IN THE SUPREME COURT OF FLORIDA

LEON COUNTY EDUCATIONAL FACILITIES AUTHORITY and SRH, INC.,

Petitioners,

CASE NO. 87,769

v.

BERT HARTSFIELD, LEON COUNTY PROPERTY APPRAISER,

Respondent.
_____/

BRIEF OF AMICUS'CTJRIAE LEE COUNTY

On Petition for Certiorari
From The First District Court of Appeal
Case No. 95-1399

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Florida Constitution

Florida Statutes

PRELIMINARY STATEMENT

This brief is submitted by Amicus Curiae Lee County to assist the Court in resolving the conflict between the First District Court's decision in the case below and the decision of the E'ifth District in First Union National Bank of Florida v. Ford, 636 So. 2d 523 (Fla. 5th DCA 1993).

STATEMENT OF CASE AND FACTS

Because this case is before the Court upon a request to resolve the conflict between the First District Court's decision in the case below and the Fifth District Court of Appeal's decision in First Union National Bank of Florida v. Ford, 636 So. 2d 523 (Fla. 5th DCA 1993), Amicus Curiae Lee County adopts the First District's narrative of the facts and statement of the case from the decision in the case below. See Slip Op. at 1-4.

Additionally, the following facts, although they were not mentioned in the First District Court decision, were gleaned from a stipulation between the parties in the circuit court proceeding and should be noted. First, the property in question, known as "Southgate" or the "Southgate Property," is subject to a mortgage as security for the repayment of the certificates of participation which were issued to finance the construction and acquisition of the Southgate Property. The mortgage is in foreclosure for the non-payment of the debt. Stipulation, at 3, para. 6 (App. A). Second, Southgate was granted an exemption from ad valorem taxation for 1992, the year prior to the exemption year at issue before the Court. Stipulation, Exhibit 26. (App. B).

SUMMARY OF ARGUMENT

The issue presented in this case, whether property leased to a governmental entity pursuant to a lease purchase arrangement and used for governmental purposes may be exempt from ad valorem taxation where the governmental entity has equitable, but not legal, title to the property is of great importance to governmental entities currently levying ad valorem taxes or using lease purchase arrangements as a finance mechanism. Section 196.199(1)(c), Florida Statutes, exempts property owned by a governmental entity and used for a governmental purpose from taxation. In First Union National Bank of Florida v. Ford, 636 So. 2d 523 (Fla. 5th DCA 1993), the Fifth District Court employed a test of relative ownership rights of the parties to the lease purchase arrangement in determining whether property is exempt from ad valorem taxation. An analysis of the indices of ownership, as expressed in First Union, is essential to the application of section 196.199(1)(c), Florida Statutes. While legal title is one factor in the indicia of ownership, it is not dispositive of the issue. Florida law looks to the rights and responsibilities of the parties relative to the property and to each other in order to determine the owner for ad valorem tax purposes. Because an analysis of Southgate Property with regard to the ownership rights of the parties and the uses of the facilities is not evident from the record, the Court does not have sufficient information to make a determination of exemption

from ad valorem taxation at this time.

ARGUMENT

I. THE COURT SHOULD ACCEPT JURISDICTION OF THIS CASE TO RESOLVE THE CONFLICT BETWEEN FIRST UNION NATIONAL BANK OF FLORIDA V. FORD, 636 So. 2d 523 (FLA. 5TH DCA 1993) AND THE FIRST DISTRICT COURT OF APPEAL'S DECISION IN THE CASE BELOW.

Pursuant to Article V, section (3)(b)(3), Florida Constitution, the Court has jurisdiction to review a decision of a district court of appeal that "expressly and directly conflicts with a decision of another district court of appeal." The First District Court of Appeal in the decision below certified that its opinion directly conflicts with First Union National Rank of Florida v. Ford, 636 So. 2d 523 (Fla. 5th DCA 1993). Slip Op. at 11. The two decisions conflict on an issue of law that is significant to local taxing authorities, which levy ad valorem taxes, and to governmental entities which acquire and finance government facilities pursuant to lease purchase arrangements.

This case and the Fifth District Court of Appeal's First Union case present the following issue: whether property leased to a governmental entity pursuant to a lease purchase arrangement and used for governmental purposes may be exempt from ad valorem taxation when the governmental entity has equitable, but not legal, title to the property. The Fifth District Court held that when a bank held legal title to the subject property as trustee pursuant to the terms of the lease purchase arrangement, the bank had no significant rights of ownership in the property. Rather, the court

concluded that the governmental entity held every significant right and responsibility of property ownership; thus, the property was exempt from ad valorem taxation. First Union, 636 So. 2d at 527. In contrast, the First District Court below ruled that, as a matter of law, a governmental entity must hold legal title to the property to qualify for an ad valorem tax exemption. Slip Op. at 11. The First District Court expressly rejected the test of relative ownership rights of the parties to the lease purchase arrangement employed by the Fifth District Court, concluding, "[we] decline to follow the Fifth District's decision in First Union National Bank of Florida, and we expressly certify our conflict with it." Id. Because of this direct and express conflict, the Court may exercise its discretion and resolve this important issue of ad valorem taxation.

A. A Lease Purchase Arrangement Is An Important Tool For Financing Capital Improvements Of Governmental Entities.

A lease purchase arrangement, such as the one presently at issue, is a financing mechanism by which a governmental entity may acquire a capital project over an extended period of time. It offers an alternative to a commercial lease of a property and to traditional municipal bond financing. It also offers an alternative to mortgage financing, a technique unavailable to county governments under the Florida Constitution.

A lease purchase financing provides money for the acquisition

of a capital project through a sale to investors of certificates of participation in the lease purchase agreement. Each certificate holder is entitled to "participate" in the investment income received under the lease purchase arrangement to the extent of the certificate holder's investment. Title to the leased property is held by an independent third party in trust, solely for the protection of the certificate holders. Alternatively, title may be placed in the name of a not-for-profit corporation created solely for the limired purpose of facilitating the financing. Under such an alternative, the not-for-profit corporation is typically controlled by the governmental entity and thus constitutes the governmental entity's alter ego.

Regardless of the type of entity that holds legal title to the property, lease purchase financing is "asset financing." The holders of the certificates of participation have a lien and security interest in the capital project, regardless of whether it is land, equipment, or buildings 'chat are leased. The lease payments are used to pay operating expenses and to repay the certificate holders. Upon full payment of all the certificates of participation, the legal title is deeded to the governmental entity for no or nominal consideration.

The cost of financing the construction and acquisition of a governmental facility under a lease purchase arrangement compares favorably with revenue bond financing. Section 103(a) of the

Internal Revenue Code excludes from gross income interest on "any state or local bond." This provision exempts the interest earned on revenue bonds issued to finance government facilities. Additionally, this provision exempts the interest component of the payments to the investors in the certificates of participation in a governmental lease purchase arrangement which is structured as a conditional sale agreement and not a true lease pursuant to Internal Revenue Service criteria.[1] As a consequence, the rate of

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[1] See Revenue Ruling 55-540, 1955-2 C.B. 39. The Internal Revenue Service criteria for determining whether a contract is a conditional sale agreement or a true lease include:

> (1) Portions of the periodic payments are made specifically applicable to equity in the property;
>
> (2) The governmental unit will acquire title to the property upon payment of all rental payments under the lease;
>
> (3) The total amount that the governmental unit is required to pay for a relatively short period of use constitutes an inordinately large proportion of the total sum required to be paid to secure the transfer of the legal title to the property;
>
> (4) The rental payment materially exceeds the current fair market rental value of the property;
>
> (5) The property may be acquired under a purchase option at a price that is nominal in relation to the value of the property at the time the option may be exercised, as determined at the time of entering into the original agreement. Also, the option price may be a relatively small amount when compared

(continued...)

interest paid to investors in certificates of participation is generally lower in a properly structured lease purchase arrangement than in a financing where the interest is subject to federal income taxation.

In addition to federal income tax benefits, a properly structured lease purchase arrangement allows a local government to maintain maximum budgetary flexibility. Annually, the governmental entity may choose to make the lease payments and continue to use the property. Further, a lease purchase arrangement does not require a pledge of a particular source of revenue, thereby preserving the governmental entity's discretion.

Additionally, a lease purchase arrangement does not constitute a pledge of ad valorem taxation. Article VII, section 12, Florida Constitution permits local governments with taxing powers to issue bonds payable from ad valorem taxation and maturing more than twelve months after issuance only: (1) to finance or refinance capital projects approved by vote of the electors; or (2) to refund outstanding bonds and interest and redemption premium at a lower

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[1](...continued)
with the total payments requi-red to be made

(6)Some portion of the rental payments is specifically denominated as interest or is otherwise readily recognizable as the equivalent of interest.

No single factor is controlling, nor must all of the foregoing factors be present in order for a contract to be a conditional sale agreement for federal tax purposes.

net average interest cost sate. Local governments are not constitutionally prohibited from incurring an obligation payable only from non-ad valorem revenues or from incurring an obligation payable from ad valorem taxes which does not extend beyond twelve months. The prohibition against pledging ad valorem taxes for payment of obligations in excess of one year extends to a pledge of all non-ad valorem revenues coupled with a promise to fully maintain the programs and services which generate the non-ad valorem revenues. County of Volusia v. state, 417 so. 2d 968 (Fla. 1982). Article VII, section 12, of the Florida Constitution, has also been applied to prohibit a mortgage against public property. See Nohrr v. Brevard Countv Educational Facilities Auth., 247 So. 2d 304 (Fla. 1971), (mortgage and security interests in public property are treated as general obligations on the theory that the governmental unit would be compelled or coerced to levy ad valorem taxes to avoid loss of the property).

In State v. Brevard County, 539 So. 2d 461 (Fla. 1989), this Court considered a lease purchase of equipment by Brevard County from a single-purpose, non-profit corporation established by the County. The lease purchase arrangement provided that title to the property did not pass to the County until all applicable lease payments had been satisfied. Further, upon the occurrence of an event of default or no-appropriation, the property was subject to sale by the lease purchase lessor for the benefit of the investors.

In the event the sale proceeds exceeded the remaining scheduled lease payments, the balance of the payment of sale costs was to be paid to the County.

In the bond validation proceeding, the State Attorney contended that the arrangement was violative of Article VII, section 12, Florida Constitution. Id. at 463. Specifically, it was argued that the arrangement was invalid under the holding in County of Volusia v. State, 417 so. 2d 968 (Fla. 1982), because the parties clearly intended that the lease purchase agreement would be in effect for longer than one year and would be payable from all non-ad valorem revenues of the County, rather than specific, designated sources. 539 so. 2d at 463. The State Attorney also contended that because the County was required to either appropriate sufficient funds to make all annual payments or lose possession of the property, the arrangement was contrary to Nohrr. Id. at 463.

This Court upheld the validation of the lease purchase arrangement, ruling that the County's lease purchase obligation was clearly distinguishable from Nohrr because its annual renewal feature fully preserved the County's budgetary discretion for all future fiscal years. Id. at 464. Moreover, the Court held that there was no prohibited security interest because there was no right of foreclosure against the leased property. Id. Because the lease purchase obligation in Brevard County was in all respects

subject to the County's discretion in adopting its budget on an annual basis, no "implied pledge" of ad valorem taxes was created.

Similarly, in State v. School Bd. of Sarasota County, 561 So. 2d 549 (Fla. 19903, this Court ruled that a lease purchase arrangement did not constitute a pledge of ad valor-em taxes requiring elector approval, even though ad valorem revenue was available to the school board for the lease payments. The Court cited St ate v . Miami Beach Redevelopment Agency, 392 So. 2d 875 (Fla. 1980), as precedent for its conclusion that the annual lease payments were not payable from ad valorem taxation. The Court stated:

> In State v. Miami Beach Redevelopment Agency, 392 So, 2d 875 (Fla. 1980), . . . [w]e noted that although contributions may come from ad valorem tax revenues: "What is critical to the constitutionality of the bonds is that , after the sale of the bonds, a bondholder would have no right, if [funds] were insufficient to meet the bond obligations . . to compel by judicial action the levy of ad valorem taxation . . . . [T]he governing bodies are not obliged nor can they be compelled to levy any ad valorem taxes in any year."

Id at 552.

This Court's decisions in Brevard County and School Bd. of Sarasota County have provided guidance to governmental entities as to the proper structure of lease purchase arrangements which preserves the annual budgerary discretion of the governmental unit and assures that a mortgage or security interest is not created by the arrangement. For example, the lease purchase structures approved in Brevard County and School Rd. of Sarasota County are

simiiar to the structures of the arrangements considered by the Fifth District Court in First Union and by the First District Court in the case below. Each of the structures include investors in certificates of participation or revenue bonds as the mechanism! to finance the cost of the facility. The interest on the income received by the investors is exempt from federal income tax, as in traditional governmental financing. Finally, each of the structures has a legal title holder to the property other than the governmental unit during the term of lease purchase arrangement.

In the cases of Brevard County and School Bd. of Sarasota County, as well as in this case, the legal title holder is a not-for-profit corporation created for the purpose of accomplishing the financing arrangement. Additionally, in the case of First Union, the legal title holder was the bank serving as a trustee, At the expiration of each of the lease purchase arrangements, title is transferred to the governmental unit for no or nominal consideration. And in the event the governmental unit decided not to renew its obligations during the term of the lease, the title holder was obligated to sell the property and use the proceeds to repay the investors. Monies received in excess accrue to the governmental unit.

A lease purchase financing technique structured in a manner similar to that in the cases of Brevard County and School Bd. of Sarasota County creates an effective and secure leasing vehicle and

achieves savings in financing costs from those incurred in traditional commercial leases customarily entered into by governmental units. Under a lease purchase arrangement, a governmental entity preserves its future discretion to commit non-ad valorem revenues and to exercise its ad valorem taxing power in its future annual budgetary deliberations. No investor or outside party has the right to invade such discretion or to compel any budgetary decision. Thus, budgetary discretion is unfettered by the financing transaction. Moreover, the income received by the investors in the certificates of participation is exempt from federal income taxes. Consequently, lease purchase arrangements are an important financial tool for local governments acquiring capital facilities.

B. The Resolution Of The Issue Of The Ad Valorem Taxation Of Property Acquired Through A Lease Purchase Arrangement Affects The Usefulness Of Lease Purchase Arrangements And The Scope Of The Ad Valorem Tax Base.

After the decisions in Brevard County and School Bd. of Sarasota County, many local governments, including Amicus Curiae Lee County, have entered into lease purchase arrangements to finance the acquisition of governmental facilities and equipment using the structure approved in the decisions for guidance. As Amicus Curiae in this case, Lee County has two goals. First, Lee County seeks to preserve the usefulness of the lease purchase

arrangement as a financial tool in the acquisition of capital facilities and equipment, and its ad valorem tax exemption. Second, Lee County seeks to preserve the integrity of its ad valorem tax base from unwarranted exemptions for property subject to commercial leases and other arrangements where the governmental entity does not have sufficient ownership in the property

Article VI?, section 9, Florida Constitution, authorizes counties and other local governmental entities to levy ad valorem taxes within specified millage limitations. Other tax sources may be authorized by the Legislature, but only by general law. Specifically, Article VII, section 9 provides in pertinent part:

> Local taxes.--
>
> (a) Counties, school districts, and municipalities shall, and special districts may, be authorized by law to levy ad valorem taxes and may be authorized by general law to levy other taxes, for their respective purposes . . . .
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> * * *
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> (b) Ad valorem taxes . . . shall not be levied in excess of the following millages upon the assessed value of real estate and tangible personal property: for all county purposes, ten mills; for all municipal purposes, ten mills; for all school purposes, ten mills; . . . A county furnishing municipal services may, to the extent authorized by law, levy additional taxes within the limits fixed for municipal purposes.

In furtherance of this constitutional provision, section 200.071, Florida Statutes, provides statutory millage limitations for counties both as to millage for county purposes and millage for municipal purposes.

As a county authorized to levy ad valorem taxes, Amicus Curiae Lee County desires to preserve the ad valorem tax base from unwarranted exemptions. The issue of the ad valorem taxation of government facilities financed through lease purchase arrangement.5 is important because facilities which are not exempt from ad valorem taxation are necessarily more expensive to acquire and maintain. if facilities financed through 1 ease purchase arrangements are not exempt from ad valorem taxation, then governmental entities will have to weigh the effects of the additional expense in determining whether a facility is affordable and in designing the structure for the financing of a facility.

II. THE CONFLICT IN THESE CASES SHOULD BE RESOLVED IN FAVOR OF EXAMINING ALL THE INDICES OF OWNERSHIP AS WELL AS THE USES OF THE PROPERTY IN DETERMINING AD VALOREM EXEMPTIONS FOR GOVERNMENTAL PROPERTY.

A. Ad Valorem Exemptions For Governmental Property Are Rooted in Fundamental Law And Expressed In The Florida Statutes.

The Florida Constitution authorizes certain local governments, including Amicus Curiae Lee County, to levy ad valorem taxes within certain millage limitations. The Florida Constitution prescribes the ad valorem tax base generally in, Article VII section 4, requiring that "[b]y general law,regulation shall be prescribed which shall secure a just valuation of all property for ad valorem taxation . . ." Because of this requirement for just valuation of

"all property" for ad valorem taxation, the Legislature generally may not limit the reaches of the ad valorem tax unless the Florida Constitution authorizes an exemption. Thus, the Legisiature may not provide an exemption for all commercial property, for example, because no such authority is granted by the Florida Constitution.

The Florida Constitution specifically provides an exemption for municipal property and property used for educational, literary, scientific, religions and charitable purposes. Article VI;, section 3(a), Florida Constitution, provides:

> All property owned by a municipality and used exclusively by it for municipal purposes shall be exempt from taxation. A municipality, owning property outside the municipality, may be required by general law to make payment to the taxing unit in which the property is located. Such portions of property as are used predominantly for educational, literary, scientific, religious or charitable purposes may be exempted by qeneral law from taxation.

The exemption authorized in the first sentence of section 3(a) for property owned and used for municipal purposes is self-executing. In contrast, exemptions for property used for educational, literary, scientific, religious and charitable purposes, authorized in the third sentence, require general law authorization.

An exception tc the general rule does exist that all governmental property is subject to ad valorem taxation unless an express exemption is authorized in the Florida Constitution. No express exemption is provided for counties, school districts, special districts, the State of Florida, or the United States.

However, Florida courts have ruled that property of the state, its "political subdivisions," and the federal government are immune from ad valorem taxation. See Park-N-Shop, Inc. v. Sparkman, 99 so. 2d 571 (1958). This conclusion rests "upon broad grounds of fundamentals in government" rather than upon a constitutional or statutory foundation. Dickinson v. City of Tallahassee, 325 So. 2d 1, 3 (Fla. 1975), (quoting State *ex rel.* Charlotte County v. Alford, 107 So. 2d 27, 29 (Fla. 1957)).

The Florida Legislature has enacted provisions exempting governmental property from ad valorem taxation. These enactments are generally found in chapter 196, Florida Statutes, together with the provisions for the exemptions for the enumerated purposes authorized in Article VII, section 3(a), of the Florida Constitution, as quoted above.

B. The First District Court's Decision In The Case Below Construed Too Narrowly The Term "Owned" In Section 196.199, Florida Statutes, By Failing To Consider Any Indicia of Ownership Other Than Legal Title.

Section 196.199(1)(c), Florida Statutes, exempts property owned by a governmental entity and used for a governmental purpose from ad valorem taxation. Section 196.199(1)(c) provides, in pertinent part:

> (1) Property owned and used by the

following governmental units shall be exempt from taxation under the following conditions:

* * *

(c) All property of the several political subdivisions and municipalities of this stat? 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.

In the circuit court proceeding below, Leon County Educational Facility Authority ("LCEFA") relied upon this statutory section and argued that Southgate is exempt from ad valorem taxation. LCEFA alleged that it was a governmental entity entitled to exemption under the statute, because it was created by the Board of County Commissioners of Leon County pursuant to chapter 243, Florida Statutes.- Further, LCEFA maintained that the property was used for a public purpose, in that the Legislature in chapter 243, Florida statutes, and the Board of County Commissioners in creating LCEFA, both declared that the use of property for dormitories was a public purpose. See Stipulation, para. 3. (App. A).

Additionally, LCEFA asserted that it was the owner of

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[1] See Stipulation, para. 2. (App. A). LCEFA also argued that it was entitled to an exemption pursuant to section 243.33, Florida Statutes, which authorizes an ad valorem tax exemption for facilities financed by educational facilities authorities created pursuant to chapter 243, Florida Statutes. The decision in the First District Court did not address this issue.

Southgate pursuant to section 196.199 (1) (c), Florida Statutes, because it had significant indicia of ownership under the lease purchase arrangement even though SRH, Inc., a not-for-profit entity, held legal title to the property. Stipulation, para. 5 . (App. A) . As a basis for this argument, LCEFA relied upon t-he rationale of the Fifth District Court of Appeal's decision in First Union, which held that the Brevard Government Center was exempt from ad valor-em taxation pursuant to section 196.199, Florida Statutes, because Brevard County had equitable and beneficial ownership of the property under a similar lease purchase arrangement where the legal title to the property was held by the First Union National Bank, Inc. First Union, 636 So. 2d at 524.

In the decision of the First District Court of Appeal in the case below, the court denied the exemption, specifically rejecting LCEFA's indicia of ownership argument and the Fifth District Court's rationale. The First District Court ruled that section 196.199, Florida Statutes, requires that title to the property be in the governmental entity in order for the property to be exempt. Slip Op. at 11. In reaching its conclusion, the First District Court relied on two of its earlier cases construing another section of chapter i96, Florida Statutes,' a rule of statutory construction

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[3] The First District Court inappropriately relied on the cases of Ocean Highway and Port Auth. v. Page, 609 So. 2d 84 (Fla. 1st DCA 1992) and Mastroianni v. Memorial Medical Center of Jacksonville, Inc., 606 so. 2d 759 (Fla. 1st DCA 1992).

requiring all statutes to be read in harmony with one another, and certain legislative history of an amendment to section 136.192, Florida Statutes, which authorizes exemptions for the purposes enumerated in Article VII, section 3(a), Florida Constitution. Neither the rules of statutory construction nor the legislative history of the amendments to section 196.192, Florida Statutes, supports the result reached in the case below.

Section 196.132, Florida Statutes, provides in pertinent part:

> (1) All property owned by an exempt entity and used exclusively for exempt purposes shall be totally exempt from ad valorem taxation.
>
> * * *
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> For purposes of this section, each use to which the property is being put must be considered in granting an exemption from ad valorem taxation, including any economic use in addition to any physical use. This section shall not apply in determining the exemption for property owned by governmental units pursuant to s. 196.199.

The First District Court's reliance on this section is misplaced. The language at the end of the section expressly declares that the section does not apply in determining exemptions pursuant to section 196.199, Florida Statutes.

The First District Court's interpretation of the legislative history of a 1988 amendment to section 196.192, Florida Statutes, is also incorrect. Prior to the 1988 amendment, section 196.192(1)

provided: "Ail property used exclusively for exempt purposes shall be totally exempt from ad valorem taxation." After the amendment, subsection (1) provided: "All property owned by an exempt entity and used exclusively for exempt purposes shall be totally exempt from ad valorem taxation." As the First District Court indicated, the Legislature amended the statute in response to the conclusion reached by the Second District Court in the case of Daniel v. T.M. Murrell Co., 445 So. 2d 587 (Fla. 2d DCA 1984), rev. denied, 453 So. 2d 43 (Fla. 1984). The Supreme Court in Daniel held that under section 196.192, prior to the amendment, a facility owned by a husband and wife and leased to the couple's closely held corporation, which operated the facility as a school, was exempt from ad valorem taxation. Id.

An Interim Project, titled "Exemptions from Taxation of Property Used for Exempt Purposes" (February 1, 1988), prepared by the staff of the Senate Committee on Finance Taxation & Claims, suggested the need for the amendments to chapter 196, Florida Statutes. (App. 3). The staff expressed concern that the exemption in Daniel, and the exemption upheld in a similar case out of the Second District, Schultz v. Trustees Skycrest Baptist Church, Tnc., 508 so. 2d 1314 (Fla. 2d DCA 1987), incurred a benefit to an entity that was receiving a profit. The staff opined that the real purpose of the constitutional authorization for the enumerated exemption was to benefit the exempt entity. Interim

Project at 10. (App. C). The staff noted that in order for property to be exempt from ad valor-em taxation, Article VII, section 3, Florida Constitution, requires only that the property be used for one of the enumerated purposes. Article VII, section 3 does not require that the exempt entity own the property. Interim Project at 11. (App. C).

The legislation suggested by the staff, which was identical to SB 375 as it was filed, added the language at the end of the section, as quoted above, which requires all uses of the property to be considered in granting an exemption under section 196.192, Florida Statutes. Interim Project, Attachment 1, p. 2. (App. C). Additionally, SB 375 added a definition of the term "use" to chapter 196: "'Use' means the exercise of any riqht or power over real or personal property incident to the ownership of or any interest in such property," Id. Note that this definition was not limited to exemptions prescribed in section 196.192, Florida Statutes. Only when SB 375 was amended and became a Committee Substitute did the ownership language appear as an amendment to section 196.192, Florida Statutes. CS/SB 375 (App. D).

While CS/SB 375 added the term "ownership" to the criteria for determining an exemption pursuant to section 196.192, Florida Statutes, the overriding purpose of the legislation was not to require that legal title be in the exempt entity fcr an exemption to apply, as opined by the First District Court in the decision

below. The Interim Project never refers to legal title as an important aspect of an exemption. Rather, the overriding purpose of the legislation was to assure that consideration be given to all the uses of the property, as the term "use" is broadly defined in the legislation, in determining whether an exemption applies.

The First District Court also relied upon a rule of statueory construction, "in pari materia," in concluding that legal title must reside in the exempt entity to qualify for an exemption. The '"in pari matecia" rule requires that all portions of a statute be read together in construing a portion of the statute. The First District noted that because section 196.011(1), Florida Statutes, requires that an applicant for an exemption must be the "person who, on January 1, has the legal title to real or personal property . . . ," the exempt entity must hold legal title for the property to be exempt. This language does not indicate that a necessary prerequisite to an exemption is that legal title must reside in an exempt entity. Rather, this language proves that when legal title is required, as for an application for an exemption, the Legislature uses the term "legal title." If the Legislature intended for the exemption to be predicated on legal title, the Legislature would have used the term "legal title" instead of "owned" in sections 196.192 and 196.199, Florida Statutes.

Another, more applicable, rule of statutory construction holds that the Legislature's deliberate use of different terms is strong

evidence that it intended different meanings. Ocasio v. Bureau of Crimes Compensation Div. of Workers' Compensation, 408 So. 2d 751 (Fla. 3d DCA 1982). Consequently, "ownership" in section 196.192, Florida Statutes, cannot be synonymous with "legal title" in section 196.011(1), Florida Statutes. Further, the Legislature has not acted to alter the conclusion reached in First Union by amending section 196.199, Florida Statutes, to require legal title in the governmental entity.

Additionally, the First District Court applied the wrong standard in considering the exemption presently at issue. Generally, exemptions are to be construed against the claimant;' as the First District stated and then applied. Slip op. at 10. However, the rule is reversed when public property is involved. When the taxation of public property is at issue, strict construction against the claimant may not be invoked. Overstreet v. Indian Creek Village, 239 So. 2d 149 (Fla. 3d DCA 1970). In the case of Saunders v. City of Jacksonville, 25 so. 2d 648 (Fla. 1946), this Court stated:

> Many of our opinions have been cited to sustain the principle that exemptions from taxes are frowned upon and each claim should be strictly construed. This rule does not

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"In the case of Lummus v. Cushman, 41 So. 2d 895 (Fla. 1949), this Court stated, "But this does not mean that where an exemption is claimed in qood faith the provision of law under which the claimant attempts to bring himself is to be subjected to such a strained and unnatural construction as to defeat the plain and evident intendments of the provision."

> apply where the question is raised by a municipality asserting the exemption by virtue of a statute duly passed pursuant to the Constitution. In the latter case exemption is the rule and taxation is the exemption.

Id. at 651. Consequently, strict construction against the exemption is inapplicable to the Southgate Property.

This Court should also reject the implication in the First District Court's decision below that the title to the property and the use of the property must reside in the same entity to qualify for an exemption. The First District Court's adherence to such a requirement is implicit in the following passage from the First District Court's decision:

> [T]he legislature clarified its purpose by pronouncing that section 196.199(1), which provided both before and after the 1988 amendment that '[p]roperty owned and used by [certain specified] governmental units shall be exempt from taxation,' meant precisely that--property may not be owned solely by an exempt entity or used only for an exempt purpose--but must be both owned by the exempt person *and* used for an exempt purpose before it is entitled to the exemption provided by law.

Slip Op. at 9 (emphasis added). This language clearly indicates that the exempt entity with title to the property must also use the property for an exempt purpose to qualify for an exemption. Such a conclusion is not mandated by the language of the statute. If the Legislature intended to limit exemptions to those entities that both own and use the property, the Legislature would have qualified the language in sections 196.192 and 196.199, Florida Statutes, to

require that ownership and use reside in the same entity.

C. The Better Analysis Considers All The Indicia of Ownership In The Property In Determining Governmental Property Exemption, As The Fifth District Court Did In First Union, As Well As The Uses Of The Property As Required By Section 196.199, Florida Statutes.

Florida law, for well over 100 years, has recognized that the legal title holder to property is not necessarily the owner for the purpose of determining whether the property is exempt from ad valorem taxation. Mundee v. Freeman, 3 So. 153 (Fla. 1887). See also Mikos v. King's Gate Club, Inc., 426 So. 2d 74 (Fla. 2d DCA 1983); Roberts v. First Federal Savings & Loan Assoc., 222 So. 2d 32 (Fla. 2d DCA 1969); Wingert v. Prince, 123 So. 2d 277 (Fla. 2d DCA 1960); Pensacola v. State Road Dept., 188 So. 2d 38 (Fla. 1st DCA 1966). Thus, Florida law establishes that an owner for tax purposes can have either equitable or legal title.[5]

An early case on the subject is Bancroft Invest. Corp. v. City of Jacksonville, 27 So. 2d 162 (Fla. 1946). The issue before the

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[5] In the circuit court, the Property Appraiser acknowledged that an equitable owner of government property may be exempt from taxation. In the stipulation of facts provided to the trial court, paragraph 7 provides, "The Property Appraiser acknowledges, however, that in the event LCEFA is determined to have been the equitable owner of the Southgate Property as of January 1, 1993, then that portion of the Southgate Property used for exempt purposes during the period of LCEFA's equitable ownership was exempt from ad valorem taxation." (App. C).

Court was whether property titled in the name of the United States Government was subject to ad valorem taxation. The United States exclusively used the subject property for governmental purposes for over 50 years, during which time the property was exempt from taxation. The United States entered into a contract to sell the property which required that use and possession of the property be given to the purchaser; however, the United States would retain title until full payment of the purchase price and full performance of the contract were contemplated.

The Supreme Court in Bancroft held that the property was not exempt, finding that the exemption which previously existed was lost when the complete use and occupancy was given to non-governmental purchasers. Id. at 171." In its reasoning, the Supreme Court acknowledged that the parties went to great length to argue the interpretation of the language of the applicable statutes. In response to these arguments, the Supreme Court stated:

> [A]s to their history and effect and whether or not they involve a 'separate interest,' a 'bare legal title,' an 'equitable fee,' or some other interest in land, we do not deem it necessary to labor our views by a lengthy treatment. To do so would liken the discussion to the fable of the old fox

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'The Court based its holding on the United States Supreme Court's opinion in S.R.A., Inc. v. State of Minn., 327 U.S. 558 (1946), which held that when the vendee enters into possession of the real estate under contract of purchase the vendee becomes subject to the jurisdiction of the state for tax purposes.

> exhausting his bag of tricks in an effort to distract the hounds from the main issue.

Id. at 169-170. The Supreme Court concluded that it was not limited to a literal interpretation of the statute defining exemption and that it was "authorized to look through form to fact and substance to answer the question cf tax exemption or tax liability." Id.

Similarly, in Hialeah, Inc. v. Dade County, 490 So. 2d 998 (Fla. 3d DCA 1986), rev. den'd., 500 So. 2d 544 (Fla. 1987), the court was called upon to determine whether property which was the subject of a sale leaseback transaction between the City of Hialeah and Hialeah, Inc. was exempt from ad valorem taxation. The City of Hialeah, which had obtained title to the property from Hialeah, Inc., leased it back to the corporation through a thirty-year lease under the condition that the corporation conduct thoroughbred horse racing on the property. If racing was discontinued, the leasehold would be terminated. Hialeah, Inc. also had the option to purchase the City's fee simple interest in the property upon satisfaction of the City's mortgage debt and upon further payment of $100.

The City obtained funds for the acquisition of the property through the issuance of municipal revenue notes. The lease payments due from Hialeah, Inc. were equivalent to principal and interest owned by the City on its mortgage loans paid by Hialeah, Inc., directly to the bank. No payments were made to the City. In addition, under the lease, Hialeah, Inc. had significant

responsibilities as to the property, including the payment of all taxes, insurances and expenses relative to the subject property. The City had no responsibilities to the property whatsoever. The Court analyzed the existing principles of Florida law and held that property was not owned by the City where the government merely holds legal title as security and the private entity is the beneficial owner in equity. Hialeah, Inc., 490 so. 2d at 1001.

Rather than looking at the holder of legal title, Florida law looks toward the rights and responsibilities of the parties relative to the property and to each other in order to determine the owner for ad valorem tax purposes. In other words, the law requires an analysis of the indices of ownership in making a determination of exemption. Factors constituting indicia of ownership include possession and use of property, responsibility for maintenance, beneficiary for profit upon sale or other disposition, responsibility for taxes, whether the real effect of title holding is to secure the payment of money, and whether the non-title holder has a right to specifically enforce a title transfer upon the happening of some event such as the final payment of a lease. Thus, while legal title is a factor, it does not control in determining who owns the property for tax exemption purposes.

In First Union Bank of Florida v. Ford, 636 So. 2d 523 (Fla. 5th DCA 1993), the case which conflicts with the decision of the

Fifth District Court in the case below, the First District Court focused upon the issue of equitable and beneficial ownership for the purpose of exemption from ad valorem taxation and established well reasoned guidelines in determining when lease purchase facilities may be exempt. In First Union, the property at issue was titled in First Union National Bank, leased to Brevard County, and used for governmental and administrative purposes. Id. Brevard County appealed a denial of an exemption from ad valorem taxes for real estate and improvements constituting a new county government center, The trial court ruled that the County had only a leasehold interest in the property and was not the equitable owner. Id. Thus, the Bank, as holder of the legal title, was assessed ad valorem taxes. Id.

In concluding that Brevard County was the equitable and beneficial owner of the property and therefore exempt from ad valorem taxation, the Fifth District Court of Appeal stated, "Based on our analysis of the trust and lease involved in this case, we conclude that the County has retained sufficient rights and duties regarding the realty and its improvements, to make it the equitable owner." Id. at 524. The Fifth District Court analyzed the indices of ownership to logically conclude that because Brevard County was the equitable and beneficial owner, as well as the lessee, of the property, such property was not taxable. Id. at 527. The Fifth District Court found that pursuant to the lease and trust

agreements, the Bank and certificate holders never had a right to use the land and buildings.' The certificate holders could only anticipate a recovery of their principal investment plus interest, and the Bank could only anticipate a fee for its services, which the Court was careful to note was not excessive.

The Fifth District Court of Appeal noted that no appellate decisions concerning the ad valorem taxation of real estate and improvements subject to a similar lease-trust arrangement existed. Id. at 525. Further, the court distinguished the cases of Ocean Highway and Port Auth. v. Page, 609 So. 2d 84 (Fla. 1st DCA 1992) and Mastroianni v. Memorial Medical Center of Jacksonville, Inc., 606 So. 2d 759 (Fla. 1st DCA 1992), both of which were also relied upon by the First District Court in the decision in this case. The Fifth District Court emphasized that neither of these cases address the equitable ownership of the property under the lease, an inquiry which is essential in the determination of exemption from taxation. Both cases did emphasize that in order to be entitled to a tax exemption, a tax exempt entity had to be the owner as well as the user and occupant of the property. 636 So. 2d at 526. However, neither case provides a sufficient rationale for distinguishing between legal and equitable or beneficial owner. Finally, neither Ocean Highway nor Mastroianni involves a lease-purchase

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The court analogized that, "Even a mortgagee who has the right to foreclose on mortgaged property, has more rights than do the Bank and certificate holders in this case." Id. at 524.

arranqement, the arrangement in First Union and the present case.

The Fifth District Court of Appeal in First Union also considered the treatment of lease purchase arranqemencs outside the State of Florida. In Mayhew Tech Center v. Count vof Sacramento, 5 Cal.Rptr.2d 702 (Ct. App. 1992), and Texas Dept. Of Corrections v. Anderson Countv Appraisal Dist., 834 S.W.2d 130 (Tx. Ct. App. 1992), both courts held that because the states retained equitable ownership of the real estate and improvements at issue, the property was not subject to ad valorem taxation. The Texas case concerned the ad valorem taxation of a state prison that was financed through a lease purchase arrangement, In Mavhew, the State of California as lessee of a facility used for the Franchise Tax Board had obligations similar to those of LCEFA in the present case. For example, the State was responsible for all maintenance and repair on the property, the provision of utilities and services on the property, and payment of any taxes and assessments levied on the property. The State did have an option to purchase the property ten years into the lease. If all rental payments were made, the title to the property would vest in the State at the end of the lease term. 5 Cal.Rptr.2d at 703.

The Mayhew court found that in order to ascertain ownership of the property for tax purposes, "the court must examine the terms of the agreements involved and determine who holds the 'essential indicia of ownership."' Id. at 704. The court noted that the

financing arrangement, which was identical to the arrangement in this case, resembled the financing of a purchase through a loan secured by a deed of trust on the subject property. As a consequence, the majority of the property rights were vested in the state as if the transaction was a normal purchase through a loan secured by a deed of trust. Id. at 706. Additionally, the court acknowledged the State of California's equitable interest in the property. Similar to the arrangement in the present case, in the event of a default, the State of California received all excess funds after a sale of the property and payment of the certificate holders. Thus, the Mayhew court concluded that the State held the essential indicia of ownership in order to constitute the beneficial owner for ad valorem tax purposes. Id.

The Fifth District Court of Appeal in First Union found ample support in Florida case law for its conclusion that courts must look through form to the substance to determine the beneficial owner of the property. 636 So. 2d at 527. In the case of Parker v. Hertz Corp., 544 so. 2d 249 (Fla. 2d DCA 1989), the court determined that fixed improvements constructed by a lessee, but actually owned by a governmental entity, were subject to ad valorem taxation.[8] The court, in determining that Hertz "as a matter of

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[8] Id. at 250. The court followed the doctrine enunciated in Helvering v. F & R Lazarus & Co., 308 U.S. 252 (1939), that "[i]n the field of taxation, administrators of the laws and the courts are concerned with substance and realities, and formal written (continued...)

law is endowed with sufficient indicia of ownership," stated:

> Hertz asserts that its lack of unfettered use and enjoyment and inability to alienate the premises forecloses ownership. Although those elements are frequently characteristic of ownership, their absence alone, in the presence of other factors, does not demand a finding, as in this instance, that the entity in possession of the property is not the owner. See Mikos v. King's Gate Club, Inc., 426 so. 2d 74 (Fla. 2d DCA 1983) (dominion over property is equivalent to ownership). The Ground Lease convinces us that Hertz possesses and exercises sufficient dominion over the improvements warranting the conclusion that it is the owner subject to ad valorem taxation.

Id. at 251.[9]

Additionally, the court in Parker addressed section 196.199(7), Florida Statutes, which was also cited by the First District Court of Appeal in the case below. Section 196.199(7), Florida Statutes, provides:

> Property which is originally leased for 100

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[8] (...continued)
documents are not rigidly binding." 544 So. 2d at 250, citing Helvering, 308 U.S. at 255.

[9] Courts do not limit their full examination of indicia of ownership to instances of determining ad valorem tax exemptions. Rather, such an examination is commonplace in determining other issues. For example, the First District Court considered indicia of ownership in determining whether an entity which no longer had title to rezoned property had standing to challenge a vested rights decision by a local government. Equity Resources, Inc. v. County of Leon, 643 So. 2d 1112 (Fla. 1st DCA 1994). The courts in Florida also examine indicia of ownership in determining damages in eminent domainproceedings. See, e.g. Pensacola Scrap Processors, Inc. v. State Road Department, 188 So. 2d 38 (Fla. 1st DCA 1966).

> years or more, exclusive of renewal options, or property which is financed, acquired, or maintained utilizing in whole or in part funds acquired through the issuance of bonds pursuant to parts II, III, and IV of chapter 159, shall be deemed owned for purposes of this section.

In the present case, the First District Court of Appeal reasoned that if the Legislature had intended to exempt equitable ownership of property, it would have done so in section 196.199(7), Florida statutes. Slip Op. at 11. However, the word "owned" should not be measured exclusively by this particular statutory provision. As the court in Parker stated, "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 196.199(2)(b)." Parker, 544 So. 2d at 251.

A ruling in the present case that equitable ownership rather than bare legal title is the proper measurement of ownership for ad valorem tax exemption purposes will not result in property leased to governmental entities pursuant to commercial leases escaping ad valorem taxation. A commercial lease may grant the governmental entity exclusive use and benefit. It may also require the government to maintain the premises, purchase property insurance, and pay for the utilities. However, a commercial lease does not grant sufficient indicia of ownership to the governmental entity to qualify for an exemption. For example, a commercial lease does not

typically prohibit sale of the property to another entity, as is inherent in a lease purchase arrangement where the title holder- has no authority to sell the property except upon default or to the governmental entity at termination of the lease term. Further, a commercial lease does not require the sale proceeds in excess of the investor's return be transferred to the governmental entity, as is the case in a typical lease purchase arrangement. Additionally, pursuant to a commercial lease the lessor makes a profit which under the statute providing for exemption, fails to qualify as a governmental use and would therefore render the property taxable.

III. IT IS NOT POSSIBLE ON THE STATE OF THE RECORD BEFORE THE COURT TO DETERMINE WHETHER THE SOUTHGATE PROPERTY IS EXEMPT FROM AD VALOREM TAXATION APPLYING THE PRINCIPLES OF OWNERSHIP AND USE ARTICULATED IN FIRST UNION TO THE LEON COUNTY EDUCATIONAL FACILITIES AUTHORITY PROJECT.

At fir-st glance, the Southgate Property appears to qualify for an ad valorem tax exemption because its lease purchase arrangement is so similar to the structure found to be exempt in First Union. However, a closer examination of the relative ownership rights of the parties and the uses of the facilities as outlined in the First District Court's decision and framed in the Stipulation of the parties in the circuit court proceeding, reveals that some of the factors that may bear upon ownership and use are

missing from the record.

The actual use of Southgate differs from the uses of the facility in First Union. The Southgate facility is rented to college students, as opposed to actual physical use by LCEFA. In contrast, the facility at issue in First Union was used by Brevard County for administrative offices of the county government. However, both uses serve a public purpose and consequently, this difference does not disqualify Southgate from exemption.

The First District Court's decision in the case below outlines the relative ownership rights of the parties to the lease purchase financing of Southgate. SRH, Inc., a not-for-profit corporation, holds legal title to Southgate and leases the facilities to LCEFA. Slip Op. at 2. LCEFA is required to operate and maintain Southgate as well as pay insurance and any taxes assessed on the property. Id. at 3. LCEFA also collects rent and other revenue from the occupants and delivers them to a trustee. The trustee then provides the funds necessary to operate and maintain Southgate and uses the net revenues to repay the investors in the Certificates of Participation, who provided the monies for financing the cost of the acquisition and construction of Southgate. At the expiration of the long term lease, LCEFA may acquire the facility for nominal additional consideration. Id.

The structure of the Southgate financing is similar, but not identical, to the one in First Union where the Fifth District Court

found sufficient indicia of ownership in Brevard County to qualify for an ad valorem tax exemption. One difference is that in First Union, a bank held title to the property as security for the holders of the Certificates of Participation. Here, title is held by SRH, Inc., a not-for-profit corporation. That difference alone does not remove the Southgate facility from tax exempt status. On the contrary, having the titie in a not-for profit corporation evidences a higher public purpose in granting an exemption than in having title reside in a bank.

However, the uses of Southgate by SRH, Inc. have not been examind. In First Union, the Fifth District Court closely examined the title holder's use of the property, noting that the Bank, the title holder, received a fee for its services rendered in facilitating the financing. The Fifth District Court concluded that the fee paid for the Bank's services was reasonable and consequently it did not disqualify the facility from tax exempt status. In contrast, the First District Court decision did not focus on SRH, Inc. The Court indicated that SRH, Inc. is a not-for-profit corporation; however, it noted that SRH, Inc. is a "non-exempt entity." Slip op. at 3. The Stipulation of the parties indicates that "[t]axpayers make no claim of tax exemption based on ownership of the Southgate Property by SRH, Inc. as a Florida not-for-profit corporation." Stipulation, para. 8. (App. A).

In order to qualify as an entity entitled to an exemption under section 196.1.92, Florida Statutes, the entity must meet the financial requirements of section 196.195, Florida Statutes. Section 196.195, Florida statutes, limits the type of no-for-profits that may qualify as exempt entities by requiring entities to disclose pertinent financial information and, further, by requiring that the fees paid by the entity for contracts and the salaries of its officers and employees be reasonable. If SRH Inc. had qualified as an exempt entity by meeting the requirements of section 196.195, Florida Statutes, then no question would exist about SRH, Inc.'s ownership and use of the property. However, because no analysis of SRH, Inc., or its uses of the property, has been undertaken in a fashion similar to the examination by the Fifth District Court in First Union, whether any activity or benefit of SRH, Inc. would disqualify Southgate from exemption is not clear. Additionally, although not mentioned in the First District Court's decision, the record reveals that Southgate is in foreclosure. Stipulation at 3, para. 6. (App. A). No court has analyzed what restrictions the foreclosure has on the ownership rights and the responsibilities of SRH, Inc., LCEFA, and Sun Bank, National Assoc., as mortgagees. This analysis should be accomplished on remand by the circuit court to determine whether the foreclosure has an effect on LCEFA's equitable ownership.

One additional factor remains that may bear on the ad valorem

tax exemption in this case. In 1992, Southgate was granted an exemption from ad valorem taxes by the Property Appraiser. Stipulation, Exhibit 26. (App. B). The Property Appraiser denied the renewal application in the succeeding year, 1993. Although the granting of an ad valorem exemption in one year does nor generally entitle a taxpayer to an exemption the following year, this fact may indicate that a change in circumstance of ownership or use of Southgate, although not explained on the record, may be relevant to a determination of the tax status of the property.

CONCLUSION

The conflict between the First District Court's decision in this case and the Fifth District Court's decision in First Union should be resolved in favor of analyzing claims to ad valorem tax exemptions in lease purchase arrangements to require that all the indicia of ownership, as well as all the uses of the property, be considered. Because this extensive analysis was not accomplished either in the First District Court's decision below or in the circuit court, this case should be remanded for full development and consideration of the factors of ownership and use by all the parties to the arrangement.

Respectfully Submitted,

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CERTIFICATION OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to the persons on the attached Service List this 26th day of June, 1996.

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