SUPREME COURT **OF FLORIDA**

LEON COUNTY EDUCATIONAL FACILITIES AUTHORITY, ET AL.,

Petitioners,

vs.

BERT HARTSFIELD, ETC.

Respondent.

* * * * * * * * * * * * * * * * *

CASE NO. 87,769

District Court of Appeal, **1ST** District - No. 95-1399

INITIAL BRIEF OF APPELLANTS LEON COUNTY EDUCATIONAL FACILITIES AUTHORITY and **SRH, INC.**

On Appeal from:
The District Court of Appeal
First District
Case No: 95-1399

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INTRODUCTORY NOTES

The Plaintiffs/Appellants are (i) Leon County Educational Facilities Authority, a unit local government created by general law to carry out state educational facilities policy, registered as a dependent special district government with the office of District Information of Florida Department of Community Affairs and established by county resolution, and (ii) SRH, Inc., a Florida not-for-profit corporation. Leon County Educational Facilities Authority will be referred to in this Brief as "Authority." SRH, Inc., will be referred to as "SRH." SRH and the Authority are collectively referred to as the "Appellants."

The Defendant/Appellee is the Honorable Bert Hartsfield, Property Appraiser in and for Leon County. Appellee will be referred to as "Appellee."

The real property identified in the record at R-11-231-233 is hereinafter referred to as the "Property."

The Property, its improvements and the equipment therein are hereinafter referred to as the "Project."

References to the Record on appeal shall be referred to by an "R" followed by the appropriate volume and page number of the Record.

ISSUES PRESENTED

1. WHETHER THE SUPREME COURT OF FLORIDA HAS JURISDICTION PURSUANT TO ARTICLE V, SECTION 3(b)(4), FLORIDA CONSTITUTION TO CONSIDER THIS APPEAL, BASED ON A CERTIFICATION BY THE FIRST DISTRICT COURT OF APPEAL THAT ITS DECISION IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF THE FIFTH DISTRICT COURT OF APPEAL.

2. WHETHER OWNERSHIP MUST INCLUDE LEGAL TITLE IN ORDER FOR AUTHORITY AND THE PROJECT TO BE GRANTED THE EXPRESS STATUTORY EXEMPTION FROM AD VALOREM TAXATION PURSUANT TO THE CONCEPT OF OWNERSHIP AS USED IN SECTION 243.33, SECTION 196.199, FLORIDA STATUTES AND SIMILAR STATUTES.

STATEMENT OF THE CASE AND FACTS

The facts in this case are of first impression within this Court's jurisdiction and the issues they raise have been reviewed in this state in two district jurisdictions giving rise to the certified conflict.

This case initially arose from the denial by the Appellee of the timely application for tax exemption made by Appellants for the Property in 1993. (R-V-709) The 1993 application for exemption was denied by Appellee despite being based on the same facts as the 1992 application for which an exemption was granted. (R-IV-686) The Appellants exhausted all available administrative remedies via an appeal of the Appellee's decision to deny the exemption for 1993 to the Value Adjustment Board, which rejected the appeal filed by Appellants. (R-V-725)

On 3 December 1993, Appellants brought suit against Appellee for declaratory relief pursuant to Chapter 86, Florida Statutes, Section 194.036(2) and (3), Florida Statutes (1992) and Section 194.171, Florida Statutes (1992). (R-I-l) This matter came for hearing on 28 February 1995 in the Circuit Court of the Second Judicial Circuit on the parties' cross-motions for summary judgment. (R-V-729) The summary judgment motion of Appellee was granted. (R-V-729) The summary judgment motion of Appellants was denied and Appellants' complaint was dismissed with prejudice. (R-v-729) Appellants appealed the order dismissing their complaint and denying their motion for summary judgment (R-V-731) to the First District Court of Appeal ("First District"), which ruled in

favor of Appellee and certified a conflict to this Court. Appellants now take this appeal from the decision of the First District.

The facts in this case arise from the beneficial use, enjoyment, and ownership of the Property by the Authority. Such beneficial use, enjoyment, and ownership emanates from an acquisition and construction financing mechanism designed to assist the Authority to fulfill its statutory duty of facilitating the provision of facilities for the education of the citizens of this state in institutions of post-secondary learning.

The Authority is a public body corporate and politic established by the Leon County Board of County Commissioners by resolution dated 17 July 1990, and created pursuant to Chapter 243, Part II, Florida Statutes, a general law. (R-11-119) The Authority is broadly empowered by Chapter 243, Part II, Florida Statutes, to own, lease and finance educational facilities, and the Project is such a facility. (R-11-123) This dormitory and food service project is referenced in the minutes of the Board of County Commissioners as a reason for creation and establishment of the Authority. (R-11-114)

The acquisition, construction and equipping of the Project by the Authority was financed through a rather complex commercial transaction. At the heart of that transaction is a long-term lease of the Property, its improvements and equipment to the Authority by SRH, which is the nominal owner of the Property. (R-11-158) SRH is a not-for-profit Florida corporation created and

established for the sole purpose of facilitating the financing, acquisition, construction and equipping of improvements to the Property. (R-I-52,67) The net revenues (after the payment of operating and maintenance expenses) from the lease and operation of the Project are utilized to repay debt investors (as opposed to equity investors) who provided the resources to finance the construction and equipping of the Project. (R-1-67) The investors purchased a participating interest in the net revenues of the Project. (R-1-67) The investment instruments utilized, known as certificates of participation **("COPs"),** were sold to evidence an ownership interest in the net revenues. (R-1-67) **COPs** are a variety of municipal bonds, the interest income from which receives tax free treatment under the Internal Revenue Code. (R-1-67)

The Property and its improvements are operated and maintained exclusively by the Authority as a dormitory, dining hall, and related student facilities. (R-1-55) The Property is occupied and used expressly by students of Tallahassee Community College, The Florida Agricultural and Mechanical University and The Florida State University. The Authority has the obligation under the lease to provide for the maintenance of and insurance on the Project and will have the obligation to pay taxes, if any are assessed, on the Property. (R-II-187,192)

The Authority employs and actively supervises a manager to oversee the Property and collect rent and other revenues from the occupants. (R-1-55-56) Rent and other operating revenues are collected by the manager and delivered to a trustee for the holders

of the COPs. (R-1-56) The trustee then provides to the manager the funds necessary to operate and maintain the facility. (R-1-56) The remaining net revenues are used to repay the COP holders. (R-I-56) The Authority holds an option to acquire the Property for a nominal consideration when the COPs are paid in full. (R-1-67)

On 28 November 1990, in the absence of any legal duty to do so, the certificates of participation of the Authority in a functionally similar transaction were validated by the Circuit Court in the Second Judicial Circuit through official bond validation proceedings. (R-11-147)

Section 243.33 and related sections expressly exempt both the authority as an entity and its projects from ad valorem taxation. It is further stipulated by the parties that the dormitory project and property serve a public purpose and are exempt if the Authority is the equitable owner. (R-11-106) Moreover, it is stipulated by the parties that SRH has bare legal title only (R-11-105-06). Finally, it is uncontroverted that SRH is one of the two applicants for tax exemption and is not an exempt entity for any purpose.

SUMMARY OF ARGUMENTS

SUMMARY OF ARGUMENT ONE

The Florida Supreme Court has jurisdiction to resolve the conflict expressly certified by the First District in Leon County Educational Facilities Authority v. Hartsfield, 669 So. 2d 1105 (Fla. 1st DCA 1996) ("Leon County"), pursuant to Article V, Section 3(b)(4) of the Florida Constitution. The First District in Leon County entered an opinion which is the exact opposite of the holding of the Fifth District in First Union Nat'l. Bank v. Ford, 636 So. 2d 523 (Fla. 5th DCA 1993) on substantially the same operative facts as summarized in Leon County at page 1106. The operative facts involve issuance of certificates of participation by a public government entity as lessee of property used for exempt purposes with bare, naked legal title held in a private entity. On this set of facts, in reviewing the statutory requirements that an exemption be based upon both "ownership and use" in Chapter 196, Florida Statutes (1992), the First District says that legal title is required and the Fifth District says that legal title is not required so long as indices of ownership are found. This certified conflict in Leon County is within the four corners of the First District opinion, appears expressly on the face of that opinion and is neither inferred nor implied.

SUMMARY OF ARGUMENT TWO

Specifically under section 243.33, Florida Statutes (1992), and related subsections dealing with tax exemptions for projects pursuant to lease, the Leon County Educational Facilities project

in the First District Leon Countv case is exempt from taxation, including ad valorem taxation, and the Property Appraiser must honor this direct and express statutory exemption. In addition, the Authority and its university dormitory project are exempt under section 196.199(1)(c), Florida Statutes (1992), because the statutory requirements that all property must be "owned and used" for public purposes by an exempt entity do not require legal title, but rather, the indices of ownership, be they legal or equitable. Accordingly, the First District in Leon Countv has misapplied the law and misconstrued its legislative history whereas the Fifth District has properly applied the law on the same operative facts.

ARGUMENT ONE

THE FIRST DISTRICT COURT OF APPEAL'S DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF THE FIFTH DISTRICT COURT OF APPEAL

Appellants seek review of the First District Court of Appeal's decision in Leon County Educational Facilities Authority v. Hartsfield, 669 So. 2d 1105 (Fla. 1st DCA 1996), pursuant to Article V, section 3(b)(4) of the Florida Constitution. While affirming the circuit court's entry of a summary final judgment against Appellant, the First District Court of Appeal expressly certified its decision as being in direct conflict with the Fifth District Court of Appeal's ("Fifth District") decision in First Union Nat'l Bank v. Ford, 636 So. 2d 523 (Fla, 5th DCA 1993), the operative facts of which the First District identified expressly and discussed specifically as the same as those that attend the Leon County case.

In order for this Court to have jurisdiction under Art. V, Section 3(b)(4), the decision being reviewed must be in direct conflict with the decision of another District Court of Appeal or with a decision of this court, and the conflict must appear "within the four corners of the majority decision." Reaves v. State, 485 so. 2d 829, 830 (Fla. 1986); see also Dept. of Health v. National Adoption Counseling Svcs., 498 So. 2d 888 (Fla. 1986). The conflict must appear on the face of the opinion and may not be inferred or implied. Id.; see also Jollie v. State, 405 So. 2d 418 (Fla. 1981); Dodi Publishina Co. v. Editorial America, 385 So. 2d 1369 (Fla. 1980). The conflict between the First District's

decision in the case at hand and the Fifth District's decision in First Union Nat'l Bank meets these requirements.

The First District held that, although the indicia of ownership, i.e., actual use, management and possession of the property, is in a public entity, the property was not exempt from taxation because the mere legal title was held by a private non-exempt entity. Leon County, 669 So. 2d at 1108. In reaching this conclusion, the First District read section 196.122 and section 196.199 in pari materia and considered the statute's legislative history. Id. The First District held that section 196.199(1), Florida Statutes, requires that "--property may not be owned solely by an exempt entity or used for only 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." Id. (emphasis in original). The First District also relied upon its prior decisions in Ocean Hishwav & Fort Auth. v. Page, 609 So. 2d 84 (Fla. 1st DCA 1992) and Mastroianni v. Memorial Medical Ctr., 606 So. 2d 759 (Fla. 1st DCA 1992). Based upon its construction of the statutes and its prior holdings in Ocean Highway and Mastroianni, the First District held that the property and its use in question below were not exempt because the Authority did not have legal title which the First District states is essential for ownership under the statute. Leon County, 669 So. 2d at 1108.

However, in reaching its conclusion below, the First District specifically noted that the Fifth District reached a different conclusion in First Union Nat'l Bank, which involved a factually

similar situation. Leon County 669 So. 2d at 1106. In First Union Nat'l Bank, a bank held mere legal title to the property in question and leased the property to the Brevard County for use as its "primary governmental and administrative offices." First Union Nat'l Bank, 636 So.2d at 524. The facts in First Union Nat'l Bank also involved financing agreements substantially similar to those in the case at hand. The Fifth District noted that it faced a case of first impression in this state. Id. Leon County is the second such case.

Upon considering the lease and trust agreements in First Union Nat'l Bank, the Fifth District held that "the County had retained sufficient rights and duties regarding the realty and its improvement, to make it the equitable owner," (emphasis added) even though the County did not have legal title. Id. at 524. The Fifth District distinguished Mastroianni and Ocean Highway and found those cases inapplicable and not on point because, among other things, those cases did not consider whether the lessee (one a private hospital and the other a public governmental port authority) retained equitable ownership of the leased premises. Id. at 526. In other words, neither the line of First District cases, i.e., Mastroiannf and Ocean Hishwav, nor the First Union Nat'l Bank case, in the eyes of the Fifth District, is inconsistent with the statutory requirement of "ownership and use." The records of the First District cases did not raise the issue of the indices of ownership.

The problem has been the inference by the First District,

specifically in Ocean Hiahwav, that an equitable owner has no standing for tax exemption even if the legal title holder has no significant indicia of ownership beyond mere legal title.

Further review of key cases as related to this certified conflict are illustrative and support jurisdiction by this court. In First Union Nat'l Bank the Fifth District held that the county was "the beneficial owner of the real property and improvements sought to be taxed" and "[a]s such, it is immune from taxation both as owner and lessee." First Union Nat'l Bank, 636 So. 2d at 527. The Fifth District also discussed "mirror images" cases to the effect that legal title in an exempt entity should not prevent the court from looking through form to the substance to deny an exemption. Id. at 527.

In Mastroianni, for example, the First District correctly stated that section 196.011(1), Florida Statutes, "clearly requires that the person or organization who holds legal title to the real or personal property and who claims entitlement to exemption from taxation as a result of the ownership and use of the property file an application for exemption". Mastroianni, 606 So. 2d at 761. (emphasis supplied). That court's language is not sufficient for all cases, such as an application by the legal titleholder who, does not "claim" exemption "as a result of" its ownership and use, but rather "as a result of" the ownership and use of the entity having active beneficial ownership.

Although the facts discussed in First Union Nat'l Bank arose after the 1988 amendments discussed later herein, the Fifth

District in First Union Nat'l Bank based its analysis of the trust agreement and lease involved in the case and concluded that "the County has retained sufficient rights and duties regarding the realty and its improvements to make it the equitable owner." First Union Nat'l Bank, 636 So. 2d at 524. That court also disagreed with the trial court's position that the private legal title holder, the non-exempt bank, was "the owner of this property for any purpose other than holding bare legal title." Id. The First U on Nat'l Bank court said further that neither the private lessor (with bare legal title) nor the investors (the certificate holders) have "a right nor prospect of ever occupying or using the lands and buildings", so that even a mortgagee (with foreclosure rights) "has more rights than do the bank and certificate holders in this case." Id.

The First Union Nat'l Bank court further stated that "the concept of taxing the equitable owners of real property in Florida rather than the holder of the bare legal title is well established and that "[I]t is just and equitable to apply that doctrine in an appropriate case, whether the result is to uphold or to overturn the tax. If only applied so as to result in taxation of aroaertv, that would redound to the detriment of the State, its subdivisions and agencies . . . ." Id. at 525, (emphasis added). The court stated further: "In Florida, we have found no appellate decisions concerning the ad valorem taxation of real estate and improvements subject to a similar trust agreement." Id.

This Leon Count-y case is now the second such case in Florida

and it directly conflicts with First Union Nat'l Bank.

The court in First Union Nat'l Bank examined the case of Parker v. Hertz Corp., 544 So. 2d 249 (Fla. 2d DCA 1989), where the Second District Court of Appeal upheld the tax on the Hertz Corporation, concluding, after review of the lease provisions, that Hertz had "sufficient indicia of ownership" of the improvements to constitute beneficial ownership subject to taxation, ignoring the fact that the bare passive legal title to the property was in an aviation authority, an exempt entity. Id. at 526-527. Because a private lessee without legal title may be taxed, then in the instant case the same principle should apply with a different result, i.e., exemption from ad valorem tax due to the full and sufficient indicia of ownership in the active lessee Authority. See Hialeah v. Dade County, 490 So.2d 998 (Fla. 3rd DCA 1986), rev. denied, 500 So. 2d 544 (Fla. 1986).

As the Fifth District stated, the First Union Nat'l Bank case is the "mirror image" of the Hialeah case because the private lessor (the bank), like the City of Hialeah, holds merely the bare legal title to the land and improvements as security for the debt owed to the certificate holders. First Union Nat'l Bank, 636 So. 2d at 527. The court stated that the lessor bank "cannot be taxed for any interest in the Government Center because it does not have any beneficial ownership interest in the land or improvements." Id.

In the instant case, the Authority holds the burdens and benefits of ownership relating to the property rights sought to be taxed, and SRH, the lessor (like the bank in First Union Nat'l Bank

and the City of Hialeah), holds merely the bare passive legal title to the land and improvements as security for the debt owed to the certificate holders. SRH therefore cannot be taxed for any interest in the Project because, of record, it does not have any beneficial ownership interest.

In Lununus v. Cushman, 41 so. 2d 095, 897 (Fla. 1949), the Court stated that "[e]xemptions from taxation will be granted by the sovereign only when and to the extent that it may be deemed that such exemptions will conserve the general welfare. Hence it is the rule that a provision of the constitution or a statute will be construed strictly against one attempting to bring himself within the exemption. . . . But this does not mean that where an exemption is claimed in sood faith, the provision of law under which the claimant attempts to bring himself is to be subiected to such a strained and unnatural construction as to defeat the plain and evident intendments of the provision." Id. (emphasis added); see also Oranse Countv v. Oranse Osteopathic Hospital, 66 So.2d 285, 287 (Fla. 1953). The conflict presented by Leon Countv and F t Union Nat'l Bank now gives the Supreme Court the opportunity to guide other tribunals on whether to construe the exemption provisions so unreasonably strictly as to be of real detriment to government or to grant exemptions which are "plain and evident intendments."

Leon County and First Union Nat'l Bank are expressly in conflict as a result of the First District's statement on page 1108 of its opinion that the word "owned" as it appears in Section

196.192(1) (and for that matter in Section 196.199(1)(c), Florida Statutes), when read "in pari materia with the term of 'legal title' in Section 196.011(1) leads to the conclusion that the Legislature . . . had no purpose other than to require legal title to the property by the entity which uses it for the exempt purpose." This statement is wrong and the First District has misinterpreted, misconstrued, and misapplied the law.

In both Leon County and First Union Nat'l Bank, legal title to the property is in a private entity and all the indices of equitable and beneficial ownership are in a public, tax exempt entity. Whether immune or not, it is uncontroverted that these two government entities are exempt as are their uses (administration building; dormitory) and properties. Nevertheless, the First District refused to recognize the difference between the case at hand and Mastroianni and Ocean Hishwav, whereas the Fifth District in First Union Nat'l Bank acknowledged and accepted those distinctions. Therefore, the First District's decision expressly and directly conflicts with First Union Nat'l Bank on identical issues of fact and law. The conflict between the First District line of cases, now including Leon County, and the Fifth District First Union Nat'l Bank case is that the Fifth District maintains that the vesting of bare legal title to land and improvements in an otherwise non-exempt entity, as part of a legal and financial structure to provide security for creditors, is not determinative of whether to grant a tax exemption. The Fifth District looks through form to the substance of legal and financial structure to

find which entity has the indices of ownership, both burdens and benefits, to constitute the statutory requirement of ownership and use for tax purposes. The First District, while acknowledging the reasoning of First Union Nat'l Bank, reached the opposite result by refusing to look past the bare legal title. The First District also expressly and specifically identified the virtually identical operative facts in both cases. Accordingly, the conflict is direct and expressly within the four corners of the First District opinion. The First District correctly certified its decision below as being in conflict with First Union Nat'l Bank and this Court has jurisdiction pursuant to Article V, section 3(b)(4) of the Florida Constitution.

ARGUMENT TWO

UNDER THE CONCEPT OF OWNERSHIP AND USE IN SECTION 243.33 AND SECTION 196.199, FLORIDA STATUTES (1992) AND SIMILAR STATUTES, LEGAL TITLE IS NOT REQUIRED TO QUALIFY FOR AN EXEMPTION FROM TAXATION.

A. Overview.

In both First Union Nat'l Bank (Fifth District) and Leon County (First District):

1) bare naked legal title is in a private non-exempt entity with no indicia of active ownership;

2) possessory leasehold interest is held by an exempt government entity (in one instance a county political

subdivision, and in the other instance a dependent district created as a government corporate entity and body politic by general law and established by county resolution);

3) full active indicia of ownership are in the government entities which are holders of the possessory lessee interest;

4) the lessees/holders of the possessory interest are exempt;

5) the purposes for which the properties are being used (in the Fifth District a county government building and in the First District a university dormitory project) are exempt projects, and

6) the holders of bare legal title are private (a bank; a non-profit corporation) and not exempt.

The active use and management by the public and exempt Leon County Educational Facilities Authority of a statutorily-exempt public project on property leased from a non-profit entity (which only had bare, naked, inactive legal title and was simply a co-applicant for tax exemption) constitutes an exemption expressly

under the terms of section 243.33, Florida Statutes (1992), section 243.20(5), Florida Statutes (1992), and section 243.22(5)(b), Florida Statutes (1992). The facts of record show that the Authority in Leon County, because of its active management of the leased property for exempt purposes, meets the statutory requirements of "ownership and use", even though it does not have bare, naked legal title, as provided in section 196.091(1)(c), Florida Statutes (1992), with which the applicable provisions in Chapter 243, Part II, Florida Statutes (1992), are consistent. Moreover, the law does not require, as a justification for exemption, that the entity holding the bare, naked legal title also be exempt under any religious, educational or charitable purpose, such being legally irrelevant. Neither does the law require that the Project, at the termination of the lease, be conveyed automatically to an institution of higher education in order for the exemption to apply so long as the statutory requirements for exemption were met during the years in question. These other matters are not legally pertinent, are extraneous and, as facts, were rejected by the First District when summarizing the identical operative facts of both cases.

Yet, in the Fifth District "ownership", for purposes of exemption from taxation, is found in the entity with full indicia of ownership regardless of legal title, while in the First District "ownership" is linked and equated to legal title. That dichotomy is central to this appeal.

B. Ownershis and Use under Chapter 196, Florida Statutes.

The First District relies on Mastroianni and Ocean Highway which involve leaseholds operated respectively by a private non-profit hospital corporation and a public port authority. In those cases the operative applicable general law is codified in section 196.192(1), Florida Statutes, whereas in First Union Nat'l Bank and Leon County, the law applied in common is section 196.199(1)(c), Florida Statutes (and in Leon County also the substantially identical section 243.33 and related sections).

Appellants agree with the First District that, although these codified sections of law are different, they ought not to be read in isolation from each other. Appellants further agree that the two statutes set forth by the learned judges in the First District must be read in pari materia and that a proper construction of both statutory provisions leads to the "inevitable conclusion" that all property in order to be exempt must be "owned and used" for a public purpose by an exempt entity. Leon County, 669 So. 2d at 1108. Appellants also agree with the First District that the law of Florida is that exemption must be based on both ownership and use by an exempt entity. This legal requirement is not at issue.

The fundamental question is whether a determination of what constitutes "acquired", "owned" or "ownership" must necessarily include a finding of legal title held by the applicant(s) in order for the express statutory exemption to be granted.

Section 196.011(1), Florida Statutes, is the key statutory provision in determining the meaning of the term "owned and used":

> Every person or organization who, on January 1, has the legal title to real or personal

> property, except inventory, which is entitled by law to exemption from taxation as a result of its ownership and use shall, on or before March 1 of each year, file an application for exemption with the county property appraiser, listing and describing the property for which exemption is claimed and certifvina its ownership and use....

Section 196.011(1), Florida Statutes (1992) (emphasis added). In this subsection the requirement is that the applicant for a tax exemption must have "legal title" to the property which is entitled by law to the exemption. Two things must be noted in the expressed wording of this subsection.

First, the term "which is entitled" means not the person or entity applying for the exemption but the property itself which is the subject of the exemption application. The First District in Leon Countv interprets this provision in the exact opposite fashion to apply to the person or organization and not to the property. This interpretation is wrong and is inconsistent with the clear and express language of the statute.

Second, there is no reference anywhere else in Chapter 196, Florida Statutes, to legal title. In Chapter 196, Florida Statutes (1992), dealing with exemptions from ad valorem taxation for real property, there is no provision or definition uniformly defining the word "ownership" to mean legal ownership of property for any purpose other than expressly for the limited ministerial purpose of applying for tax exemption under section 196.011(1), Florida Statutes (1992). Legal title is required for the applicant, not ownership.

Accordingly: 1) Applications for real property tax exemption

must be made by the person or entity "who" on January 1 of a given taxable year has "legal title" to the property, not ownership. The antecedent to the word "who" is the entity making the application; 2) "The property" is that "which" is by law entitled to exemption from ad valorem taxation because of both "ownership and use"; 3) The legal titleholder, if not the exempt entity, ministerially lists and describes the particular property for "which" exemption is claimed, "certifying its" (emphasis added) ownership and use. The antecedent to the word "its" is the property, not the entity which files the application. There is no lanauaae in this statute that requires the exempt entitv to be the applicant and the First District Court is wrong in concluding and holding otherwise.

Other applicable statutes shed light on the use by the Florida Legislature of the term "ownership" and the term "ownership and use": Section 196.012(1), Florida Statutes (1992); Section 196.012(4), Florida Statutes, (1993); Section 196.192(1), Florida Statutes, (1993); Section 196.192, Florida Statutes, (1993); Section 196.199(1)(c), Florida Statutes, (1993). Nothing in these statutory sections limits ownership to legal title; none uses the adjective "legal"; none requires that the ownership be limited to bare legal title in the exempt entity. Rather, they address the full character of both ownership and use without either emphasizing use over ownership or distinguishing kinds of ownership. Under the statutory language, economic use must be considered without limitation as to ownership; that is, economic use is available to either or both equitable and legal titleholders for demonstrating

ownership.

There is no confusion or ambiguity in the statutory language so as to require secondary persuasive sources, such as staff reports of the appropriate legislative committees of the Florida Legislature or principles of statutory construction. Such reports and principles are not themselves the law being cited. However, if one were to apply such principles, the statutory interpretation maxim, ***expressio unius est exclusio alterius,*** confirms that legal title is required only of the applicant for purposes of exemption from property taxes under Chapter 196, Florida Statutes (1993). Under this maxim, the language gives rise to an inference that all omissions should be viewed as exclusions. The matter under scrutiny (legal title ownership of property) is expressly designated only for the applicant under section **196.011(1),** Florida Statutes (1993). Because the adjective **"legal"** does **not** appear in any other applicable statutory exempting provisions, the **only legally** authorized inference is that all of the **omissions should** be understood as actual exclusions, There is neither evidence nor statutory indication of legislative intent **or** policy to the contrary.

The important and historical changes in applicable statutory and case law are noteworthy and have been misconstrued and misapplied by the First District. After Daniel v. T.M. Murrell co., 445 **So.2d** 587 (Fla. 2d DCA 1984) was decided, Chapter 88-102, Laws of Florida, was subsequently enacted, amending parts of Chapter 196, Florida Statutes. In Daniel, the court construed the

then statutory language in Section 196.192(1), Florida Statutes (1993), and held the exemption therein applied "without regard for legal ownership." Daniel, 445 So. 2d at 587. Essentially, the Daniel court confirmed the then law that the character of the use is emphasized rather than the character of ownership (legal title or not) for determining the exemption of certain property. Id. at 589.

The Florida Legislature studied and then righted the impact of such an ownership and use imbalance as enunciated in Daniel (rejecting in Daniel both the emphasis of use over ownership and the factually limited Daniel-specific requirement of legal title). See Chapter 88-102, page 473, Laws of Florida (the wording in the title of which announces the "requiring [of] ownership of property by an exempt entity for grant of an exemption," but without even the implication of any distinction between legal and equitable title). The new law defines "use" in Section 1 at page 474, adding a new section 196.012(4), Florida Statutes, to mean "the exercise of any right or power over . . . property incident to the ownership of property" (emphasis added). Indicia of active, equitable and beneficial ownership in the exempt entity, even without the passive, bare legal title in the non-exempt applicant, constitute rights and powers incident to ownership affirmatively consistent with the post-Daniel statutory definition.

The new language at the end of Section 2 of the new law, at page 474, amending section 196.192, Florida Statutes (1988), requires consideration of each use, including "economic" and

"physical", applicable in a given case to either equitable or legal title or both. Note, first, the wording in both applicable committee staff reports contains no express or implied distinction between legal and equitable ownership in the exempt entity. Staff of Fla. H.R. Comm. on Fin. & Taxation, CS/SB 375 (1988) Staff Analysis 1 (May 31, 1988); and Staff of Fla. S. Comm. on FT & C, CS/SB 375 (1988) Staff Analysis 1 (Apr. 20, 1988). Second, the law, as amended, and the Committee staff reports, once and for all clarify that the full character of both ownership and use be considered, with equal emphasis, on a case-by-case basis.

Therefore, read in parimateria, any exemption in Chapter 196, Florida Statutes, must always be based on ownership and use by an exempt person or organization, but only the applicant for such exemption must have legal title. Under the statutory law of exemption from taxes, the owner need not have legal title. That is the law.

C. Ownership and Use under Chapter 243, Part 11, Florida Statutes.

The language in section 243.33, Florida Statutes (1993), not only expressly exempts the Authority itself and any of its agents, but also "a" project or "any" property "acquired or used" by the Authority under the provisions of Chapter 243, Part II, Florida Statutes, with no language requiring or implying acquisition of legal title by the Authority to meet the test for exemption. The line of inquiry is simply whether the exempt Authority is being asked to pay taxes "a" project or "any property"

which is "acquired or used" by the Authority.

The concept of ownership and use is also found in the express dispositive language of general law in Chapter 243.33, Part II, Florida Statutes. Section 196.001(1), Florida Statutes (1992) provides that real and personal property in this state shall be subject to taxation unless expressly exempted. Section 243.33, Florida Statutes (1992) is such an express exemption. Section 243.33, Florida Statutes (1992), states in relevant part:

> . ..and as the operation and maintenance of a project by the Authority or its agent will constitute the performance of ~~an essential~~ public function, 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 , . . [and] shall at all times be free from taxation of every kind by the state, the county and by the municipalities and other political subdivisions in the state (emphasis added).

Section 243.20(5), Florida Statutes (1992), defines "project" as:

> a structure suitable for use as a dormitory or other housins facility, dining hall, student union, . . academic building,athletic facility; . . . and other structures or facilities related thereto, or required thereto, or required or useful for the instruction of students . . . or the operation of an institution for higher education, including parking and other facilities or structures, essential or convenient for the orderly conduct of such institution for higher education and shall also include equipment and machinery and other similar items necessary or convenient for the operation of a particular facility or structure in the manner for which its use is intended . . . (emphasis added).

Under section 243.33, Florida Statutes (1992), if a project is acquired, used, operated and maintained by the Authority or the agent of the Authority, and if a project is specifically authorized by section 243.20(5), Florida Statutes (1992), then the Authority and such a Project shall be exempt from ad valorem taxes. The Authority Project is such a statutory project. This concept is substantially the same as "owned and used" because acquisition is a form of ownership under section 243.22(5)(a), Florida Statutes. Acquisition for such property and project expressly may include the role of the Authority as lessee in the lease-assisted financing and acquisition transaction before this Court.

This language, even under the most narrow statutory construction, is a constitutional and express exemption from taxation. Accordingly, Chapter 243.33, Florida Statutes, is not inconsistent with the concept of ownership and use presented in Chapter 196, Florida Statutes. There is nothing in either Chapter 196, Florida Statutes, or section 243.33, Florida Statutes, which requires legal title in the owner in order for the exemption to be granted. The property appraiser, courts and the Legislature should not be required to follow only the detailed provisions of Chapter 196, Florida Statutes, if the Legislature has made substantially similar exemptions available in other statutes. All the Legislature is required to do under the Constitution is to state expressly, dispositively and unequivocally that a specified project and related property are exempt from taxes, including property taxes. It has done so with school board projects under section

235.056(2)(c)(2), Florida Statutes; another example is the above-referenced Authority provisions (section 243.33, section 243.22(5)(b), and section 243.20(5) Florida Statutes). Therefore, this court is not limited to any specific codification in Chapter 196, Florida Statutes for determining either exemption or immunity from ad-valorem taxation. See Sarasota-Manatee Airaort Auth. v. Mikos, 605 So. 2d 132 (Fla. 2d DCA 1992), rev, denied 617 So. 2d 320 (Fla. 1993). It may rely upon section 243.33, Florida Statutes, and its related provisions, to grant the relief sought by the Appellants.

D. Application of Chapters 196 and 243, Part II, Florida Statutes, to Facts at Bar.

It is the duty of the fact-finding property appraiser, prior to any litigation, to determine what are the indicia of ownership when one person or organization has bare naked legal title and another has possessory and other interests. In some of these situations, if not most, full indicia of ownership are held by the entity that has legal title, thereby constituting legal ownership. In other instances the full indicia of ownership are in the entity that has the possessory and other interests, thereby constituting equitable ownership. In both, only the applicant may have legal title, the procedural condition precedent to determine subsequently "ownership and use." It is as to this concept, therefore, that the Fifth District decision is correct and can be viewed as construing an exemption strictly against the taxpayer, consistent with Section 196.001, Florida Statutes, requiring all

real property to be taxed unless there is an express exemption. In section 235.056(2)(c), Florida Statutes; Section 243.33, Florida Statutes (and its related provisions cited above); Section 196.199(1)(c), Florida Statutes; and in Section 196.192, Florida Statutes, the express exemption is for the entity which has "ownership and use," and it is not relevant or material, legally, whether that ownership and use is ascribed on the facts to a lessor with bare naked legal title or to a lessee with possessory and other interests, so long as the applicant for exemption has bare legal title.

A more detailed review of the record and law in that legal context is confirming. It is uncontroverted from the record that this Project, consisting of the dormitory and related facilities, is used for governmental and public purposes and that Authority manages that use with full indicia of ownership. The dormitory and related facilities uncontrovertedly constitute a "project" as defined in section 243.20(5), Florida Statutes (1992). Under section 243.33, Florida Statutes (1992), the acquisition, use, operation and maintenance of such a project by the Authority or its agent constitutes the performance of an "essential public function". Section 243.21(1), Florida Statutes (1992), further provides that "the exercise by an authority of the powers conferred by this part shall be deemed and held to be the performance of an essential public function." The public purpose of Chapter 243, Part II, Florida Statutes (1992), is to provide the facilities needed to assist institutions of higher education in meeting their mission

set forth in section 243.19, Florida Statutes (1992).

Pursuant to section 243.22(5), Florida Statutes (1992), the Authority had to determine that the Project had the character and location to serve a public purpose to justify financing through the issuance of certificates of participation. Further, the public purpose contemplated by the Project is specifically referenced in the resolution of the Board of County Commissioners of Leon County establishing the Authority under Chapter 243, Part II, Florida Statutes (1992), to meet a shortage of educational facilities or projects at the institutions for higher education located within Leon County. (R-11-119). The minutes of the meeting of the Board of County Commissioners of 17 July 1990, at which the above-referenced resolution establishing the Authority was adopted, make it specifically clear that the purpose of creating and establishing the Authority was to provide for the Southgate dormitory and related facilities in order to carry out the statutory public purpose of meeting this specific educational facility needs. (R-II-114) At page 6, Minutes of County Commissioners, dated July 17, 1990, recorded at Volume 78, Page 597, (R-11-114) the minutes read in pertinent part as follows:

> "The Assistant to the County Administrator Brent Wall was present and explained the proposal for the creation of an Educational Facilities Authority. He reported that he has contacted three institutions (FSU, FAMU, Tallahassee Community College) and they have no objection to the creation of the authority. This is a mechanism to assist institutions for higher education in the construction, financing, and refinancing projects; and is one way to expedite the funding of the FSU University PUD South Gate Residence Hall

project." (emphasis added).

Therefore, the dormitory and related facilities are a single project owned and used for governmental and public purposes, an essential public function, as determined in general law by the Florida Legislature, the Board of County Commissioners of Leon County, and the members of the Board of Directors of the Authority in approving the application it reviewed for the project.

It is uncontroverted that bare, naked, legal title to the property is not in the Authority, but rather is in SRH, the non-profit corporate entity created solely to facilitate the financing, acquisition, construction and equipping of the improvements to the Property, on which the Appellee has denied the exemption for the ad valorem taxes at issue. There is no other purpose for the existence of SRH other than to facilitate the acquisition and financing of the Project. (R-I-52,67) Accordingly, as of 1 January 1993, SRH held only bare passive legal title to the Property.

All the burdens and obligations of ownership in the use of property under the Lease Agreement are vested in the Authority as Lessee. Neither the trustee bank nor the holders of the COPs have the right or even contemplate the prospect of occupying or using the dormitory and related facilities, except in the event of default under the financing documents. Both the trustee bank and certificate holders fully contemplate that active management and maintenance of the Project will be effected by the Authority directly and/or in combination with its agent, but under the

exclusive supervision of the Authority.

The Fifth District's decision was not heard by the Supreme Court and until **Leon County** it was the only applicable case in Florida. The Fifth District did, however, cite two recent cases from other states. **See Mayhew** Tech Center v. **County** of **Sacramento**, 5 Cal. Rptr. 2d 702 (1992); Texas **Dep't** of Corrections v. Anderson **County** Awwraisal Dist., 834 **S.W.2d** 130 (Tex. App. 1992). The court reported that in both cases the holdings were that governmental entities retained equitable ownership of real estate and improvements and they were not subject to ad **valorem** taxation, with the improvements on the properties in both cases being built with funds raised from certificate holders, while the title to the property was vested in private for-profit entities. First **Union Nat'l** Bank, 636 So. **2d** at 523. These facts substantively mirror the facts in the instant case.

The Fifth District, further to bolster its argument that the key issue is whether there are sufficient indicia of ownership, i.e., whether the ownership is legal or equitable, cited the case of Parker v. Hertz Corw., 544 So. 2d 249 (Fla. 2d DCA **1989)**, where the Hertz Corporation leased property from the aviation authority at the Tampa Airport. In that instance, the **tax** was upheld because, based upon the lease provisions, the lessee, Hertz, without **legal** title, had sufficient indicia of ownership as a private entity for a private project and thus was the beneficial owner and therefore subject to taxation. The Fifth District in **First Union Nat'l Bank** maintained that the key judicial inquiry is

to look throush form to the substance of who is the beneficial owner of the property, and this court should follow this approach.

CONCLUSION

The Florida Supreme Court has conflict jurisdiction, as certified by the First District in Leon County, because the Fifth District in First Union Nat'l. Bank determined that the law does not require legal title to be part of ownership in order for the statutory requirement for "ownership and use" of exempt property by an exempt entity to apply, whereas the First District did require a showing of legal title. This conflict, as certified, is direct, within the four corners of the Leon County opinion, expressly stated and is neither inferred nor implied. The First District has improperly construed its prior line of cases and has misconstrued the applicable statutory language and legislative history. The law is that form should not prevail over substance and that the determination of which entity has the indicia of ownership over an exempt project is the key issue. Legal title is required by an applicant only and the applicant need not be the entity that has the active management constituting the full indicia of ownership. The Leon County Educational Facilities Authority in Leon County is exempt by express statutory provision in applicable sections of Ch. 243, Part II, Florida Statutes (1992), and also in and pursuant to the express language in Section 196.091(1)(c), Florida Statutes (1992), all as read in pari materia with all other applicable general law, because the law of ownership and use does not require legal title in an exempt entity which actively manages an exempt project on property leased for a public purpose as part of an

acquisition by a governmental entity.

This Court should reverse the trial court and the First District and remand this case for further proceedings.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing has been furnished by U.S. Mail to: ROBERT HINKLE, Esq., and LESLIE G. STREET, Esq., Radey, Hinkle, Thomas & McArthur, Monroe Park Tower, 101 N. Monroe Street, Suite 1000, Tallahassee, FL 32301; SARAH BLEAKLEY, Esq., and KIMBERLY FRANKLIN, Esq., Nabors, Giblin & Nickerson, P.A., 315 S. Calhoun St, Suite 800, Tallahassee, FL 32301; JAMES G. YEAGER, Esq., County

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