE NO: 87,769

LEON COUNTY EDUCATIONAL FACILITIES ATJTHORITY, and SRH, INC.,

Petitioners,

vs.

BERT HARTSFIELD, Leon County Property Appraiser,

Respondent.

BRIEF OF AMICUS CURIAE, HONORABLE DAVID H. GOOLSBY, JR., HAMILTON COUNTY PROPERTY APPRAISER AND AS PRESIDENT OF THE PROPERTY APPRAISERS' ASSOCIATION OF FLORIDA

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 amicus curiae

TABLE OF CONTENTS

TABLE OF CITATIONS

Other Authorities:

INTRODUCTION

The Property Appraisers" Association of Florida, (PAAF), submits this brief as amicus curie in support of the respondent, Bert Hartsfield, Leon County Property Appraiser (appraiser). The PAAF is state-wide association of duly elected property appraisers in various counties throughout Florida who have an interest in the outcome of litigation involving their official functions and duties. The PAAF appears as amicus curiae in this cause because the decision being reviewed by this Court involves whether certain real property operated by the Leon County Educational Facilities Authority pursuant to lease is entitled to ad valorem tax exemption, and the outcome affects the duties of all property appraisers. The PAAF respectfully urges this Court to uphold the First District Court of Appeal's decision finding that the subject property is taxable.

PRELIMINARY STATEMENT

The appellant, Leon County Educational Facilities Authority, will be referred to herein as the "authority," and the appellant, SRH, Inc., will be referred to herein as "SRH." The appellee, Bert Hartsfield, Leon County Property Appraiser will be referred to herein as the "appraiser." The Honorable David H. Goolsby, Jr., Hamilton County Property Appraiser, and the Property Appraisers' Association of Florida, will be referred to collectively herein as the "PAAF." References to the record on appeal will be delineated as (R-volume #- page #).

STATEMENT OF THE CASE AND OF THE FACTS

The PAAF adopts the Statement of the Case and of the Facts set forth in the appraiser's answer brief. For the court's ready reference, the document entitled "Lease Agreement With Option to Purchase" contains the following provisions:

> WHEREAS, by the Resolution, the Lessee has authorized, among other things, the issuance, execution and delivery of this Lease Purchase Agreement and the Trust Agreement by the Lessee to provide for the financing through lease-purchase of the acquisition, construction and equipping of the Project; and
>
> * * * *
>
> WHEREAS, the Lessee shall be obligated to make the Rent Payments only from the Pledged Revenues, and neither the Lessee nor the State of Florida, nor any political subdivision or agency thereof shall be obligated to make any payment of any sums due under the Lease or the Trust Agreement from or levy, ad valorem or other taxes or assessments and neither the full faith and credit of the Lessee nor the State of Florida, nor any political subdivision or agency thereof is pledged for payment of such sums due under the Lease and the contractual obligation under this Lease to pay same does not constitute an indebtedness of the Lessee or the State of Florida, or any political subdivision or agency thereof, within the meaning of any constitutional, statutory or charter provision or limitation; and
>
> * * * *
>
> WHEREAS, the Lessor has executed and delivered the Guaranty and Mortgage in trust for the benefit of the Owners of the Certificates to induce the Trustee to issue the Certificates of Participation; and
>
> * * * *

WHEREAS, the Lessor has agreed to guarantee payment of the Basic Rent Component of the Rent Payments under the terms of the Guaranty by the Mortgage; and

*** * * ***

2.2. Termination. The Lease Term will terminate upon the earliest to occur of the following events:

(a) an Event of Lease Default by the Lessee and an Event of Guaranty Default;

(b) the payment by the Lessee of all Rent to be paid by the Lessee under this Lease for the Lease Term including all moneys sufficient to make payment or provision for payment of the Certificates then outstanding and all other amounts due and payable hereunder or under the Trust Agreement; or

(c) the date that the payment of the Option Price for the Project by the Lessee pursuant to the exercise by the Lessee of its Option pursuant to Section 17.2 hereof is applied to either the prepayment or defeasance of the Certificates and payment or provision for payment is made of all amounts due and owing hereunder (provided such defeasance or provision for payment is made in accordance with Section 19 hereof).

2.3 Rent. The Lessee agrees to pay, but solely from Pledged Revenues, as Rent hereunder for the Project the full amount of the Gross Revenues of the Project, which Rent shall be paid to the Trustee, as assignee of the Lessor, immediately as such Gross Revenues are received. Included in its obligation to pay Rent hereunder is the obligation of the Lessee to pay the portion of Rent constituting the Basic Rent Component and the portion constituting the Subordinate Rent Component. The Trustee shall apply all Rent Payments as provided in Article V of the Trust Agreement.

*** * * ***

2.4. Punctual Payment; Limited Obligation; No Abatement or Set-off.

(a) The Lessee covenants and agrees that it will punctually pay or cause to be paid the Rent and that it will be unconditionally and irrevocably obligated, so long as any of the Certificates are Outstanding and unpaid, to take all lawful action necessary or required during each Fiscal Year so long as any of the Certificates are Outstanding and unpaid, to pay from the Pledged Revenues, in accordance with the provisions hereof all Rent. Such covenant and agreement of the Lessee shall be cumulative and shall continue until such funds in amounts sufficient to make all payments required hereunder have been actually paid as herein provided. NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED HEREIN OR IN ANY OF THE CERTIFICATE DOCUMENTS, THE PAYMENTS DUE HEREUNDER ARE TO BE MADE ONLY FROM THE PLEDGED REVENUES, AND NEITHER THE LESSEE NOR THE STATE OF FLORIDA, NOR ANY POLITICAL SUBDIVISION OR AGENCY THEREOF, SHALL BE OBLIGATED TO MAKE ANY PAYMENT OF ANY SUMS DUE TO THE LESSOR OR THE TRUSTEE HEREUNDER FROM, OR LEVY, AD VALOREM OR OTHER TAXES OR ASSESSMENTS, AND NEITHER THE FULL FAITH AND CREDIT OF THE LESSEE NOR THE STATE OF FLORIDA, NOR ANY POLITICAL SUBDIVISION OR AGENCY THEREOF IS PLEDGED FOR PAYMENT OF SUCH SUMS DUE HEREUNDER AND THE CONTRACTUAL OBLIGATION HEREUNDER TO PAY SAME DOES NOT CONSTITUTE AN INDEBTEDNESS OF THE LESSEE OR THE STATE OF FLORIDA, OR ANY POLITICAL SUBDIVISION OR AGENCY THEREOF, WITHIN THE MEANING OF ANY CONSTITUTIONAL, STATUTORY OR CHARTER PROVISION OR LIMITATION.

* * * *

2.5.1 Surrender.

(a) If this Lease is terminated pursuant to Section 2.2(a) hereof, the Lessee agrees peaceably and immediately to convey by release, bill of sale or such other document as the Lessor or the Trustee shall reasonably request, each and every component of the Project to Lessor, or the Trustee, as assignee of the Lessor, and deliver immediate possession thereof to Lessor, or the Trustee, as assignee of the Lessor, in the condition required by Section 7.1 hereof.

2.5.2 Sale or Re-Letting. If this Lease is terminated pursuant to 2.2 (a) hereof, Trustee, as assignee of Lessor, shall have the right, to the extent permitted by Applicable Law, to sell or re-let the Project or portions thereof.

* * * *

12. Remedies.

12.1 Remedies for Lease Default. Upon the occurrence of an Event of Lease Default, and as long as such Event of Lease Default is continuing, the Lessor (and its assigns including, without limitation, the Trustee) may, at its option, exercise any one or more of the following remedies or any other remedy available pursuant to law or in equity or granted pursuant to this Lease, including without limitation, the following remedies:

(a) Seek performance by the Lessor under the terms of the Guaranty;

(b) Terminate the Lease in accordance with the terms of Section 2.2(a) hereof and seek transfer by the Lessee of the Project in accordance with the terms of Section 2.5.2 hereof.

(c) Seek any other remedy permitted under applicable law, including, without limitation, upon a default under the Guaranty, foreclosure of the Mortgage.

* * * *

17.1. Prepayment Option.

The Lessee shall have the option, so long as the Lessee is not then in default under this Lease, on each Optional Prepayment Date on or after the First Optional Prepayment Date, including, without limitation, in conjunction with the exercise of its option to purchase in Section 17.2 hereof, to prepay a portion of the Basic Rent Component effective on any such Optional Prepayment Date upon the deposit of the amount of such prepaid Rent with the Trustee not less than forty-five (45) days prior to such date of

prepayment. Any prepayment in part shall be not less than the Minimum Optional Prepayment Amount and a premium shall be due in connection therewith as provided in Section 4.02 of the Trust Agreement.

17.2. Option to Purchase.

The Lessor hereby grants unto the Lessee the irrevocable option (the "Option") and right to purchase the Project on any Optional Prepayment Date on or after the First Optional Prepayment Date (or if accomplished by defeasance hereof pursuant to Section 19 hereof, at anytime hereunder) on the following terms and conditions: . . .

(R-II-148-152; 156; 158-158)

Under definitions attached and a part of the lease agreement, are the following:

"Lease" means the Lease Agreement with Option to Purchase dated as of July 1, 1991 between the Authority, as Lessee, and the Corporation, as Lessor.

* * * *

"Mortgage" means the Mortgage and Security Agreement dated July 1, 1991, between the Lessor, as mortgagor, and the Trustee, as mortgagee, securing the obligations of the Lessor under the Guaranty.

* * * *

"Option"' means the purchase option in favor of the Authority set forth in Section 17.2 of the Lease.

* * * *

"Option Price" shall have the meaning set forth in Section 17.2(a) of the Lease.

(R-II-168-169)

SUMMARY OF ARGUMENT

The PAAF submits that the First District Court of Appeal's decision that the subject property is taxable is correct and should be affirmed. The PAAF further submits that First Union Nat'1 Bank of Florida v. Ford, 636 So.2d 523 (Fla. 5th DCA 1993), is squarely inconsistent with the decisions of this Court in State v. School Bd. of Sarasota, 561 So.2d 549 (Fla. 1990), and State v. Brevard County, 539 So.2d 461 (Fla. 1989), and should be disapproved. Neither the First District Court of Appeal nor the Fifth District Court of Appeal mention either of these two cases in their respective opinions, and review of the briefs submitted discloses that neither of these cases were ever cited to either of the two courts.

The First District Court of Appeal recognized that the documents were a means of financing construction of the subject property, but correctly held that the lease with option to purchase entered into between SRH, (lessor), and the Leon County Educational Facilities Authority (authority), was precisely what it represented itself to be, which was a lease. This holding is totally consistent with Brevard Countv and School Bd. of Sarasota. In both of these cases, this Court held that the agreement was a "lease" and not a "mortgage." That holding was critical to validation of the certificates in both cases. A lease with an option to purchase conveys no equitable or beneficial interest in the property. Had this Court in these two cases concluded that the agreement was a mortgage instead of a

lease with an option to purchase, the bonds could not have been validated, Thus, the total indebtedness would then have exceeded far beyond a 12-month period since it would have been for the full time period necessary to retire the indebtedness.

Inasmuch as the instrument is a lease with an option to purchase and not a mortgage, the authority does not both own and use the subject property within the purview of section 196.199(1), Florida Statutes (1995), and, accordingly, the property is taxable. Additionally, the operation and rental of what is the equivalent of high-priced luxury accommodations is certainly a questionable foundation to support exemption. See Daniel v. Canterbury Towers, Inc., 462 So.2d 497 (Fla. 2d DCA 1985); Mikos v. Plymouth Harbour Incorporated, 316 So.2d 627 (Fla. 2 d D C A 1974), writ discharged, 337 So.2d 975 (Fla. 1976).

However, the PAAF does not agree with that part of the First District Court of Appeal's decision finding that, the assessment of property must follow the legal title only. This holding is inconsistent with Bancroft Inv. Corp. v. Citv of Jacksonville, 27 So.2d 162 (Fla. 1946), in which this Court held the involved property taxable even though the United States Government still held legal title. It also is inconsistent with the provisions of Article VII, Section 6, Florida Constitution, and section 196.031, Florida Statutes (1995), which recognize that homestead exemption can be granted based on either a legal or equitable title to real property, a provision which was overlooked by the First District Court of Appeal. Equitable or

beneficial ownership is nothing more than a way of recognizing and identifying the real or true owner of the property as opposed to someone holding property as a trustee or as security for the payment of a mortgage as was the case in Bancroft. Section 196.011, Florida Statutes (1995), relates to the filing of application for exemption and addresses the legal title holder which is generally reflected in public records. This statute is merely setting forth the procedure for seeking exemption, recognizing that a record owner would be the appropriate person to know the use of the property to file the application for exemption. It should be noted that section 193.461(3) (a), Florida Statutes (1995), which deals with agricultural assessments, allows lessees to file applications for agricultural classification but only if authorized by the owner.

The PAAF submits that this Court should disapprove of First Union, uphold the First District Court of Appeal's decision that the subject property is taxable, disapprove of that part of the decision which suggests that only legal title determines the taxable or exempt status of property, and find that the authority possesses no characteristics of immunity and that even if it did, it would not suffice because in Florida no statute exists which exempts privately-owned and held property leased to a governmental entity. In fact, were the contrary to be true, billions of dollars of property value would be removed from the tax rolls because governmental agencies frequently choose to rent office space and other accommodations instead of purchase same.

In this regard, the First District Court of Appeal's decision in Ocean Highway & Port Auth. v. Page, 609 So.2d 84 (Fla. 1st DCA 1992), should be approved. The authority should be treated no different from any other governmental lessee of privately-owned property.

ARGUMENT

I. The subject property is not exempt under section 196.199(1), Florida Statutes (1995).

The authority and SRH contend that the subject property is exempt under section 196.199(1) under Argument II of their initial brief. The statute requires both ownership and use by the governmental entity for exemption to inure to the property. This is the same requirement as that found in Article VII, Section 3, Florida Constitution, which addresses exemption for municipal property, and that found in section 196.192, Florida Statutes (1995), as amended by chapter 88-102, Laws of Florida, and recognized in Mastroianni v. Memorial Med. Ctr., 606 So.2d 759 (Fla. 1st DCA 1992). Mastroianni traced the evolution of the statutory changes to address what was felt to be two erroneous holdings of the Second District Court of Appeal in Schultz v. Trustees of Skvcrest Baptist Church, Inc., 508 So.2d 1314 (Fla. 2d DCA 1987), and Daniel v. T.M. Murrell Co., Inc., 445 So.2d 587 (Fla. 2d DCA 1984). Schultz held that, notwithstanding the statutes requiring property appraisers to consider the profitmaking, financial affairs and status of the owner of

property, (economic use to the owner), section 196.195, Florida Statutes (1985), and section 196.196, Florida Statutes (1985), actual use as a church school of property leased from a private commercial corporation for $10,000.00 per month controlled and, thus, the property was exempt. The 1988 law corrected the obviously erroneous result as recognized in Mastroianni.

The authority and SRH attempt to avoid the requirement that the property be both owned and used to qualify for exemption by saying that the financial arrangement and the "lease with option agreement" is, in fact, a mortgage, and thus, the authority has acquired equitable ownership of the property and, since it is using the property, it is exempt. In a similarly crafted arrangement, this court held in both School Bd. of Sarasota County and Brevard County, that the "lease with purchase option agreements" involved were leases and not mortgages and, that being so, upheld the bond validations.

Although the purpose of the statutory provisions considered here are somewhat different from those considered in School Bd. of Sarasota, several holdings in that case are directly applicable to the instant situation. In that case, the court upheld a bond validation for construction of public educational facilities. The facts are set forth as follows:

> Pursuant to resolutions, the School Boards of Sarasota, Collier and Orange Counties (boards) entered into agreements supporting the bonds and certificates of participation (bonds) under review. These agreements provide for the lease of public land owned by the boards to not-for-profit entities (by way of ground leases), the construction or

> improvement of public educational facilities upon the leased lands and the annual leaseback of the facilities to the respective school boards (by way of facilities leases), and the conveyance of the lease rights of the not-for-profit entities to trustees (by way of trust agreements). The trustees are to market the bonds and disburse funds to finance construction of the facilities. Title to the public lands remains in the respective school boards. Title to the facilities constructed with the proceeds of the bonds passes to the respective school boards at the end of the term of the ground lease.

School Bd. of Sarasota, 561 So.2d at 550 (footnotes omitted, emphasis added). There, title to the lands remained in the school boards. In the instant situation, title was never in the state agency. The court described the financing arrangement as follows:

> Money from several sources, including ad valorem taxation, will be used to make the annual facilities' lease payments. If, in any year, a board does not appropriate money to pay the lease, the board's obligations terminate without penalty and it cannot be compelled to make payments. The board then has two options. It may purchase the facilities and terminate the ground lease. Alternatively, it may surrender possession of the facilities and lands for the remainder of the ground-lease term and is free to substitute other facilities for those surrendered. The trustee may relet the facilities for the remainder of the leases' term or sell its interest in the leases to generate revenue to pay bondholders. As an additional precaution, insurance has been purchased for the benefit of bondholders to cover the risk of insufficient revenue. Amounts received in excess of that owed to bondholders must be paid to the board as ground rent.

School Bd. of Sarasota, 561 So.2d at 551 (footnotes omitted, emphasis added). Similar options are available to the authority in the lease agreements being reviewed,

The court then addressed the contentions that the lease agreement was for a term in excess of 12 months requiring voter approval, and that the use of ad valorem taxes to pay same also required voter referendum for bond validation under article VII, section 12, Florida Constitution. The court rejected both contentions. It pointed out that, because the bondholders could not coerce the levy of ad valorem taxes to pay the indebtedness, such was not "payable from ad valorem taxes" within the purview of article VII, section 12. With regard to the 12-month period proscription contained in article VII, section 12, the court stated:

> In *State v. Brevard County, 539* So.2d 461 (Fla.1989), we interpreted the "maturing more than twelve months after issuance" language of article VII, section 12. The *Brevard* agreements provided traditional lease remedies and preserved the county's right, in adopting its annual budget, to terminate the lease without further obligation. We held that article VII, section 12 was not violated. *As* in *Brevard,* the agreements here give the boards freedom to decide anew each year, burdened only by lease penalties, whether to appropriate funds for the lease payments.

School Bd. of Sarasota, 561 So.2d at 552 (emphasis added). Thus, the 12-month constitutional proscription was not violated. This holding that the agreement was a lease and not a mortgage was restated thereafter as follows:

> The state in addition argues that validation is precluded by Nohrr v. *Brevard County Educational Facilities Authority,* 247 So.2d 304 (Fla.1971) In *Nohrr,* we held that a bond-supporting agreement which granted a mortgage with right of foreclosure violated the predecessor to article VII, section 12, absent an approving referendum. The rationale of *Nohrr* does not apply to the instant case. There is no mortgage with right of foreclosure. Here the bondholders are limited to lease remedies and the annual renewal option preserves the boards' full budgetary flexibility.

School Bd. of Sarasota, 561 So.2d 553 (emphasis added).

The supreme court recognized that the leases or lease purchase agreements involved in those cases were precisely what they represent themselves to be; that is, leases. The remedies provided there, as here, are traditional lease remedies. There, the supreme court held that the lease agreement was a lease and not a mortgage. Here, as there, since there exists a lease for a 12-month period, with renewal options for additional l-year periods, the lessee acquires no equitable ownership in the property. Stated differently, here, as in School Bd. of Sarasota, no debt obligation exists for the full time period provided for certificate retirement on the part of the involved public body; there the school boards, here the authority.

In School Bd. of Sarasota, the court rejected the contention that the financing instruments, the lease, and the annual leaseback, were a mortgage and thus invalid in violation of article VII, section 12. Said constitutional provision prohibits local governmental bodies from issuing bonds, certificates of indebtedness, or any form of tax anticipation

certificates payable from ad valorem taxes maturing more than 12 months after issuance subject to two exceptions, neither of which were applicable in School Bd. of Sarasota. Had the instruments been held to be a mortgage within the purview of chapter 697, Florida Statutes (1995), this constitutional provision would have been violated. By holding that the instruments were leases with annual renewal, and no board obligation to appropriate funds to pay the lease payment used to repay the certificate holders existed, this Court held that article VII, section 12 was not violated. A one-year lease does not create long-term "debt."

For the same reasons, First Union should be disapproved. First Union also involved a lease with purchase option and the court there, as did the First District Court of Appeal in the instant case, apparently overlooked both Brevard County and School Bd. of Sarasota.

Similarly overlooked is Bancroft Inv. Corp. The instrument in Bancroft Inv. Corp. was totally different from that involved in School Bd. of Sarasota, Brevard County, and the instant situation. In Bancroft Inv. Corp., the transaction was described as follows:

> A brief analysis of the factual picture will be helpful. It is admitted that the lands in question were purchased by the United States in 1888 and that they were used as a post office and court house by the Federal Government until 1940, when they were sold to private parties and, through mesne conveyances, acquired by appellant. The contract of sale provided for immediate delivery to the purchaser and the payment of a consideration of $350,129, one-fifth of which was payable in cash and the balance in

> five equal annual installments with interest on deferred payments. The contract also provided that the seller execute a quitclaim deed to the purchaser and retain title until the contract was fully performed. The purchaser took possession at once and constructed a five-story department store on the premises, which he is now leasing for that purpose. The Federal Government released all control and dominion to the purchaser and is not a party to this litigation.

Bancroft Inv. Corp., 27 So.2d at 170 (emphasis added). Bancroft Inv. Corp. involved a contract of sale, delivery simultaneously with the present execution of a quit-claim deed to the purchaser, and retention of title as security for the payment in installments. Thus, there was a present conveyance and the purchaser became the equitable owner, and chapter 697 declares such transactions to be mortgages. Here, there is no present conveyance to the lessee (authority), and the authority has no obligation under the lease to appropriate funds to pay the lease payments or to ever acquire the property. The instrument in Bancroft Inv. Corp. was legally a mortgage under chapter 697.

There, bare legal title was held by the seller as security for payment of the purchase price. The situation is set forth as follows:

> The question is whether the City of Jacksonville may tax lands which have been sold by the Federal Government to a private purchaser under an installment contract whereby title to the lands is retained by the government until the purchase price is paid and other conditions performed, where before the time for full performance of the contract and execution of the deed the purchaser is let into possession and thereafter uses the property for private purposes.

Bancroft Inv. Corp., 27 So.2d at 164 (emphasis added). The appellant's contention is set forth thereafter as follows:

> The appellant maintains that under federal and state law the property is immune and exempt from such taxation, because it remains property of the United States until a deed of conveyance is given or until the purchaser has fully complied with all conditions entitling him to a deed. The appellee submits that when the contract of purchase was executed and possession delivered, the conditional purchaser became the real beneficial owner of, and acquired the complete equitable title to, the property, the government thereafter retaining only the bare legal title in trust for the purchaser and as security for the balance of the purchase price; and that such beneficial interest of the purchaser may be taxed and the tax enforced against the land subject to the right, lien or interest retained by the government as security for the unpaid purchase money.

Bancroft Inv. Corp., 27 So.2d at 164. Thereafter, the court made the point that a quit-claim deed was executed by the seller when the contract of sale was entered into, and that the purchaser took immediate possession. Other statements made by the court are also instructional:

> If I abandon my homestead, it loses its right of exemption from taxation as soon as abandoned. We think the rule is general; that property dedicated to municipal, educational, religious, or other purposes that exempt it from taxation, reverts to its original status and becomes subject to state and municipal taxes as soon as it is abandoned for the purpose that fixes its exemption status. We think what we have said concludes the question, but Section 6.04 is also persuasive. This statute deals with the question of jurisdiction on the part of the state and federal governments over lands acquired by the latter for needful federal purposes and concludes with this limitation

> exempting "said lands from any taxation under the authority of this state while the same shall continue to be owned, held, used, and occupied by the United States for the purposes above expressed and intended, and not otherwise." The statute does not list "post office" sites, but the statute listing the lands that may be acquired (Section 6.02) has the omnibus clause, "other needful buildings," so we would strain no rule of interpretation to hold that they were included. At any rate, every rule of interpretation cuts off the right of tax exemption as soon as it is abandoned for the use that warrants it.

Bancroft Inv. Corp., 27 So.2d at 171 (emphasis added).

Thereafter the court stated:

> In S. R. A. v. State of Minnesota, the Supreme Court of the Untied States held, in terms that the equity of a purchaser under an executory contract of sale is, in fact, the realty and that such legal title as the United States held was held only as security. This holding is consistent with the holding of this court in Porter v. Carroll, 84 Fla. 62, 92 so. 809, and Dean v. State, 74 Fla. 277, 77 so. 107, wherein it was held that the one who holds the equitable interest is the owner for taxing purposes.

Bancroft Inv. Corp., 27 So.2d at 171. Continuing the court stated:

> This reasoning is supported by City of New Brunswick v. United States et al., 276 U.S. 547, 48 S.Ct. 371, 72 L.Ed. 693, where it was held, in effect, that when the vendee takes possession of the lands purchased from the United States under an executory contract and nothing remains to be done on the part of the vendor but execute and deliver the deed, the lands are then subject to state and municipal taxes. Miami Bond and Mortgage Co. v. Bell, 101 Fla. 1291, 133 So. 547; Ken Realty Co. v. Johnson, D.C., 138 F.2d 809. Such is the rule between individual vendors and vendees, and we are shown no reason why it should be

different if the government happens to be the vendor.

Bancroft Inv. Corp., 27 So.2d at 171. Particularly pertinent is the next statement:

> The real question here is the application of the quoted exemption statute to the facts recited. We never decide such questions in isolation, but we lay the statute beside the facts and deduce what appears to be the rational result. If a court is not to look through the letter of the statute and apply it to facts as they exist, the legislative declaration of a falsehood may, in many cases, amount to the judicial declaration of a truth. In this case it amounts to selecting one taxpayer in one of the most desirable business areas in Jacksonville and placing him in a privileged class. To so interpret the exemption statute does not square with reason

Bancroft Inv. Corp., 27 So.2d at 171 (emphasis added). In conclusion the court stated:

> We, therefore, conclude that appellant is the owner of the taxable interest in the property in question, that the United States has abandoned such use of it as gave it an exemption status, and that it is now amenable to taxation under the law of Florida. It follows that our former opinion is receded from, and the judgment appealed from is affirmed.

Bancroft Inv. Corp., 27 So.2d at 171.

Here, the lease agreement between SRH and the authority generates funds that are assigned to the trustee to repay the certificate holders. However, no present sale of real or personal property takes place. In fact, chapter 957, Florida Statutes (1995), expressly only permits lease arrangements, subject to annual appropriation of funds as does chapter 255,

Florida Statute (1995). See § 957.04(2)(a), (d), Fla. Stat. (1995). The lease is subject to annual renewal and may be terminated by the authority as provided in the lease without further obligation. The virtually identical type situation existed in School Bd. of Sarasota in this regard, and this Court held that the lease agreement was a lease and not a mortgage. The same conclusion was reached in Brevard County. The bondholders here and in School Bd. of Sarasota have no remedy against the authority if no funds are appropriated.

Similarly overlooked are Hialeah, Inv. v. Dade County, 490 So.2d 998 (Fla. 3d DCA 1986), and Mikos v. King's Gate Club, Inc., 426 So.2d 74 (Fla. 2d DCA 1983). Both of these cases recognized that equitable ownership is no bar to taxation. Florida ad valorem taxes are imposed against the property not the owners. In fact, section 197.122(1), Florida Statutes (1995), places the duty on all owners of property to know that taxes are due on their property and to ascertain the amount and pay same. It provides in part:

> All owners of property shall be held to know that taxes are due and payable annually and are charged with the duty of ascertaining the amount of current and delinquent taxes and paying them before April 1 of the year following the year in which taxes are assessed.

§ 197.122(1), Fla. Stat. (1995). This duty is placed on owners and not legal title holders, and thus is different from section 196.011(1), Florida Statutes (1995), which deals with applications for exemption.

At page 14 of its brief, the authority cites Parker v. Hertz Corp., 544 So.2d 249 (Fla. 2d DCA 1989), but its discussion of the case is factually flawed. The authority states that "bare passive legal title to the property was in the aviation authority," and this is incorrect as the court noted as follows:

> The title to all fixed improvements situated on the leased land remains in Hertz during the life of the Ground Lease but upon its termination, title passes to and vests in the Aviation Authority. Beginning with the date that the fixed improvements were contemplated and ready for occupancy by Hertz, and extending over the 25 year period of the Ground Lease, Hertz is empowered to depreciate fully the actual cost to it of the fixed improvements on a straight line basis without any allowance for salvage. In the event the Ground Lease is terminated prior to its expiration because of the Aviation Authority's need for the land or Hertz's cessation of business at the airport, the Aviation Authority is obligated to purchase the fixed improvements from Hertz in an amount equal to the actual cost to Hertz less the benefit of depreciation Hertz has enjoyed to the nearest complete month of the consumed portion of the 25 year term, but in no event will the purchase price to the Aviation Authority exceed $500,000.

Hertz Corp., 544 So.2d at 251 (emphasis added). As can be seen, title was in Hertz and not in the authority. The court then stated:

> In light of the boundaries marked by the principles announced in *Williams* and *Volusia County,* we have concentrated upon the views Hertz has entreated us to adopt. Hertz contends that it is [sic] has only a possessory interest int eh improvements and holds nothing more than a bare legal title tot he premise. In urging affirmance of the final summary judgment, Hertz emphasizes section 196.199(7), Florida Statutes (1987), which provides that "[p]roperty which is

> originally leased for 100 years or more, exclusive of renewal options . . . shall be deemed to be owned for purposes of this section." Thus, says Hertz, because its Ground Lease is limited to a term of less than 100 years, it cannot be deemed an " owner" of the improvements. We reject the contention. Section 196.199(7) plays no part in determining Hertz's status as the owner of the improvements. Simply stated, we do not perceive the sweep of the word "owned" appearing in section 196.199(2) (b) to be measurable exclusively by section 196.199(7). Section 196.199(7) is a legislative declaration, the purpose and effect of which are confined to its terms. There is nothing within section 196.199(7) barring the examination of extrinsic criteria in deciding a question of ownership under section 196.199(2) (b). *See Hialeah, Inc. v. Dade County,* 490 So.2d 998 (Fla. 3d DCA), *rev. denied,* 500 So.2d 544 (Fla. 1986).

Hertz Corp., 544 So.2d at 251. Hertz held legal title to the improvements assessed. Here, the authority is a lessee. Since the agreement is a lease, no division of title between legal and equitable ownership has taken place.

Some additional comment on Hertz Corp. is in order. Hertz Corp. must be read in light of the legislative and judicial history of what had transpired since the enaction of chapter 71-133, Laws of Florida, which gave rise to Williams v. Jones, 326 So.2d 425 (Fla. 1975, appeal dismissed, 429 U.S. 803 (1976).

Cases dealing with the statutory changes resulting from the enaction of chapter 71-133, Laws of Florida, should be carefully scrutinized to determine if they were prior to 1980 or after 1980 because chapter 196, Florida Statutes (1979), was amended to specifically address the situation where governmental property was leased, in chapter 80-368, Laws of Florida. This

change in the law in 1980 was brought about from Florida Supreme Court decisions beginning with Strauqhn v. Camp, 293 So.2d 689 (Fla. 1974), and Williams, and cases which followed same. In reviewing each of the cases, the property appraiser's position is also significant because the property appraiser's position controlled the issues presented to the court for resolution.

After the 1980 amendment, Miller v. Higgs, 468 So.2d 371 (Fla. 1st DCA), review denied, 479 So.2d 117 (Fla. 1985), was decided. Miller upheld the 1980 law and held that improvements were part of the leasehold interest to be taxed as intangibles. Hertz Corp. and Marathon Air Servs., Inc. v. Higgs, 575 So.2d 1340 (Fla. 1991), arose before this Court disapproved of Miller in Capital City Country Club v. Tucker, 613 So.2d 448 (Fla. 1993). Capital City held that improvements could not be taxed as intangibles and recognized the difference between real property and an intangible leasehold.

In Sebring Airport Auth. v. McIntyre, 642 So.2d 1071 (Fla. 1994), this Court reaffirmed Williams and Volusia County v. Daytona Bch. Racing & Recreational Facilities Dist., 434 U.S. 804 (1977), and the function by utilization test, which holds that both the land and improvements are assessed as real property if not used for a governmental-governmental purpose if the property is governmentally owned and leased to a private entity. Sebring Airport Auth. also disapproved of Page v. Fernandina Harbor Joint Venture, 608 So.2d 520 (Fla. 1st DCA 1992), review denied, 620 So.2d 761 (Fla. 1993). In City of Sarasota, 645 So.2d 417 (Fla.

1994), the Florida Supreme Court approved the decision in City of Sarasota v. Mikos, 633 So.2d 1075 (Fla. 2d DCA 1993), citing Sebring Airport Auth., and Volusia County, both of which applied the function by utilization test, one of which involved city and one county-owned property.

Two cases which presently are pending in the Florida Supreme Court addressing the issue of the taxability of property used by lessees of property owned by a governmental entity are State Department of Revenue v. Port of Palm Beach Dist., 650 So.2d 700 (Fla. 4th DCA 1995), review pending, F.S.Ct. 85,435, and Department of Revenue v. Canaveral Port Auth., 642 So.2d 1097 (Fla. 5th DCA 1994), review pending, F.S.Ct. 84,743. In both these cases, the district courts held that the involved property was taxable.

II. The language in section 196.199(1)(c), Florida Statutes (1995), providing for exemption for "property conveyed to a nonprofit corporation which would revert to the governmental agency" does not apply to the subject property,

The language in section 196.199(1)(c), Florida Statutes (1995), referring to "property conveyed to a nonprofit corporation which would revert to the governmental agency" does not apply to the authority and does not operate to exempt the subject property from taxation. This is addressed under appellants' question 4.

Appellants claim exemption under such language found in section 196.199(1)(c), Florida Statutes (1995) underlined in the following quoted provision:

> (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.

This language does not provide exemption for the subject property for two reasons.

First, the underlined language has reference to "direct support organizations" (DSO), which take title to property by gift or otherwise when the situation is such that the involved entity cannot hold title. Historical boards and societies which manage and oversee acquisition, restoration, and management of historical properties, old homes, etc., cannot hold property directly, so DSO's are formed as nonprofit corporations for the purpose of holding title to property acquired, frequently by gift, until such time as the government can acquire same. The DSO holds the property pursuant to a reverter clause, which upon abolition of the DSO vests title in the government agency by virtue of the reverter clause. See §§ 266.021, 266.028, Fla. Stat. The Historic Tallahassee Preservation Board of Trustees,

created in section 266.0021, Florida Statutes (1995), is supported through a DSO. The Historic Tallahassee Preservation Board of Trustees, provided for in section 266.0028, Florida Statutes, (1995), is authorized to "receive, hold, invest, and administer property and to make expenditures to or for the benefit of the board." Section 266.0028(2)(d), Florida Statutes (1995), provides that:

> (2) The direct-support organization shall operate under written contract with the board. The contract must provide for:
>
> * * * *
>
> (d) The reversion to the board, or the state if the board ceases to exist, of moneys and property held in trust by the direct-support organization for the benefit of the board if the direct-support organization is no longer approved to operate for the board or the board ceases to exist.

Similar DSO's are recognized in sections 570.902, 570.903, 581.195, 240.331, 240.3315, 240.364, 288.809, 14.22, 265.26, 265.261, and 288.1226, Florida Statutes (1995), which endorse, among others, the Agricultural Museum, the Ringling Museum of Art, Sunshine State Games, Olympic Training centers and others.

The second reason the statute does not provide exemption for the subject property is because no reverter clause exists in any of the involved instruments vesting title in the state or county upon default or upon the happening of any contingency. The property is subject to mortgage and the lease with purchase option is subject to the lease default provisions. It does not revert to any public body.

Accordingly, appellants contentions are not well founded and this language does not exempt the subject property.

III. The subject property is not entitled to exemption under section 243.33, Florida Statutes (1995).

The position of the authority and SRH that the subject property is exempt under section 243.33, Florida Statutes (1995), is without merit for three reasons.

First, the property is owned by SRH not the authority, and is merely leased to the authority. The primary purpose of exemptions such as those found in section 243.33 is to facilitate marketing and to provide the preferential interest treatment for bonds or other indebtedness issued for the construction of the projects and facilities contemplated by part II of chapter 243, Florida Statutes (1995). The issuance of revenue bonds as a financing source for the construction of such projects as contemplated by said statute, is addressed in section 243.27, Florida Statutes (1995), and section 243.27(2), Florida Statutes (1995), expressly restricts the source of funds to be used to repay any such indebtedness incurred through the issuance of certificates. No pledge of ad valorem taxes may be made. Rentals and other fees and charges used for repayment are expressly addressed in section 243.27(4)(b), Florida Statutes (1995). Section 243.30, Florida Statutes (1995), also addresses the rents. Numerous other Florida Statutes contain similar provisions to facilitate the issuance of certificates and obtain

the preferential interest rates for public indebtedness. See e.g. §§ 159.15(1), 159.31, 159.50, 183.15, 215.76, 243.33, 315.11, Florida Statutes (1995).

Second, virtually all of these various provisions, including section 243.33, trace their genesis prior to 1971, which was the year of enaction of chapter 71-133, Laws of Florida, the tax reform act which predicated the decisions of this Court in Straughn and Williams. Section 243.33 was created in chapter 69-345, Laws of Florida. The purpose of the tax reform act of 1971 was to make chapters 192-197, Florida Statutes (1971), the law applicable to ad valorem taxation, including any exemptions. Any language in section 243.33 indicating exemption would have been superseded by chapter 71-133, and modified by implication. This was recognized in Straughn and Williams. Although section 243.33 was amended in 1973 through chapter 73-327, Laws of Florida, this amendment was only to address the enaction of the Florida Corporate Income Tax law imposed by chapter 220, Florida Statutes in 1971. The last sentence in section 243.33 was added at that time to insure that corporate income tax was due on any corporate income generated.

The purpose of chapter 71-133 was to establish uniformity throughout the state in determining the taxable or exempt status of property, and specifically governmental property as recognized in Straughn, Williams, and the cases which followed them.

Third, the property involved is not owned by the authority but is in private ownership. The case at bar is the antithesis of the situations in Strauqhn, Williams, Sebrinq Airport Auth., etc., because it involves privately-owned property leased to a governmental unit for which no exemption in Florida law exists. This was recognized by the First District Court of Appeal in Ocean Hiqhwav & Port Auth.

Accordingly, for the reasons stated section 243.33 does not provide exemption for the subject property which is privately owned by SRH and leased to the authority.

CONCLUSION

The PAAF submits as follows:

1. The decision of the First District Court of Appeal holding the subject property taxable should be affirmed.

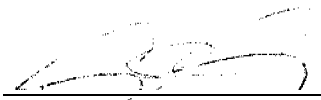
2. The decision of the Fifth District Court of Appeal in First Union should be disapproved as inconsistent with this Court's decisions in School Bd. of Sarasota and Brevard County.

3. The First District Court of Appeal's decision holding that the document is a lease and not a mortgage should be affirmed as consistent with School Bd. of Sarasota and Brevard County.

4. That part of the First District Court of Appeal's decision finding that Florida law does not authorize assessment of property based on the equitable ownership of same should be

disapproved as inconsistent with Bancroft Inv. Corp. and article VII, section 6.

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 amicus curiae
David H. Goolsby, Jr.,
Hamilton County Property
Appraiser and as President of
the Property Appraisers'
Association of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U. S. Mail to the following addressees on this the 22nd day of August 1996.

Ken van Assenderp, Esquire
Young van Assenderp & Varnadoe
Post Office Box 1833
Tallahassee, Florida 32302

Richard E. Benton, Esquire
3837-A Killearn Court
Tallahassee, Florida 32308

James G. Yaeger, Esquire
Lee County Attorney
6th Floor
2115 Second Street
Fort Myers, Florida 33901

C. Allen Watts, Esquire
Cobb Cole & Bell
Post Office Box 2491
Daytona Beach, FL 32115-2491

Robert Hinkle, Esquire
Radey Hinkle Thomas & McArthur
Suite 1000, Monroe Park Tower
101 North Monroe Street
Tallahassee, Florida 32301

Robert L. Nabors, Esquire
Sarah M. Bleakley, Esquire
Kimberly L. Franklin, Esquire
Suite 800, Barnett Bank Bldg.
315 South Calhoun Street
Tallahassee, Florida 32301

Elliott Messer, Esquire
Kimberly King, Esquire
Messer Caparello Madsen
Goldman & Metz
Post Office Box 1876
Tallahassee, Florida 32302

Larry E. Levy