IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

LEON COUNTY EDUCATIONAL FACILITIES AUTHORITY and SRH, INC.,

Appellants,

vs. **CASE** NO. **87,769**

BERT HARTSFIELD, LEON COUNTY PROPERTY APPRAISER,

Appellee.
_____/

BRIEF OF AMICUS CURIAE CHRIS JONES, ESCAMBIA COUNTY PROPERTY APPRAISER, IN SUPPORT OF APPELLEE, BERT HARTSFIELD, LEON COUNTY PROPERTY APPRAISER

On **appeal** from the First District Court of Appeal, Case No. 95-1399

Elliott Messer
Albert T. Gimbel
Kimberly L. King
MESSER, CAPARELLO, MADSEN, GOLDMAN & METZ, **P.A.**
Post Office Box **1876**
Tallahassee, FL **32302-1876**
(904) **222-0720**

Attorneys for Chris Jones, Escambia County Property Appraiser

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SUMMARY OF THE ARGUMENT

The central substantive issue in this appeal is whether the tax exemption for "government property" provided in section 196.199(1), Florida Statutes, can apply where legal title to the property does not reside in (and indeed has never resided in) the governmental unit claiming the exemption, and the property is not otherwise deemed by the statute to be "owned . . . by," such governmental unit, The First District Court of Appeal in this case, *Leon County Educational Facilities Authority v. Hartsfield*, 669 So.2d 1105 (Fla. 1st DCA 1996), and the Fifth District Court of Appeal in *First Union National Bank v. Ford*, 636 So.2d 523 (Fla. 5th DCA 1993), took opposing views on the issue, even though their decisions were reached on different grounds. The Fifth District based its holding on the principle of tax immunity, as opposed to tax exemption, but it nevertheless suggested that equitable or beneficial ownership of property by a governmental unit is alone a sufficient basis upon which property may be deemed "owned . . . by" the unit for purposes of section 196.199(1). The First District rejected this view, instead construing the statutory language "owned . . . by" as requiring that legal title reside in the governmental unit.

To the extent there is a conflict of decisions warranting review by this Court, the First District Court's construction of section 196.199(1) should be adopted, as it reflects the better view. The First District's decision adheres to the well-founded principles that exemption statutes are to be strictly construed against the claimant, and that it is not the

province of the courts to expand the scope of an exemption that the Legislature has created.

Nevertheless, this Court's adoption of the First District's view would not necessarily require that the Fifth District's holding in *First Union* be disturbed. The court in *First Union* held that the land on which Brevard County's primary governmental and administrative offices were situated was not subject to ad valorem taxation, because the County was immune (as opposed to exempt) from taxation. Recognizing that the County was in the first instance both the legal and beneficial owner of the property and had conveyed bare legal title to First Union **Bank** solely for the purpose of facilitating a form of revenue bond financing, the Fifth District determined that sufficient attributes of ownership (including the obligation to pay the taxes) resided in the County to support application of the immunity doctrine. Thus, Brevard County was relieved of its burden to pay taxes to other governmental entities, Implicit in the Fifth District's holding is a recognition that conveyance of bare legal title by a tax immune entity, solely to secure financing, does not constitute a waiver of such immunity, so long as all other attributes of ownership are retained. In effect, the Fifth District avoided the clear and plain provisions of section **196.**199(1), Florida Statutes, in order to reach the result it deemed most appropriate to the circumstances.

In the case at bar, the circuit court concluded, and the First District Court of Appeal agreed, that the Leon County Educational Facilities Authority ("LCEFA") never held either legal or equitable title to the property on which the college dormitory, dining

hall, and related student facilities were situated. Therefore, LCEFA cannot avail itself of the doctrine of sovereign tax immunity, assuming the doctrine applies to special districts. Furthermore, even if this Court should determine that the tax exemption for "government property" provided in section 196.199(1) can apply where legal title to the property does not reside in, and the property is not otherwise deemed by statute to be "owned . . . by," the governmental unit, the exemption is still unavailable to LCEFA because there is no beneficial or equitable ownership to support the same.

The provisions of section 243.33 should be read in pari materia with those of chapter 196, Florida Statutes, which requires ownership in connection with the exemption of governmental and educational property. The Legislature has carefully restricted the availability of the governmental and educational exemptions and the First District properly respected and followed the more recent expression of Legislative intent in chapter 196, Florida Statutes. Accordingly, the decision under review should be AFFIRMED.

ARGUMENT

POINT I

THE SECTION 196.199(1) EXEMPTION CANNOT APPLY WHERE LEGAL TITLE TO THE PROPERTY DOES NOT RESIDE IN, AND THE PROPERTY IS NOT OTHERWISE BY STATUTE DEEMED "OWNED" BY, THE GOVERNMENTAL UNIT.

A. The tax, the exemption, and the role of the courts.

The Legislature has imposed an annual ad valorem tax on "[a]ll real property in this state" cxccpt propcrty that it has "expressly cxcmptcd from taxation." § 196.001, Fla. Stat. (1991).[1] The tax is imposed on the real property itself, not the owner of the property. *Wolfson v. Heins*, 6 **So.** 2d 858, 860-61 (Fla. 1942) ("in this State, the levy and assessment is on the realty itself regardless of the existence of estates in it"); **Op.** Att'y Gen. Fla. 054-63 (Mar. 16, 1954) ("Real property taxes are levied and assessed against the property itself and not against the owner or owners of interests therein"). The availability of the exemption established through section 196.199(1), however, turns in part upon the identity and status of the owner. The statute provides:

> 196.199 Government property exemption.--
>
> (1) Property owned and used by the following governmental units shall be cxempt from taxation under the following conditions:
>
> (a) All property of the United States shall bc exempt from ad valorem taxation, except such propcrty as is subject to tax by this state or

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[1] Unless otherwise indicated, all citations in this brief to the Florida Statutes refer to the Florida Statutes (1991), which is the codification that was effective on January 1, 1993, the day as of which the assessment at issue was made.

any political subdivision thereof or any municipality under any law of the United States.

(b) **All** property of this state which is used for governmental purposes shall be exempt from ad valorem taxation except as otherwise provided by law.

(c) **All** 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.

§ 196.199(1), Fla. Stat, (emphasis added).

The Legislature is the only branch of State government that has the power to impose a tax or to create a tax exemption. It is not the province of the courts to expand the scope of a tax or of an exemption that the Legislature has created. Fla. Const. art. **V I,** § 1(a) ("No tax shall be levied except in pursuance of law"); ***id.*** art. II, § **3** ("No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein"); ***Belcher*** *Oil Co.* **v. *Dude*** *County,* 271 **So.** 2d 118, 122 (Fla. 1972) ("The right to determine the subjects of taxation and exemptions therefrom is within the Legislature's prerogative in the exercise of its sovereign power"). The court in ***Miller*** *v. Higgs,* 468 So. 2d 371 (Fla. 1st DCA), ***review denied,*** 479 So.2d 117 (Fla. 1985), explained:

> Subject only to constitutional restrictions and the will of the people expressed through elections, the legislature's power and discretion in regard to taxation are broad, plenary, unlimited and supreme. . . . All questions as to mode, form, character, or extent of taxation, exemption or nonexemption,

> apportionment, means of assessment and collection, and all other incidents of the taxing power, are for the legislature to decide. . . . As long as the legislature does not violate constitutional restrictions, the courts have no concern with the wisdom or policy of the tax, the political or other motives behind it, or the amounts to be raised, since such matters are exclusively for the lawmaking body to decide.

Id. at *375*.

B. Property is "owned by" a governmental unit for purposes of section 196.199(1) only if the unit has legal title to the property, or the property is otherwise deemed by statute to be owned by the unit.

The First District rejected LCEFA's assertion that the section 196.199(1)(c) exemption can apply where the governmental unit has "equitable and beneficial ownership" of the property although "passive, lega title" to the proporty resides in a corporation that is not itself exempt from taxation. Rather, the court construed section 196.199(1)(c) to require that "legal title to the property in dispute be in the entity seeking the exemption."[2] *LCEFA*, 669 So.2d at 1107. Although the court's opinion on this issue sets forth amplc justification for the court's construction of the statutory language, Amicus Curiae Jones submits that there are additional factors that support such a construction.

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[2]The language "or property conveyed to a nonprofit corporation which would revert to the governmental agency" in section 196.199(1)(c), along with the provisions of section 196.199(7), are obvious exceptions to this general rule. These provisions, through which property may be deemed owned by the governmental unit even though legal title rests in another entity, are discussed below.

1. Words of common usage.

The term "owned" is a word of common usage. It therefore should be construed according to its "plain and ordinary sense." *Zuckerman v.* **After, 615 So.** 2d **661,663** (Fla. 1993).[3] Black's Law Dictionary states that the "primary meaning of the word ["owner"] as applied to land is one who owns the fee and who has the right to dispose of the property. . . ." Black's Law Dictionary **996** (5th ed. 1979) (emphasis added). The Restatement of Property incorporates the following definition of "owner," which is based upon common usage:

> *Ownership of a thing. A* person who has the totality ofrights, powers, privileges and immunities which constitute complete property in a thing . . . is the "owner" ofthe "thing," or "owns" the "thing." The word "thing" is substituted in this connection for the term "interests in the thing," that is, the ownership is predicated of the physical objects and not of the interests. This usage is well established and it is followed in this Restatement.

The Restatement also recognizes that one may still be considered the "owner" of property where one has conveyed some interest in **the** property to another, such as a mortgagee.[4]

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[3]Section **196.199** was created in 1971, Ch. **71-133,** § 11, at **368,** Laws of Fla. It appears that there is no extant documentation of the legislative history, such as a staff or committee report, that could serve as an extrinsic aid to this Court's construction of the statutory language.

[4] ***c.*** *Ownership despite decrease in interests.* The owner may part with many ofthe rights, powers, privileges and immunitics that constitute complete property and his relation to the thing is still termed ownership both in this Restatement and as a matter of popular usage. Thus an owner of an automobile may mortgage it, or have it subjected to a mechanic's lien, and still properly be said to be the owner. It is characteristic ofownership that upon the termination of any lesser interests, the interests of the owner are thereby automatically increased,

However, the key to this common usage of the term "owner" is that the person first had complete ownership of all the interests in the property, later conveyed one or more **of** those interests to another, but retained sufficient interests that would permit the person to dispose of the property.

LCEFA never owned the fee or had the right to dispose of the property. Therefore, it cannot bc vicwcd as having "owned" the property within the common usage of that term.

2. The Legislature has specified the circumstances under which property is to be deemed "owned" by the governmental unit.

Tn section 196.199, Florida Statutes, the Legislature has recognized three circumstances under which property is deemed to be "owned" by the governmental unit even though legal title may reside elsewhere.

First, through the language "or property conveyed to a nonprofit corporation which would revert to the governmental agency" in section 196.199(1)(c), the Legislature has deemed such property "owned" by the governmental unit regardless of legal title. Thus the Legislature has provided a means by which local governments may engage in lease revenue financing without incurring the risk that the property will be subject to ad valorem taxation by other governmental entities. The property at issue in this case, however, is not "property conveyed to a nonprofit corporation which would revert to the governmental agency" within the meaning of section 196.199(1)(c). The property cannot

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Restatement of the Law (Property) § 10, comment c.

"revert" to the LCEFA, because LCEFA never had any interest in the property that it could have conveyed to SRH in the first place.

The legal term "revert" has a very clear meaning: It applies where property conveyed will return to its former owner. In *Sorrels v. McNally*, 105 So. 106, 109 (Fla. 1925), this Court stated: **"A** reversion is defined as the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him. It is also described as the returning of land to the grantor, or his heirs, after the grant is over." *See also Black's Law Dictionary* 1320 (6th Ed. 1990) (defining revert to mean "[w]ith respect to property to go back to and lodge in former owner, who parted with it by creating estate in another which has expired, or to his heirs").

Thus, under this Court's decision in *Sorrels*, a parcel ofpropcrty cannot rcvcrt to one who did not first own it. Appellants do not argue that the LCEFA (or any other governmental unit) owned the property immediately bcforc **SRH** did, or that LCEFA conveyed the property to SRH. Therefore, the property clearly cannot "revert" to LCEFA and the reverter provision of section 196.199(1)(c) cannot apply.

Second, property is deemed owned by the governmental unit where the property **is** "originally leased for 100 years or more, exclusive of renewal options." § 196.199(7), Fla. Stat. The applicability of this provision is not at issue in this appeal.

Third, the property is deemed owned by the governmental unit where it "is financed, acquired, or maintained utilizing in whole or in part funds acquired through the

issuance of bonds pursuant to parts II, III, and V of chapter 159." § 196.199(7), Fla. Stat. In the case at bar, there is no evidence indicating that the project was financed, acquired, or maintained with funds acquired through the issuance of such bonds.

Under the maxim ***expressio unius est exclusio alterius,*** the Legislature's enumeration in section 196.199 of three circumstances under which property is to be deemed owned even though the governmental unit generally would not have legal title implies the exclusion of all those not expressly mentioned. ***See, e.g., P.W. Ventures, Inc. v. Nichols,*** *533* So.2d 281, 283 (Fla. 1988). This Court should not construe section 196.199(1) so as to create a fourth set of circumstances under which property is to be deemed "owned" by a governmental unit where the unit does not have legal title.

C. This Court's adoption of the First District's view would not necessarily require that the Fifth District's holding in *First Union* be disturbed.

Construing the term "owned" as used in section 196.199(1) so as to require that the governmental unit have legal title (other than where the property is by statute deemed "owned" by the governmental unit) would not necessarily require that the result reached by the Fifth District in ***First Union*** be disturbed. Notwithstanding the Fifth District's extensive discussion of title in the opinion in ***First Union,*** its holding was as follows:

> In summary, we hold that the County is the beneficial owner of the real property and improvements sought to be taxed in this case. As such, it is immune from taxation both as owner and as lessee. Accordingly, we reverse. . . .

636 So. 2d at 527 (emphasis added).

Thus, *First Union* was decided on the ground that Brevard County was sovereignly immune from that tax, not that the section 196.199(1)(c) exemption applied.[5] As *First Union* demonstrates, a county need not rely on any exemption from the ad valorem tax. The State of Florida and its counties enjoy sovereign immunity from the ad valorem tax on real property. ***Park-N-Shop,*** *Inc. v. Sparkman,* 99 So. 2d 571,573 (Fla. 1957) ("property of the state and of a county, which is a political division of the state, . . . is immune from taxation"); *State ex rel. Charlotte County v. Alford,* 107 So. 2d 27, 29 (Fla. 1958) ("exemption" of State-owned lands from taxation "is not dependent upon statutory or constitutional provisions but rests upon broad grounds of fundamentals in government"); *Dickinson v. City of Tallahassee,* 325 So, 2d 1, 3 (Fla. 1975) ("the sovereign's general freedom from taxation derives from an 'immunity,' not from an 'exemption'). Sovereign immunity shields the property from taxation regardless of the purpose for which the property is used. Thus, this Court in ***Park-N-Shop v. Sparkman,*** 99 So. 2d 571 (Fla. 1957), decided that land owned by Hillsborough County but leased to private parties who conducted for-profit businesses on the land nevertheless was immune from the tax.

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[5] Amicus Curiae Jones recognizes that section 196.199, Florida Statutes, can be viewed as reflecting a Legislative intent that the sovereign tax immunity of counties be waived. However, in light of the apparent continuing validity of *Park-N-Shop v. Sparkman,* 99 So.2d 571 (Fla. 1957), and decisions indicating that waivers of immunity must be clear and specified, *e.g., Spangler v. Florida Turnpike Auth.,* 106 So. 2d 421,424, (Fla. 1958), Amicus Curiae Jones assumes for purposes of this appeal that section 196.199 did not operate as a waiver of Brevard County's immunity from ad valorem taxation. If it did and Brevard County was not immune, then the property would have been taxable unless the conditions of the section 196.199(1) were met.

In the final analysis, First *Union* was a "hard case," involving an assertion of tax against real property the County had owned before the transaction and on which the County's own governmental administrative offices were situated. The case was made even more difficult by the fact that the County had by contract assumed the obligation to pay any taxes that might become due. As this Court has noted, " 'hard cases make bad law.' " *Anderson v. State,* 455 So. 2d 1118, 1119 (Fla. 1995). The persuasive force of the discussion of title in *First Union* therefore should be gauged by its context, in which a court was struggling to do justice within statutory parameters that did not tit the situation and indeed were not necessary to its decision,

The Fifth District's decision is best understood within the context of existing Florida immunity cases by recognition of the following factors: (1) the County possessed fee simple absolute prior to the financing; (2) as such the property was immune from taxation; (3) the conveyance of legal title to First Union Bank, in order to create a stream of rent to pay holders of certificates of deposit, does not evidence an intent to waive immunity; (4) the County continued to exercise complete dominion and control over the property and use the same for its own governmental purposes; and (5) since the County had an absolute right to a return of legal title upon payment of the certificates, *First Union,* 636 So.2d at 524, the County retained a sufficient interest in the property to support continuation of immunity. The decision of the Fifth District should not be

mischaracterized as an "exemption case"; and for purposes of clarification, this Court should disapprove that appellate court's construction of section 196.199(1), even though it is dicta, and should expressly approve the statutory analysis of the First District in LCEFA.

POINT II

ASSUMING THAT THE SECTION 196.199(1) EXEMPTION IS AVAILABLE WHERE LEGAL TITLE DOES NOT RESIDE IN THE GOVERNMENTAL UNIT CLAIMING THE SAME, THE EXEMPTION DOES NOT APPLY HERE, BECAUSE LCEFA WAS NOT THE EQUITABLE OWNER.

Appellants contend that LCEFA's lease with an option to purchase the property gives LCEFA equitable or beneficial title to the property. Appellants' contention is clearly contrary to established law. This *Court* in *Gautier v. Lapoff*, 91 So.2d 324 (Fla. 1956), decided that a husband and wife in possession of a residence pursuant to a lease with an option to purchase were not entitled to the benefit of the homestead exemption provided in the Florida Constitution. This Court observed that

> until an optionce cxcrciscs the right to purchase in accordance with the terms of his option he has no estate. either legal or eauitable, in the lands involved.

91 So.2d at 326. Accordingly, this Court held that

> an option to purchase contained in a lease, until exercised, affords no greater estate than conveyed by the lease itself and

> that when the option is exercised the optionee, becomes the equitable owner of the lands involved, as of the date the option is exercised and not before, The equitable estate does not relate back to the date of the option or the date of the lease containing the option.

Id.

LCEFA was not the equitable or beneficial owner of the property. Therefore, even if this Court determines that the section 196.199(1) governmental exemption is available where legal title to the property does not lie in, and the property is not otherwise by statute deemed to be "owned" by, the governmental unit, the exemption cannot apply here.

POINT III

THE PROVISIONS OF SECTION 243.33 ARE NOT APPLICABLE.

Section 243.33, Florida Statutes, provides in pertinent part that

> neither the authority nor its agent shall be required to pay any taxes or assessments upon or in respect of a project or any property acquired or used by the authority or its agents under the provisions of this part.

This provision, which at first blush appears to be controlling, was not mentioned by the First District in its opinion, and apparently was not a material factor in its decision. Nevertheless, Appellants and Appellee have briefed the issue before this Court. On the applicability of section 243.33, Amicus Curiae Jones adopts the position of the Appellee, but offers the following additional observations.

SRH, a nonexempt entity, owns the property and uses it for the production of income through rents received from LCEFA, Therefore, LCEFA cannot be deemed to have "acquired" the property, and any "use" of it is secondary to, and colored by, a nonexempt use by a nonexempt entity. The most that can be said is that LCEFA uses its leasehold estate (rather than the property itself) to achieve the purposes of chapter 243.

SRH is not an "institution for higher education," and therefore cannot be deemed to be an "agent" of LCEFA within the meaning of sections 243.22(5)(d), 243.24, or 243.33, Florida Statutes.

LCEFA has not been "required to pay any taxes" within the meaning of section 243.33. Any requirement that LCEFA pay taxes on the property is purely self-imposed by contract.

Most importantly, however, the provisions of section 243.33 should be read in pari materia with those of section 196.199(I)(c), which requires ownership in connection with the exemption of governmental property. It should also be read in pari materia with section 196,192 and section 196.012(1), which provides:

> (1) "Exempt use of property" or "use of property for exempt purposes" means predominant or exclusive use of property owned by an exempt entity for educational, literary, scientific, religious, charitable, or governmental purposes, as defined in this chapter.

§ 196.012(1), Fla. Stat. (emphasis added). Section 196.192 incorporates the above definition in providing an exemption for property owned by exempt entities and used for

educational purposes. Finally, section 243.33 must be read in pari materia with section 196.012(4), which defines the term "use" for purposes of chapter 196 as follows:

> (4) "Use" means the exercise of any right or power over real or personal property incident to the ownership of the property.

§196.012(4), Fla. Stat. (emphasis added). As discussed above, the only right or power LCEFA has over the property exists by virtue of its status as lessee. As a lessee (even with an option to purchase), LCEFA has no ownership interest in the property. Therefore, LCEFA cannot be deemed to have "used" the property within the meaning of section 243.33.

The consequence of detaching the requirement of legal ownership from the governmental or educational use of the property is to return to the same legal status and legal controversy that prompted the 1988 legislative reform of chapter 196. This adverse consequence was both recognized and avoided by the First District in *LCEFA*, 669 So. 2d at 1107-08. The 1988 legislative amendments to chapter 196 constitute the latest expression of legislative intent and should be deemed to preclude a more liberal application of section 243.33, which was previously enacted in 1969. For this reason alone, this Court should reject Appellants' contention that the provisions of section 243.33 apply notwithstanding the admitted lack of legal ownership.

CONCLUSION

The decision and holding of the Fifth District in *First Union National Bank v. First Union* should be confined to the facts and the doctrine of immunity upon which it was predicated. Since immunity never attached to the dormitory property that was the subject of the First District's decision in the case below, that court's correct interpretation of the provisions of Florida Statutes, section 196.199(1)(c), should be affirmed.

The clear and present danger inherent in the misapplication or the expansion of *First Union* to abrogate the result reached below lies in the loss of revenues to primary governmental entities that must provide police, fire, and other essential services to the subject property. Equally important, the creation and establishment of educational but proprietary housing (or similar) ventures, sponsored by private developers and resulting in competition to private non-governmental projects, deserves serious judicial scrutiny when the question of fair share taxation is at stake.

In *First Union* the project was conceived by the county and implemented to serve an essential non-proprietary, non-competitive governmental purpose-its own administrative offices. In this case, the situation is materially different. The project itself is proprietary and competitive, even though sanctioned by law.

In the final analysis, it is most important that this Court clearly enunciate the reason or basis for its decision. Even if the Court determines that the LCEFA project should be exempt from ad valorem taxation due to the provisions of section 243.33, Florida Statutes, it should so state without impugning the rationale of the First District in

its construction of section 196.199, Florida Statutes. In Chapter 196, the Legislature has carefully restricted the availability of the governmental and educational exemptions, and the First District properly respected and followed the legislative mandate. Accordingly, Amicus Curiae, Chris Jones as Property Appraiser of Escambia County respectfully suggests that the decision under review in this Court should be AFFIRMED.

Respectfully submitted,

MESSER, CAPARELLO, MADSEN,
GOLDMAN & METZ, P. A.
215 South Monroe Street, Suite 701
Post Office Box 1876
Tallahassee, FL 32302-1876
(904) 222-0720
(904) 224-4359 (facsimile)

ELLIOTT MESSER
Fla. Bar No. 054461

ALBERT T. GIMBEL
Fla. Bar No. 279730

KIMBERLY [redacted]
Fla. Bar No. 593011

Attorneys for Chris Jones,
Escambia County Property Appraiser

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing are furnished on the 23d day of August, 1996, by U.S. mail, postage prepaid and affixed, to the persons on the attached service list.

Kimberly King

ATTORNEY

SERVICE LIST

Kenza van Assenderp
Andrew 1. Solis
Young, van Assenderp & Varnadoc
225 South Adams Street
P.O. Box 1833
Tallahassee, FL 32302
Attorneys for LCEFA and SRH, Tnc.

Richard E. Benton
14 I 5 East Piedmont Drive
Suite 4
Tallahassee, FL 32308
Attorney for LCEFA and SRH, Inc.

Ricky Polston
Leslie G. Street
Radey Hinkle Thomas & McArthur
Suite 100, Monroe-Park Tower
101 North Monroe Street
Post Office Drawer I 1307
Tallahassee, FL 32302
Attorneys for Bert Hartsfield,
Leon County Property Appraiser

Larry Levy
The Levy Law Firm
P.O. Box 10583
Tallahassee, FL 32302
Counsel for Amicus Curiae Property Appraiser's
Association of Florida, Inc.

Robert I.,. Nabors
Sarah M. Bleakley
Kimberly L. Franklin
Nabors, Giblin & Nickerson, P.A.
Barnett Bank Building, Suite 800
3 15 S. Calhoun Street
Tallahassee, FL 32301-1838
Attorneys for Amicus Curiae Lee County

James G. Yaeger
Lee County, County Attorney
2 I 15 Second Street, 6th Floor
Fort Myers, FL 3390 1
Attorney for Amicus Curiae Lee County