SUPREME COURT
STATE OF FLORIDA

Consolidated Case Nos. **94,105** & **94,118**

DEPARTMENT OF REVENUE, STATE OF FLORIDA; **THE SEBRING AIRPORT AUTHORITY**, and **SEBRING INTERNATIONAL RACEWAY, INC.**,

Appellants,

vs.

C. RAYMOND McINTYRE, Property Appraiser of Highlands County, Florida; and **J. T. LANDRESS**, Tax Collector of Highlands County, Florida,

Appellees.
_____/

ANSWER BRIEF OF APPELLEE C. RAYMOND McINTYRE, HIGHLANDS COUNTY PROPERTY APPRAISER

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CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned counsel for appellant hereby certifies that the type size and style for appellant's initial brief is 14 point Times New Roman.

PRELIMINARY STATEMENT

Appellant, Department of Revenue, State of Florida, will be referred to herein as the "department." Appellant, The Sebring Airport Authority will be referred to herein as the "authority." Appellant, Sebring International Raceway, Inc., will be referred to herein as the "raceway." Appellee, C. Raymond McIntyre, Highlands County Property Appraiser, will be referred to herein as the "appraiser." Appellee, J. T. Landress, Highlands County Tax Collector, will be referred to herein as the "collector." References to the record on appeal will be delineated as (R-volume#-page#).

References to the amicus curiae who have filed briefs on behalf of the appellants will be referred to as follows: The Cities of Lakeland, Orlando, and St. Petersburg, the Tampa Sports Authority, and the Florida League of Cities, Inc., will be referred to herein as the "cities." The Greater Orlando Aviation Authority will be referred to herein as the "Orlando Authority."

Amicus curiae appearing on behalf of the appraiser will be referred to by name, so that the Hillsborough County Property Appraiser, Rob Turner, will be referred to as "Turner."

STATEMENT OF THE CASE AND OF THE FACTS

The property involved is subject to the same uses as existed in Sebring Airport Auth. v. McIntyre, 623 So.2d 541 (Fla. 2d DCA 1993)(Sebring I), affirmed by this Court in Sebring Airport Auth. v. McIntyre, 642 So.2d 1072 (Fla. 1994) (Sebring II). The property is used for conducting the 12 Hours of Sebring automobile race and related activities including the attendant functions such as food stands, drink stands, sale of souvenirs, and similar type activities. (R-I-035-035; I-040-041) There is permanent seating and the property is used as a racetrack at which the race is annually held. (R-I-035; I-040; I-50; I-132) The property is owned by the authority and is leased to the raceway, a for-profit entity. (R-I-001-002)

The trial court held the operative language in section 196.012(6), Florida Statutes (Supp. 1994), unconstitutional and. On appeal to the Second District Court of Appeal, that decision was affirmed. See Sebring Airport Auth. v. McIntyre, 718 So.2d 296 (Fla. 2d DCA 1998)(Sebring III). The district court held that the 1994 amendment was unconstitutional, as constituting "an impermissible attempt by the legislature to create a tax exemption that is not authorized by the Florida Constitution." Sebring III, 718 So.2d at 297. As the court stated:

> The use of the property appears to be the determinative factor in favor of exemption. There is nothing in the constitution which purports to exempt property, whether owned by a municipality or a private entity, when the property is being used primarily for a proprietary purpose.

Sebring III, 718 So.2d at 299. The language held unconstitutional by the trial court, and affirmed by the district court, was created by an amendment in section 59, chapter 94–353, Laws of Florida, codified as part of section 196.012(6), and provides:

> The use by a lessee, licensee, or management company of real property or a portion thereof as a convention center, visitor center, sports facility with permanent seating, concert hall, arena, stadium, park, or beach is deemed a use that serve a governmental, municipal, or public purpose or function when access to the property is open to the general public with or without a charge for admission.

Sebring III, 718 So.2d at 297.

Thereafter, the department, authority, and raceway timely appealed to this court.

SUMMARY OF ARGUMENT

The trial court and district court correctly held that the applicable parts of section 59, chapter 94-353, Laws of Florida, amended into section 196.012(6), were unconstitutional as constituting an attempt to grant an exemption from ad valorem taxation not permitted by the Florida Constitution. Furthermore, article VII, section 3(a), Florida Constitution, expressly requires that the property must be used "by it" (the municipality), for exemption to inure and, here, such property is leased. The legislature lacks the power to declare a purely proprietary activity to be a governmental/governmental function so as to circumvent this Court's decisions. In fact, the amendment held invalid is an example of the exact type of authority which the people voted to withhold from the legislature in the recent constitutional revision election. Constitutional Revision Amendment #10 was the only provision which was defeated by the citizens of the State of Florida in the November 1998 General Election. The authority, raceway, and the various amicus argue that the legislature possesses this power anyhow.

Article VII, section 3(a), Florida Constitution, sets forth the parameters for municipal exemption stating in part:

> All property owned by a municipality and used exclusively by it for municipal or public purposes shall be exempt from taxation. * * * Such portions of property as

> are used predominantly for educational, literary, scientific, religious or charitable purposes may be exempted by general law from taxation.

(Emphasis added.) This provision constitutes a limitation on the power of the legislature to expand the exemption for municipal property. No authority exists in the provision to suggest that the term "public purposes" was intended to apply as defined by the legislature. No such authority is granted to the legislature. Since this Court's decision in Williams v. Jones, 326 So.2d 425 (Fla. 1976), this Court consistently has adhered to the concept that the Florida Constitution requires the term "public purposes" as used in the tax context to mean government/ governmental purposes as opposed to governmental/proprietary purposes. The pronouncement in Williams has since been held to apply to municipalities and other public bodies. See Canaveral Port Auth. v. Department of Revenue, 690 So.2d 1226 (Fla. 1996); Walden v. Hillsborough Co. Aviation Auth, 375 So.2d 385 (Fla. 1979); Lykes Bros. v. City of Plant City, 354 So.2d 878 (Fla. 1976).

The entire thrust of the appellants' argument is that this Court should defer to any determinations made by the legislature as to what is and what is not a public purpose. It was this exact argument which was rejected in Williams. There, several special acts existed and bonds had been validated finding that the uses of property on Santa Rosa Island constituted a public purpose. In Sebring II, this

Court rejected the same contention made based on prior acts of the legislature dealing with airport authorities which contained broad-sweeping language containing legislative findings at to governmental purpose. The appellants' contention is precisely that which previously has been rejected.

The constitution recognizes that municipalities perform some sovereign governmental functions but that the majority of functions and activities engaged in by municipalities are municipal-corporate and proprietary. Article VIII, section 2, Florida Constitution, recognizes this specifically by mentioning municipalities' proprietary powers. See Daly v. Stokell, 63 So.2d 644 (Fla. 1953); Chardkoff Junk Co. v. City of Tampa, 135 So. 457 (Fla. 1931); 84 C.J.S., § 203 (1954). So, as used in article VII, section 3(a), the word "municipal" is intended to embrace the municipal corporation as a corporate, proprietary creature while the term "public purposes" has references to those aspects of its sovereign governmental character.

The thrust of the amendment held unconstitutional by the trial court and the district court was to address a proprietary activity engaged in by the municipality in its corporate capacity and transform it into a sovereign governmental activity. This the legislature cannot do. This Court has repeatedly considered these 1968 constitutional limitations in the tax context and held that "public purposes" means governmental/governmental purposes.

If, as suggested by the authority, raceway, and various amicus, the legislature has carte blanc authority to declare whatever it desires to be a "governmental/governmental purpose," then why could the legislature not also declare that an operation involving the sales of groceries, restaurants, the operation of lounges and bars, the operation of dress shops, the operation of barber shops, if performed on city-owned property, to be governmental/governmental uses. This Court previously has rejected these exact same type arguments involving some of the very same type properties in Williams and Archer v. Marshall, 355 So.2d 781 (Fla. 1978). Archer made it crystal clear that the legislature cannot, through legislative fact-finding, declare something to be other than what it actually is. A previous attempt by the legislature to declare certain boats not to be "boats" within the constitutional sense was voided even though the constitutional provision relating to motor vehicles and boats specifically included language referring to motor vehicles, boats, airplanes, trailers, trailer coaches, and mobile homes, ". . . . as defined by law." See Department of Revenue v. Florida Boaters Ass'n, Inc., 409 So.2d 17 (Fla. 1981).

The authority, raceway, and amicus cite cases which arose under the 1885 Constitution and which applied the test which was applicable at that time, and which no longer applies. See Volusia County v. Daytona Beach Racing &

Recreational Facilities Dist., 341 So.2d 498 (Fla. 1976), appeal dismissed, 434 U.S. 804 (1977); St. John's Associates v. Mallard, 366 So.2d 34 (Fla. 1st DCA 1978). In fact, on four occasions, this Court has pointed out that under the new constitution all property used for private purposes is required to bear a tax burden. See Walden; Archer; Lykes Bros.; and Williams. This Court's construction of the constitution has not been changed by constitutional amendments.

The standard adopted by this Court permitting exemption only where leased property serves a governmental function is entirely consistent with the whole concept of immunity from taxation which may be waived by abandonment or non-use.

ARGUMENT

The district court correctly upheld the trial court in concluding that the amendment to section 196.012(6), Florida Statutes (1995), enacted in 1994, by section 59, chapter 94-353, Laws of Florida, is unconstitutional.

(a) Section 59, chapter 94-353, Laws of Florida, is unconstitutional.

The authority, raceway, and amicus argue that the constitution permits the legislature to declare or define the property uses set forth in the amendment, which would include the raceway property in Highlands County, Florida, as governmental/governmental functions and thereby provide for exemption of such property. If this argument were sound, a great number of this Court's decisions which have been rendered during the last 20 plus years were wrongfully decided. Many of the cases cited in support of the appellants' position are cases which arose under the 1885 Constitution and which have previously been recognized as lacking vitality under the 1968 Constitution. In Volusia County, this Court stated:

> [U]nder the Constitution of 1885, this Court decided that simply holding a proprietary interest in "a community recreational asset and business stimulant," *Daytona Beach Rracing & Rec. Fac. Dist. v. Paul*, 179 So.2d 349, 353, (Fla. 1965), like the speedway served a "municipal purpose." *Id.* Perceiving decisions of this kind as creating inequities in the tax structure, the draftsmen of the Constitution of 1968 limited the municipal purposes

> exemption to "property owned by a municipality and used exclusively by it for municipal or public purposes."

341 So.2d at 501. In arriving at the decision in Volusia County, this Court relied upon its prior decision in Williams, which also had recognized the constitutional limitations of the 1968 Constitution in declaring that the only exemptions permitted for governmentally-owned property for which governmental use had been abandoned through lease, was when the user of the property was using same for a governmental/governmental purpose as opposed to a governmental/ proprietary purpose. This Court previously had made observations concerning expansion of permissible legislative exemptions in Jasper v. Mease Manor, Inc., 208 So.2d 821, 824 n.4. (Fla. 1968), as follows:

> In *Lummus v. Florida Adirondack School* (1934), 123 Fla. 810, 168 So. 232, it is said: "Legislative records disclose that during the years even prior to 1868 the exemption of corporate property from taxation had grown to be somewhat of a menace. Special interests were enjoying exemptions which could not be justified and which if continued would seriously deplete the resources of revenue from ad valorem taxation, which accounts for the inclusion of the provisions of section 24 of article 16 in the Constitution [of 1868] as amended in 1875, and now carried as section 16 of article 16 of the Constitution of 1885." To the same general effect is the statement by Mr. Justice Terrell, in *State ex rel. Cragor Co. v. Doss* (1942), 150 Fla. 491, 8 So.2d 17, wherein, in speaking of the intent and purpose of Section 16, Article XVI of the Constitution of 1885, he made this observation: "Section

> Sixteen of Article Sixteen was designed to cover the property of certain corporations for profit which had been enjoying exemptions * * *. This section was first approved in May, 1875, as Section Twenty-four of Article Sixteen of the Constitution of 1868 * * *. It was limited to religious, educational and charitable purposes. It is entirely possible that the property of Masonic Lodges and Woman's Clubs may in cases be covered by Section Sixteen of Article Sixteen but if property held by them is used for no other than the exemptions stated, they could be exempt as provided in Section One of Article Nine [Constitution of 1885] * * *. The property of any charitable or other corporation not for profit could in its taxable aspect be regulated by the Legislature as provided in Section One of Article Nine of the Constitution. * * *" See also Vol. 1, pp. 379 and 477, The Story of Florida by W. T. Cash.

(Emphasis added.) The limitations on the authority of the legislature, especially in the area of taxation, have long been recognized. On one occasion this Court summarized these constitutional limitations stating that:

> The legislature is without power to provide for exempting from taxation any class of property which the Constitution itself makes no provision for exemption. The principle has been more than once affirmed in this state that the Constitution must be construed as a limitation upon the power of the legislature to provide for exemption from taxation any property except those particularly mentioned classes specified in the organic law itself.

L. Maxcy, Inc. v. Federal Land Bank, 150 So. 248, 250 (Fla. 1933) (emphasis added). More recently, this Court adhered to this firm principle stating "the

legislature is without authority to grant an exemption from taxes where the exemption does not have a constitutional basis." Capital City Country Club v. Tucker, 613 So.2d 448, 451 (Fla. 1993). These limitations on legislative authority were recognized by this Court in Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433, 434-435 (Fla. 1973):

> Under the 1885 Constitution, we had held that the legislature could tax different classes of property on different bases, as long as the classification was reasonable. The people of this State, however, by enumerating in their new Constitution which classifications they want, have removed from the legislature the power to make others.
>
> It is true that the constitutional provision allows the Legislature to prescribe regulations for the purpose of securing a just valuation of all property, but such regulations must apply to all property and not to any one particular class. The regulations contemplated by the Constitution are those which establish the criteria for valuing property; and all property - save those four classes specifically enumerated in the Constitution - must be measured under the same criteria.
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> * * * * *
>
> We find it impossible to consider Fla. Stat. § 195.062(1), F.S.A., as establishing a proper valuation criterion. The statute does no more than establish a classification of property to be valued on a different standard than all other property. Under the 1968 Constitution, Article VII, Section 4, this is no longer within the prerogative of the legislature to do.

(Emphasis added.) In Interlachen Lakes Estates, the Rose Law, commonly referred to as the "developers discount law," was intended to give developers a tax break on unsold lots so that the unsold lots in a plat would continue to be assessed as unplatted acreage until 60 percent of such lands had been sold, even though the sold lots would have to be assessed at just value. The legislative attempted classification was held invalid.

Similarly, in Valencia Center, Inc. v. Bystrom, 543 So.2d 214 (Fla. 1989), this Court struck a legislative attempt to pass a statute designed to accommodate a specific taxpayer in Dade County, by manipulating assessment standards, citing Interlachen Lakes Estates. In Bystrom, the legislative attempt would have established a different standard for valuation based solely on the actual rental income generated through a sub-market lease. The principle recognized in Bystrom was adhered to in Schultz v. TM-Florida-Ohio Realty, 577 So.2d 573 (Fla. 1991), in which the taxpayer contended that his property should be valued solely on the basis of the actual rents received therefrom notwithstanding that the lease was recognized as a lease generating sub-market rents.

It is not uncommon for the legislature, being the political body which it is reacting to political pressures to enact statutes designed solely for the purpose of attempting to circumvent decisions of this Court and other courts, which have the

effect of attempting to give preferential tax treatment to specific taxpayers. The statute involved in Bystrom was a reaction to court decisions mentioned therein. Other examples of these are the statutes considered by this Court in Archer, which were an attempt to avoid this Court's decision in Williams. Another statute designed to circumvent Williams was chapter 80-368, Laws of Florida, which was considered by this Court in Capital City Country Club. There, this Court held that, notwithstanding that the legislative intent may have been to provide an exemption for all the buildings and improvements on Santa Rosa Island, that this was constitutionally prohibited and that it would construe the involved statute recognizing that the legislature did not have the power to declare that real property improvements could be considered as part of the leasehold and subject to intangible tax, by holding that the improvements remained real property, and that the intangible value had nothing to do with the real property value. Those precise interests who enjoy the use of governmental property and would like to enjoy such use tax free, are those who now contend that certain endeavors require a collaboration of public and private interests toward the end that facilities can be constructed through public financing for that which is represented as a public purpose, and subsequently leased or licensed or used for the purely private benefit, gain or advantage of the private entity tax free. The standard of review in such financing or bond validation cases is

totally different from the standard of review for taxation purposes and this has been the case ever since the 1968 Constitution was adopted. More importantly, in the recent elections the citizens of the State of Florida rejected an attempt advocated by these same special interests which would have granted to the legislature the exact power and authority which the authority, raceway, and amicus claim, notwithstanding that the citizens rejected such an amendment.

If the legislature possessed the power that is suggested herein by the authority, raceway, and amicus, then theoretically the legislature would have the power to permit cities to engage themselves in the business of operating or permitting the operation of restaurants, lounges, pool halls, etc., on public or municipally-owned property and assert the same to be a public purpose. Early on, even under the 1885 Florida Constitution, Justice Grimes, when serving as a judge on the Second District Court of Appeal, rejected a similar contention in City of Bartow v. Roden, 286 So.2d 228 (Fla. 1973). In City of Bartow, the city had engaged itself in the development business of operating an industrial park and leasing facilities and property at such area. Many of the lots and properties were leased but some were not. Judge Grimes, recognizing the limitations of municipal power as requiring use either for a municipal or public purpose, held that those lots which were owned by the city but held out for lease to private interests were not

being used for a municipal or public purpose, and were also subject to tax even though not leased. Therein, the court stated:

> A secondary point urged by Appellants is that even if the property actually being leased is subject to taxation, the county cannot tax that property which is only "held out for lease". The record reflects that the Authority has carved out certain portions of the airport and designated these areas as being available for lease. In effect, the Authority has created an industrial park at the airport. Many of the buildings within this area are leased. While the balance of the buildings are empty, the Authority is actively trying to find tenants for them. The lower court was correct in determining that by virtue of holding out this property for lease, the City had changed its character to the extent that it became subject to taxation along with the properties which were actually under lease.

City of Bartow, 286 So.2d at 230-231 (emphasis added). This was correct under the 1885 Constitution and is imminently more correct today under the 1968 Constitution. For instance, if a municipality purchased property and began the operation of a lounge, or a bar, a restaurant, or of a supermarket could it seriously be contended that such were legitimate municipal or public purposes? The appraiser submits that it could not. Any time a city begins to exercise its proprietary, municipal corporate powers for other than the general health, welfare, and safety of the inhabitants of the city, it loses its character as municipal and becomes a private entity and that is exactly what Judge Grimes recognized in City of Bartow. When a

city becomes a developer or entrepreneur like private businesses, it should be treated like any private entity or person.

In the instant case, Judge Quince recognized the same limitations in Sebring III, stating:

> There is nothing in the constitution which purports to exempt property, whether owned by a municipality or a private entity, when the property is being used primarily for a proprietary purpose.

718 So.2d at 299 (emphasis added). This statement, which is consistent with Judge Grimes' holding in City of Bartow, simply recognizes that the exemption language requiring "use by it for municipal or public purposes" would not authorize a city to engage in a commercial proprietary activity or permit someone else to engage in a commercial proprietary activity through the use of its property without losing its character which established its right to exemption. Were a municipality to itself engage in the sale of alcoholic beverages, the operation of a pool hall, or the operation of a restaurant, or permit its property to be used for such purposes by a private entity, such operations could not fall within the parameters of the constitutional exemption and, accordingly, would subject the involved property to taxation whether it was engaging in such activities itself or renting or leasing its property so that the lessee engaged in same.

The contention of the authority, raceway, and amicus appears to be that the legislature has all embracing power to define and, once so defined, the courts would be bound to acknowledge and accept such definition, notwithstanding that it may be contrary to the "normal and ordinary meaning" of words and terms. On at least two occasions this Court has rejected similar arguments. In Florida Boaters, which was cited by Judge Quince in Sebring III, this Court stated:

> While the constitution gives the Legislature the authority to define "boats" and the other species of property excluded by article VII, section 1(b) from ad valorem taxation, the authority is not unlimited and must be exercised in a reasonable manner. The flexibility thus granted to the Legislature does not empower it to depart from the normal and ordinary meaning of the words chosen by the framers and adopters of the constitution. *See, e.g., State v. Florida State Improvement Commission*, 47 So.2d 627 (Fla.1950); *City of Jacksonville v. Glidden Co.*, 124 Fla. 690, 169 So. 216 (1936). The definitional flexibility was provided because it is conceivable that floating structures might be endowed with characteristics which completely differentiate them from the historic and popularly understood concept of a "boat." The Legislature's definitional attempt, however, has failed to make such a reasonable differentiation. It has simply decreed that when the transportational or navigational use of a boat is secondary to other uses, the boat will be subject to ad valorem taxation instead of a license tax.

Florida Boaters, 409 So.2d at 19 (emphasis added).

Similarly, this Court in Archer carefully articulated the parameters surrounding legislative power in definitions and findings pointing out that such findings must actually be findings of fact and cannot be merely recitations of conclusion, or "obviously contrary to proven and firmly established truths of which courts may take judicial notice." 355 So.2d at 784. Archer, in rejecting a virtually identical attempt to that involved in the instant appeal, invalidated a legislative attempt to circumvent judicial decisions holding that:

> The Legislature is without authority to grant an exemption from taxes where the exemption has no constitutional basis. *Presbyterian Homes of the Synod of Florida v. Wood*, 297 So.2d 556 (Fla.1974). Regardless of the term used to describe the set-off, the reduction in rent afforded the leaseholders has the effect of a tax exemption and as such is unconstitutional since such exemption is not within the provisions of our present state constitution. *Williams v. Jones*, 326 So.2d 425 (Fla.1975); *Straughn v. Camp*, 293 So.2d 689 (Fla.1974). It is fundamentally unfair for the Legislature to statutorily manipulate assessment standards and criteria to favor certain taxpayers over others. *Interlachen Lakes Estates v. Snyder*, 304 So.2d 433 (Fla.1974).

355 So.2d at 784 (emphasis added). The established truth and fact is that the operation of a racetrack is a purely proprietary venture partaking of none of the attributes of a governmental/ sovereign undertaking or function and the legislature lacks the power to declare otherwise. Its attempt to declare otherwise is contrary to

the established truths that a racetrack be it vehicle, dog, or horse is a proprietary activity. Archer recognized the limitations on the legislature stating:

> The Legislature is without authority to grant an exemption from taxes where the exemption has no constitutional basis. *Presbyterian Homes of the Synod of Florida v. Wood*, 297 So.2d 556 (Fla.1974). Regardless of the term used to describe the set-off, the reduction in rent afforded the leaseholders has the effect of a tax exemption and as such is unconstitutional since such exemption is not within the provisions of our present state constitution. *Williams v. Jones*, 326 So.2d 425 (Fla.1975); *Straughn v. Camp*, 293 So.2d 689 (Fla.1974). It is fundamentally unfair for the Legislature to statutorily manipulate assessment standards and criteria to favor certain taxpayers over others. *Interlachen Lakes Estates v. Snyder*, 304 So.2d 433 (Fla.1974).

355 So.2d at 784 (emphasis added).

These statements are equally appropo in the case at bar. Could the legislature enact a statute finding that the sale of liquor, or the operation of a bawdy house are proper municipal or public purposes? The appraiser submits that it could not. No exemption is authorized in the constitution for privately used, government-owned property. This was recognized in 1946 in Bancroft Inv. Corp., 27 So.2d 162 (Fla. 1946), and adhered to in City of Bartow, decided under the old constitution.

In Lykes Bros., this Court considered certain language found which, like the language at issue here, was found in chapter 196, Florida Statutes (1975),

and dealt with governmentally-owned property used by private entities. There, this Court considered section 196.199(3), Florida Statutes (1975), which attempted to provide for continued exemption for certain property if there was a lease or other agreement between the governmental unit and private entity which provided that the governmental unit would refrain from imposing taxes, and such a lease existed between Lykes Bros. and the city of Plant City. The statute, section 196.199(3) provided:

> Nothing herein or in s. 196.001 shall require a governmental unit or authority to impose taxes upon a leasehold estate created prior to December 31, 1971, if the lease agreement creating such leasehold estate contains a covenant on the part of such governmental unit or authority as lessor to refrain from imposing taxes on the leasehold estate during the term of the leasehold estate, but any such covenant shall not prevent taxation of a leasehold estate by any taxing unit or authority other than the unit or authority making such covenant.

The trial court had held the statute invalid. On appeal, this Court stated:

> Lykes' contention with respect to the application and validity of Section 196.199(3)–that an ultra vires municipal contract can be legislatively ratified if it could have been authorized initially–is generally correct, but it neglects an additional requirement. The legislative attempt at ratification must itself be consistent with the Constitution. <u>At the time Section 196.199(3) was enacted, the Legislature no longer possessed the constitutional power to authorize tax exoneration of property owned by a municipality and used by a private</u>

> lessee predominantly for non-public purposes. Moreover, we do not read into the language of Section 196.1999(3) a legislative attempt to exceed this constitutional limitation by giving legal effect to otherwise invalid pre-1972 contracts, and thereby creating a new category of tax exemption.

Lykes Bros., 254 So.2d at 881 (emphasis added). The language held invalid by the trial court, like that involved in Lykes Bros., amounted to a legislative attempt to circumvent this Court's decisions construing the 1968 Constitution.

At least 6 times, this Court has construed the parameters of exemption permitted by the 1968 constitution and struck repeated legislative attempts to circumvent it. The legislature cannot legislatively change the constitution as construed. Sarmiento v. State, 371 So.2d 1047 (Fla. 3d DCA 1979), stated:

> Moreover, it is axiomatic that a state statute cannot constitutionally alter a prior court decision interpreting the state constitution. We therefore decline the state's invitation to interpret these statutes to apply to the home so as to overrule *Hajdu*. *Corn v. State,* 332 So.2d 4, 8 (Fla.1976). That decision was sound when rendered, has not been overruled by the above statutes, and is still good law.

371 So.2d at 1051 (emphasis added).

(b) The operation of a raceway is not a use of property permitted by article VII, section 3(a), Florida Constitution.

Article VII, section 3(a) permits certain exemptions based on property use and the only private uses permitted to be exempted in the new constitution are the five set forth therein which are "educational, literary, scientific, religious, or charitable purposes." The use of the property by the raceway for the operation of a racetrack and related endeavors by private, profitmaking, commercial entities certainly does not fit within any of the uses listed in the constitution. No other use exemption exists anywhere.

This limitation on the legislative power to grant exemptions from taxes without a constitutional basis was recognized in Capital City Country Club. In that case, the taxpayer relied upon parts of chapter 80-368, Laws of Florida, and argued that such intended to exempt from real estate taxation leases entered into before April 15, 1976. In addressing the taxpayer's contention, the supreme court stated:

> The club asserts that when this section was passed as part of chapter 80-368, Laws of Florida, the legislature intended to exempt from real estate taxation leases entered into before April 15, 1976. While it may well be that this is what the legislature intended, the question arises as to whether it had authority to do so.

Capital City Country Club, 613 So.2d at 451 (emphasis added). In finding that the legislature lacked this authority it stated:

> The legislature is without authority to grant an exemption from taxes where the exemption does not have

> a constitutional basis. *Archer v. Marshall*, 355 So.2d 781 (Fla.1978). Thus, we conclude that the legislature could not constitutionally exempt from real estate taxation municipally owned property under lease which is not being used for municipal or public purposes. We cannot accept the contention that by imposing a state intangible tax which cannot exceed two mills, art. VII, § 2, Fla. Const., on nonpublic leaseholds of municipal land, the legislature can exempt the land from the higher level of local taxation permitted by article VII, section 9 of our constitution.

Capital City Country Club, 613 So.2d at 451-452 (emphasis added).

The argument made in Capital City Country Club was that, by the enaction of chapter 80-368, the legislature intended that all buildings, structures, and other improvements constructed on real property owned by a governmental entity should be taxed as an intangible at the much lower rate provided for taxation of intangibles in chapter 199, Florida Statutes (1991). Under the Florida Constitution, taxation of real and personal property is reserved to the local government entities and the state is not permitted to impose a tax on same. See Art. VII, § 1, Fla. Const. Although acknowledging that exemption could have been what the legislature intended, the supreme court declined to construe the statute in that fashion and, instead, recognizing the constitutional limitations on the legislature with regard to taxation of real and personal property, held that the taxation of a leasehold intangible has nothing to do with the value of the real or personal property. The

document containing the rights under the leasehold may or may not have value depending on whether the contract rent is equal to, less than, or greater than the true market or economic rent. The court stated:

> The point is that the value of a person's leasehold interest has nothing to do with the value of the underlying real property for ad valorem tax purposes. In the case of a lease, the lessee's interest may or may not have value, depending on whether or not the contract rent is greater or lesser than the market or economic rent. The value of the real property for ad valorem taxation is its fair market value without regard to any leases or encumbrances on the property.

Capital City Country Club, 613 So.2d at 453. This Court then disapproved of Miller v. Higgs, 486 So.2d 371 (Fla. 1st DCA), review denied, 479 So.2d 117 (Fla. 1985), which had reached a contrary result.

More recently, in Canaveral Port Auth., this Court disapproved of the Second District Court of Appeal's decision in Sarasota-Manatee Airport Auth. v. Mikos, 605 So.2d 132 (Fla. 2d DCA 1992), review denied, 617 So.2d 320 (Fla. 1993). In Sarasota-Manatee, the involved authority attempted to avail itself of a perceived distinction between municipal property and county property insofar as the taxable status of same was concerned, if leased. When the controversy was beginning, representatives of the Sarasota-Manatee Airport Authority, which was created by special act, were able to have the special act amended to declare

specifically that the authority was a political subdivision of the state as such term is used in section 196.199(1)(c), Florida Statutes (1995). They then argued that all its property was immune. This Court in Canaveral Port disapproved of Sarasota-Manatee stating:

> We reject the Second District's holding in *Sarasota-Manatee* that classification as a political subdivision and, consequently, immunity from ad valorem taxation is dependent upon whether an entity is more like a county than a municipality. We recognize the confusion on this issue may have arisen because of cases that have stated that "[t]he state and its political subdivisions, *like a county*, are immune from taxation since there is no power to tax them." *Dickinson*, 325 So.2d at 3 (emphasis added)(quoting *Orlando Utilities Commm'n v. Milligan*, 229 So.2d 262, 264 (Fla. 4th DCA 1969), *cert. denied*, 237 So.2d 539 (Fla. 1970)); *see also Hillsborough County*, 210 So.2d at 194-95; *Orange County Fla. v. Florida Dep't of Revenue*, 605 So.2d 1333, 1334 (Fla. 5th DCA 1992), *approved*, 620 So.2d 991 (Fla. 1993). We herein clarify that immunity does not flow from a judicial determination that an entity is "like a county."

690 So.2d 1228. That was another example of a legislative attempt to create a special tax exemption not authorized by the constitution by simply declaring a port authority to be a political subdivision (county). The supreme court "reigned in" this abuse of legislative power in the same manner as it had done in Lykes Bros., Archer, and Capital City Country Club.

In an earlier case, under the 1885 Constitution, this Court also held unconstitutional a statute purporting to exempt house or automobile trailers used for housing accommodations from ad valorem taxation if the owner purchased a motor vehicle license tag. Palethorpe v. Thompson, 171 So.2d 526, 529 (Fla. 1965). The court adopted the defendants', the St. John's County Property Appraiser and the Comptroller of Florida, argument that the statute was unconstitutional because it effectively created an exemption from taxation that the constitution did not expressly permit. The court held that the legislature exceeded its bounds in attempting to create a per se exemption for motor vehicles primarily used for housing accommodations, where the constitution required just valuation of all real and personal property and only permitted exemptions for property used for municipal, education, literary, scientific, religious, or charitable purposes. 171 So.2d at 529-530. C.f. Florida Boaters Ass'n, Inc., (legislature lacked authority to exclude live-aboard vessels from definition of boats and thereby subject such vessels to ad valorem taxation).

Besides its decisions in Palethrope and Interlachen Lakes Estates, this Court has consistently and repeatedly held as unconstitutional statutes purporting to grant exemptions from ad valorem taxation that were not expressly authorized by the constitution. E.g. Presbyterian Homes of Synod v. Wood, 297 So.2d 556 (Fla.

1974) (statutory income test for determining charitable status of home for the aged is unconstitutional because general law must contain criteria which correspond to constitutional limitation); Franks v. Davis, 145 So.2d 228, 231 (Fla. 1962)(statute assessing stock in trade at 25 percent of invoice cost unconstitutionally violated just value requirement and effectively created exemption where none was permitted); State ex rel. Miller v. Doss, 2 So.2d 303, 304 (Fla. 1941)(granting taxpayer's mandamus action to coerce property appraiser to deny exemption for property only used predominately, and not exclusively, for charitable purposes because statute — insofar as it permitted an exemption for property not used exclusively for charitable purposes — was unconstitutional under the 1885 constitution); State ex rel. Burbridge v. St. John, 143 Fla. 876, 197 So. 549 (1940)(granting taxpayer's mandamus action to coerce property appraiser to deny exemption even though he relied upon statute providing that housing finance agency performed municipal purposes; statute was unconstitutional because agency activities were proprietary and legislative definition cannot circumvent the constitution); see also Lykes Bros., (recognizing that the legislature did not have constitutional authority to exempt municipally-owned property leased to a private lessee using the property for a proprietary purpose but interpreting statute to avoid declaring it unconstitutional).

The importance of the constitutional limitations on the legislature's power to exempt certain types of property from ad valorem taxation cannot be overstated. Ad valorem taxes are the primary source of funding for local government and are capped at ten mills. See Art. VII, § 9, Fla. Const. On the other hand, the state is constitutionally prohibited from levying ad valorem taxes. As article VII, section 1 provides:

> (a) No tax shall be levied except in pursuance of law. No state ad valorem taxes shall be levied upon real estate or tangible personal property. All other forms of taxation shall be preempted to the state except as provided by general law.

(Emphasis added.) Any legislative exemption from ad valorem taxation, therefore, has no effect upon the state's coffers but, instead, erodes the tax base for local government. As common sense dictates, it is much easier for the legislature to grant exemptions from ad valorem taxation accommodating political exigencies where there is no resulting loss of revenue to its budget. Once the legislature passes a constitutionally-unauthorized exemption, the property appraiser is the only elected official in the county with the ability, and the responsibility, to protect the county's tax base. The property appraiser's primary responsibility — as a constitutional officer — is to follow and apply the constitution.

All of the aforementioned cases were decisions where the Florida courts have either struck down statutes which were not constitutionally permissible as attempting to create special tax exemption, or arrived at conclusions noting the constitutional limitations on the legislature's power. The rationale of each of these cases is equally appropriate to the statute in the case at bar. It directly attempts to exempt property which is otherwise taxable and which has been so held by this court. Whether viewed as a legislative attempt to declare that a racetrack constitutes a sovereign/governmental function, or as an attempt to define what constitutes a governmental/governmental function, the end result is the same; that is, it is an attempt to grant an exemption for privately used property without a constitutional basis.

Any analysis of the fundamental law set forth in the constitution must be based on a recognition that the Florida Constitution is a limitation of power and not a grant of power and that the limitation operates to deprive the legislature of the authority to enact statutes which are inconsistent with the fundamental precepts in the constitution. See L. Maxcy, Inc; State ex rel. Moodie v. Bryan, 39 So. 929 (Fla. 1905).

Having enumerated the only permitted exempt uses of property, the legislature is without power to create others whether same is owned by a public

body or a church. For instance, if a church or church school possessed a section 501(c)(3) federal exemption certificate from the Internal Revenue Service and, subsequently, engaged in a business venture, such as book publishing and sales, it would be taxed by the Internal Revenue Service on unrelated business income. See §§501(c)(3)(a) and (b), Internal Revenue Code; Peoples Ed. Camp. Soc., Inc. v. C.I.R. C.A.N.Y., 331 F.2d 293 (1964), cert. denied, 379 U.S. 839 (1964). Obviously, the property where the publishing operation was conducted should be taxed like a similar private endeavor. The church would have abandoned its use which bottomed its right to exemption.

Fundamental to any appreciation of exemption for governmental property must be a recognition of that which bottoms the exemption. Governmental property employed in the operation of government, that is employed in the administration of sovereign functions of government, would not be taxed by the government for which it is providing the sovereign functions. This court recognized this underlying premise in Bancroft Inv. Corp., which was also cited by the trial court and district court, which held that the right to exemption ceases when the property is abandoned for the use that would warrant the exemption. Bancroft Inv. Corp, which was cited in Williams, in holding that the exemption from taxation was

lost when the use of the property which gave right to the exemption was abandoned, stated:

> If I abandon my homestead, it loses its right of exemption from taxation as soon as abandoned. We think the rule is general; that property dedicated to municipal, educational, religious, or other purposes that exempt it from taxation, reverts to its original status and becomes subject to state and municipal taxes as soon as it is abandoned for the purpose that fixes its exemption status. We think what we have said concludes the question, but Section 6.04 is also persuasive. This statute deals with the question of jurisdiction on the part of the state and federal governments over lands acquired by the latter for needful federal purposes and concludes with this limitation exempting "said lands from any taxation under the raceway of this state while the same shall continue to be owned, held, used, and occupied by the United States for the purposes above expressed and intended, and not otherwise." The statute does not list "post office" sites, but the statute listing the lands that may be acquired (Section 6.02) has the omnibus clause, "other needful buildings," so we would strain no rule of interpretation to hold that they were included. At any rate, every rule of interpretation cuts off the right of tax exemption as soon as it is abandoned for the use that warrants it.

27 So.2d at 171 (emphasis added). Bancroft Inv. Corp. was cited in Williams as follows:

> As to the power of the Legislature to so legislate, the words of Mr. Justice Terrell on rehearing in the case of *Bancroft Inv. Corp. v. City of Jacksonville*, 157 Fla. 546, 27 So.2d 162 (1946), provide a guiding principle concerning the function of the Court in reviewing the

exercise by the Legislature of its taxing power when he stated at page 170 of the opinion:

> " . . . We approach it on the premise that this is a democracy in which every parcel of property is expected to bear its due portion of the burden of government, unless exempted by the legislature in the manner provided by Section 1, Article IX of the Constitution. Courts have no more important function than to direct the current of the law in harmony with sound democratic theory."

In that case the Court, on rehearing, determined that the equitable interest of a purchaser of certain real property in Jacksonville, Florida, from the United States Government under an executory contract for sale was a sufficient interest in real estate to justify levy of ad valorem real estate taxes thereon.

326 So.2d at 429.

At bar, any claim to exemption by the authority ceased when the property was leased to be used as commercial property by a private lessee. These pronouncements are equally appropriate today. Bancroft Inv. Corp. recognized that no exemption is authorized in the constitution for privately used government owned property where the government, by its actions, has abandoned its use of the property or a use of the property which provided exemption. The holding and comments in Bancroft Inv. Corp., concerning use of property, abandonment, and right to non-

taxable status, is entirely in keeping with the underlying principle that recognizes that governmental property performing governmental services for the state's inhabitants, would not be subject to tax because the effect of it would be that the government would be taxing itself on property used in the performance of its governmental services on behalf of the people. These general principles are recognized in 84 C.J.S., section 198 (1954), as follows:

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

The court in Bancroft Inv. Corp. recognized this principle.

Taxation of municipal property not used for governmental purpose is generally recognized. The general rule would be that public property and land dedicated to a public use are not subject to taxation. See 84 C.J.S. § 197 (1954). The same authority addresses property held for public purposes stating that the property of municipal corporations "which is immune from taxation is such as is owned and held by it in its capacity as an integral part of the state government, ..." § 203, 84 C.J.S., at 389. The holdings authored by Judge Grimes in City of Bartow

and Judge Quince in Sebring III are squarely consistent with these general principles articulated in Bancroft Inv. Corp., and 84 C.J.S. section 198, that once the governmental unit (the city) chooses to engage in the type of proprietary activities which place it in competition with private business, then its property becomes taxable. In 84 C.J.S., at page 390, this general principle is recognized as follows:

> There is no implied immunity from taxation of property owned by a municipal corporation, which is not devoted to public or governmental uses, but held by the municipality in its private or commercial capacity as a source of profit or to serve some mere convenience of the citizens. So, in the absence of an express exemption, land of a city or other municipal corporation which is rented out to private persons from which it derives a revenue is subject to taxation; and the same rule applies to wharf property of a city which is in a similar manner made profitable to it, to a public market or market houses from which it derives a revenue, and to municipal farms operated for a profit. Property of a lighting company, such as lamps, office furniture, horses, wagons, etc, used by the company pursuant to its contract with a municipality, is not devoted to public use so as to be immune from taxation. If property is used both for public and private purposes and the parts so used cannot be separated, the whole is subject to taxation.

Section 204, 84 C.J.S., at 390. City of Bartow and Sebring III are squarely consistent with these general principles.

In fact, the First District Court of Appeal in Tre-O-Ripe Groves v. Mills, 266 So.2d 120 (Fla. 1st DCA 1972), recognized the principle that tangible

personal property owned by the United States lost its immunity and exemption was deemed abandoned when it was rented or leased to private persons. In Tre-O-Ripe Groves, the court recognized that this general principle was so well stated that no citation of authority was needed for such premise. These various pronouncements recognize a fundamental premise that public property not put to governmental use in the administration of part of the sovereign function of government is taxable while that property which is so used is not.

An oft-recognized principle is stated in § 146, 81A C.J.S., at page 592, as follows:

> The state does not have an unlimited right to use property but may use it only for a public purpose, and some constitutional and statutory provisions prohibit the use of public property for private purposes.

Admonitions affecting the state would most assuredly affect the municipalities and counties.

The cases cited herein involve instances where the judiciary is called upon to restrain the legislature from attempting to expand constitutional limitations on exemptions. Regardless of the form taken, these attempts have been held invalid.

(c) As to the amicus' assertions of equitable hardship.

The amicus have contended that since projects and facilities were constructed based upon the 1994 amendment which has now been held unconstitutional, that this Court should uphold the statute because of it having been relied upon. The appraiser suggests that it could not have been reasonably relied upon for two reasons which are: (1) the long-history of cases which have addressed this precise issue, i.e., the use of public owned property for private purposes; and (2) the Florida Constitution expressly addresses the taxable status of any such project.

Although public financing may be permitted for the construction of stadiums and other projects, article VII, section 10, Florida Constitution, addresses the taxable status of any such project upon completion if occupied by any private corporation, association, partnership, or person pursuant to contract or lease and points out that "the property interest created by such contract or lease shall be subject to taxation to the same extent as other privately owned property." This provision which deals with the pledging of credit by governmental entities is quite specific.

These two should have supplied ample "red flags" to any city government or city attorney involved in any public financing so that no city or public body should ever have signed any agreements which would require that the city pay

any taxes which may be levied. It is simply incredulous that this could have occurred and for the involved cities to now contend that they have been misled in reliance on the 1994 amendment in light of the long-history of cases cited herein which have stricken legislative enactments which attempted to grant exemptions without constitutional basis, cannot be seriously considered to be believable. Any "wounding" was self-inflicted. In fact, any negotiated terms and agreements entered into by the City of Tampa, City of St. Petersburg, or City of Lakeland with private entities underscore that stated herein, and such were indisputably municipal/corporate-proprietary activities. If any such agreement in any way waived or abdicated the cities' taxing power, such would be ultra vires and void for the same reasons stated by this Court in Lykes Bros.

CONCLUSION

The decisions of the trial court and the district court holding section 59, chapter 94-353, Laws of Florida, unconstitutional should be upheld for the reasons articulated by this Court in Canaveral Port Auth., Florida Boaters, City of Bartow, Lykes Bros., Archer, Williams, Volusia County, and other authorities cited. The amendment offends article VII, section 3(a), because the property is no longer used

by the city, and “public purpose,” as used in the constitution means governmental/ governmental purpose. The right to exemption has been abandoned.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to **HALA A. SANDRIDGE, ESQUIRE** and **PAUL R. PIZZO, ESQUIRE**, Fowler White, et al., Post Office Box 1438, Tampa, Florida 33601; **JOSEPH C. MELLICHAMP, III, ESQUIRE**, Senior Assistant Attorney General, Department of Legal Affairs, Tax Section - The Capitol, Tallahassee, Florida 32399-1050; **J. WENDELL WHITEHOUSE, ESQUIRE**, 143 South Ridgewood Drive, Sebring, Florida 33970; **STEVEN L. BRANNOCK, ESQUIRE**, Holland & Knight, Post Office Box 1288, Tampa, Florida 33601; **MARK C. EXTEIN, ESQUIRE** and **JOHN R. HAMILTON, ESQUIRE**, Foley & Lardner, Post Office Box 2193, Orlando, Florida 32802-2193; and **WILLIAM D. SHEPHERD, ESQUIRE**, Office of Hillsborough County Property Appraiser, 16th Floor - County Center, 601 East Kennedy Boulevard, Tampa, Florida 33602 on this the **19th** day of January 1999.

Larry E. Levy