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.
_____/

BRIEF OF AMICUS CURIAE PROPERTY APPRAISERS' ASSOCIATION OF FLORIDA, INC., IN SUPPORT OF APPELLEE, C. RAYMOND MCINTYRE, HIGHLANDS COUNTY PROPERTY APPRAISER

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CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned counsel for amicus curiae, the Property Appraisers' Association of Florida, Inc., hereby certifies that the type size and style for the amicus' 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#).

Amicus curiae, the Property Appraisers' Association of Florida, Inc., will be refereed to herein as the "PAAF."

STATEMENT OF THE CASE AND OF THE FACTS

The Property Appraisers' Association of Florida, Inc., (PAAF), hereby adopts by reference the Statement of the Case and of the Facts set forth in the appraiser's Answer Brief.

SUMMARY OF ARGUMENT

It is PAAF's position that the district court correctly held that the 1994 amendment to section 196.012(6) was unconstitutional, to the extent that the amendment attempts to grant ad valorem tax exemptions to governmentally-owned property used by private lessees for proprietary purposes. The 1968 Constitution is a limitation upon the legislature's power to grant exemptions from ad valorem taxation and provides an important "check and balance" to prevent the state from overly interfering with the tax base and primary funding source for local government and school districts.

For this Court to adopt the arguments of the raceway and amici supporting it, it would have to recede from its well established precedent and ignore the differences between the 1885 and 1968 constitutions. In a long line of cases, this Court has distinguished older cases decided under the 1885 Constitution and held that the 1968 Constitution requires that a private lessee of governmentally-owned property must use the property for a governmental/governmental purpose to be entitled to ad valorem tax exemption. In each of these cases, this Court rejected any legislative attempts to enact ad valorem tax exemptions which did not comply with this constitutional mandate. The 1994 amendment to section 196.012(6) also

attempts to provide an exemption without a constitutional basis and is unconstitutional.

In addition, Florida voters recently rejected Constitutional Revision No.10, which would have granted the legislature the precise power to determine what constitutes a public purpose for ad valorem tax exemptions that the raceway claims the legislature already possesses. Considering this court's long line of decisions construing the 1968 Constitution to restrict the legislature's power to grant ad valorem tax exemptions for governmentally-owned property leased to non-governmental lessees to property used for governmental/governmental purposes, along with this recent vote, the district court's decision should be affirmed.

ARGUMENT

The Property Appraisers' Association of Florida, Inc. (PAAF), is an association comprised of elected county property appraisers throughout the State of Florida. This year, its membership consists of appraisers from the following 37 counties: Baker, Bay, Bradford, Calhoun, Clay, Columbia, DeSoto, Dixie, Escambia, Flagler, Franklin, Gadsden, Gilchrist, Glades, Gulf, Hamilton, Hardee, Highlands, Holmes, Jackson, Jefferson, Lafayette, Levy, Liberty, Nassau, Okeechobee, Osceola, Pasco, Putnam, St. Johns, Santa Rosa, Suwannee, Taylor, Union, Wakulla, Walton, and Washington.

A property appraiser's primary overall responsibility is to ensure that property assessments within the county are imposed on an equitable and fair basis, comply with the constitutional requirement of just value, and that all property required to be taxed under the Florida Constitution bears its proper proportionate tax burden. In this regard, county property appraisers are charged with the dual duties of (1) appraising property and (2) administering exemptions. In accordance with the duty to administer exemptions, the property appraiser regularly confronts questions regarding the propriety of granting homestead exemptions and other exemptions authorized by the constitution. In the instant case, the property appraiser is

confronted with statutory provisions regarding exemptions that actually conflict with the Florida Constitution.

Because of the property appraiser's constitutional and statutory duties, the appraiser is the "first line" public officer in each county that must analyze and administer statutes passed by the legislature. The appraiser frequently will have to determine to what extent, if any, the statutes are inconsistent with or offend constitutional mandates and limitations. A property appraiser's primary responsibility as a constitutional officer, however, is to follow and apply the constitution.

Regularly, PAAF members must administer the statutes, constitution, and law as it pertains to the use of governmental property for private purposes. An excellent example would be the series of cases in which the Nassau County Property Appraiser was required to determine the taxable status of various properties owned by the city but leased to private entities and used for commercial profit-making activities. See Page v. City of Fernandina Beach, 714 So.2d 1070 (Fla. 1st DCA 1998), review denied, Case No. 93,761 (Fla. Dec. 2, 1998); Ocean Highway & Port Auth. v. Page, 609 So.2d 84 (Fla. 1992); Page v. Fernandina Harbor Joint Venture, 608 So.2d 520 (Fla. 1st DCA 1992), review denied, 620 So.2d 761 (Fla. 1993). In fact, this Court in Sebring Airport Auth. v. McIntyre, 642

So.2d 1071 (Fla. 1994), eventually disapproved of the Fernandina Harbor decision, which had granted exemption to property used as a marina, restaurant, seafood stores, and other commercial activities. Sebring Airport Auth., 642 So.2d at 1074 ("We disapprove *Page v. Fernandina Harbor Joint Venture*, to the extent that it may be read to grant ad valorem tax exemption to a nongovernmental lessee of governmental property that uses such property for governmental-proprietary purposes.").

The property appraiser's duties in administering exemptions are made all the more difficult when the legislature passes constitutionally-unauthorized special interest exemptions from taxation. No case could be more glaring than the instant case where the Highlands County Property Appraiser denied an exemption for the raceway property, had such denial challenged in circuit court, and successfully defended the denial of the exemption in the circuit court, through the district court of appeal, and then to this Court.

While the case was pending in this Court, the legislature enacted a statute which attempted to circumvent the district court and, ultimately, this Court's decisions and grant exemption to the precise property involved in the litigation. After litigating the exempt status of the raceway from 1991-1994, therefore, the appraiser was required to review another exemption claim by the raceway under a

newly-enacted statute. Once again, the raceway contested the appraiser's denial of the exemption, the trial court and district court ruled in the appraiser's favor, and the case now appears before this Court.[1] At all times, the use of the property has not changed. The only aspect of this case that has changed is the legislature's effort to declare the raceway's use of the property a "governmental, municipal, or public purpose" so as to entitle it to ad valorem tax exemption.

The PAAF's members vigorously express their support for the position of the Highlands County Property Appraiser and urge this Court to uphold the district court's decision. Legislative gerrymandering of ad valorem tax exemptions in derogation of the Florida Constitution only creates inequity and unfairness among county residents, which directly conflicts with the appraisers' primary responsibility of creating equity among assessments in their respective counties.

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[1]The property appraiser properly raised the unconstitutionality of the 1994 amendment as an affirmative defense. (R-029) See Department of Education v. Lewis, 416 So.2d 455 (Fla. 1982); Fuchs v. Robbins, 23 Fla. L. Weekly D2529 (Fla. 3d DCA Nov. 18, 1998). In its district court brief, the raceway contested the property appraiser's "standing" to rely upon the unconstitutionality of the 1994 amendment as an affirmative defense. The district court did not specifically address the argument in its decision, although by upholding the denial of the exemption because of the statute's unconstitutionality the court implicitly held that the property appraiser had such standing. The raceway has not raised this issue on appeal to this Court.

I. The 1994 amendment to section 196.012(6), Florida Statutes (Supp. 1994) is unconstitutional.

The key question for this Court to decide is whether the Florida Legislature has the power under the 1968 Florida Constitution to declare that municipally-owned property leased to a private, for-profit entity for the operation of a racetrack is a "governmental, municipal, or public purpose" so as to be entitled to ad valorem tax exemption. Beyond the facts presented in the instant case, the question may be more broadly defined as whether the legislature has the power to declare the use by a for-profit "lessee, licensee, or management company of real property or a portion thereof as a convention center, sports facility with permanent seating, concert hall, arena, stadium, park, or beach" to be "a use that serves a governmental, municipal, or public purpose" under the 1968 constitution. See § 196.012(6), Fla. Stat. (Supp. 1994).

PAAF respectfully submits that the arguments of the raceway and amici supporting its position that the legislature has the power to determine what constitutes a "governmental, municipal, or public purpose" for ad valorem tax purposes and that such a definition may change with shifting or evolving public opinion should be rejected. The raceway's and amici's arguments would require this Court to ignore the differences between the 1885 and 1968 Florida

constitutions, retreat from its well established precedent, and determine what use of property is exempt from ad valorem taxation based upon the political clamor of the moment generated by special interest groups.

(a) The Florida Constitution is a limitation upon the legislature's power to enact ad valorem tax exemptions.

It has long been established that the constitution is a limitation upon the legislature's power to provide for the exemption from taxation of any classes of real or personal property except those specifically permitted by the constitution. See e.g. Hillsborough County Aviation Auth v. Walden, 210 So.2d 193 (Fla. 1968); Palethorpe v. Thompson, 171 So.2d 526 (Fla. 1965); State ex rel. Miller v. Doss, 2 So.2d 303 (Fla. 1941); L. Maxcy, Inc. v. Federal Land Bank, 111 Fla. 116, 150 So. 248 (1933). Article VII, section 3, Florida Constitution (1968), provides for the following exemptions:

> (a) All property owned by a municipality and used exclusively by it for municipal or public purposes shall be exempt from taxation. A municipality, owning property outside the municipality, may be required by general law to make payment to the taxing unit in which the property is located. Such portions of property as are used predominantly for educational, literary, scientific, religious or charitable purposes may be exempted by general law from taxation.
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> (b) There shall be exempt from taxation, cumulatively, to every head of a family residing in this state, household

goods and personal effects to the value fixed by general law, not less than one hundred thousand dollars, and to every widow or widower or person who is blind or totally and permanently disabled, property to the value fixed by general law not less than five thousand dollars.

(c) Any county or municipality may, for the purpose of its respective tax levy and subject to the provisions of this subsection and general law, grant community and economic development ad valorem tax exemptions to new businesses and expansions of existing businesses, as defined by general law. Such an exemption may be granted only by ordinance of the county or municipality, and only after the electors of the county or municipality voting on such question in a referendum authorize the county or municipality to adopt such ordinances. An exemption so granted shall apply to improvements to real property made by or for the use of a new business and improvements to real property related to the expansion of an existing business and shall also apply to tangible personal property of such new business and tangible personal property related to the expansion of an existing business. The amount or limits of the amount of such exemption shall be specified by general law. The period of time for which such exemption may be granted to a new business or expansion of an existing business shall be determined by general law. The authority to grant such exemption shall expire ten years from the date of approval by the electors of the county or municipality, and may be renewable by referendum as provided by general law.

(d) By general law and subject to conditions specified therein, there may be granted an ad valorem tax exemption to a renewable energy source devise and to real property on which such devise is installed and operated, to the value fixed by general law not to exceed the original cost of the devise, and for the period of time fixed by general law not to exceed ten years.

> (e) Any county or municipality may, for the purpose of its respective tax levy and subject to the provisions of this subsection and general law, grant historic preservation ad valorem tax exemptions to owners of historic properties engaging in the rehabilitation or renovation of these properties in accordance with approved historic preservation guidelines. This exemption may be granted only by ordinance of the county or municipality. The amount or limits of the amount of this exemption and the requirements for eligible properties must be specified by general law. The period of time for which this exemption may be granted to a property owner shall be determined by general law.

(Emphasis added.) Under the 1968 Constitution, certain property shall be exempt while other property may be exempted by general law. Municipally-owned property leased to for-profit entities using the property for proprietary purposes, however, is clearly not included among those properties that either shall be exempt or may be exempted by general law. "Under established rules of constitutional construction, the specification of permissible exemptions will exclude others: *expressio unius est exclusio alterius.*" Franks v. Davis, 145 So.2d 228, 231 (Fla. 1962). Without the constitutional authority to grant an exemption to for-profit lessees of municipally-owned property, the 1994 amendment is patently invalid and 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. "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." Art. VII, § 1(a), Fla. Const. (1968) (emphasis added). The constitutional limitations on the legislature's power to create ad valorem tax exemptions provides an important "check and balance" to prevent the state from overly interfering with the tax base and primary funding source for local government and school districts.

Recently, this court has twice again reaffirmed its adherence to the concept that the legislature's power to grant ad valorem tax exemptions is limited to those powers expressly set forth in the constitution. See Canaveral Port Auth. v. Department of Revenue, 690 So.2d 1226 (Fla. 1996); Capital City Country Club v. Tucker, 613 So.2d 448 (Fla. 1993).

In Capital City, the taxpayers argued that section 196.199(4), Florida Statutes (1991), permitted an exemption for governmentally-owned property that became subject to lease prior to 1976. The taxpayers also argued that the legislature, by enacting chapter 80-368, Laws of Florida (1980), intended that all buildings, structures, and other improvements constructed on real property owned

by a governmental entity should be taxed as intangibles at the much lower rate provided in chapter 199, Florida Statutes (1995).

This Court stated as follows in rejecting the taxpayer's argument:

> 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.
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> 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. However, we do not believe it is necessary to hold any portion of section 196.199 unconstitutional.

Capital City, 613 So.2d at 448-449 (emphasis added). This Court avoided declaring the statute unconstitutional, however, by holding that it did not apply to leases of property by private entities using the property for proprietary purposes.

In Canaveral Port Auth., this Court rejected any notion that an airport authority could be deemed a "political subdivision" merely because the legislature designated it as such in a special act. "The Florida Constitution does not empower the legislature to designate what entities are immune from ad valorem taxation." 690 So.2d at 1228. Just as the legislature lacks the power to determine what entities are exempt from taxation, it likewise lacks the power to determine what uses of property are entitled to an ad valorem tax exemption absent an express constitutional grant of such power.

After this Court's decision in Canaveral Port Auth., the legislature passed another statute attempting to avoid one of this Court's decisions. See ch. 97-255, § 25 Laws of Fla. (1997). In the 1997 amendment, the legislature changed the definition of governmental, municipal, or public purpose set forth in section 196.012(6), Florida Statutes (1995), to include:

> Any activity undertaken by a lessee which is permitted under the terms of its lease of real property designated as a public airport as defined in s. 332.004(14) by municipalities, agencies, special districts, authorities, or other public bodies corporate and public bodies politic of the state, or which are located in a deepwater port identified in s. 403.021(9)(b) and owned by one of the foregoing governmental units, subject to a leasehold or other possessory interest of a nongovernmental lessee that is deemed to perform an aviation or airport or maritime or

> port purpose or operation shall be deemed an activity that serves a governmental, municipal, or public purpose.

Ch. 97-255, § 25, Laws of Fla. at 2921 (emphasis added). In the same section, the legislature also declared that: "[f]or the purposes of s. 196.199(1), special districts shall be treated as municipalities." Similar to the 1994 amendment at issue in the instant case, each of these 1997 amendments likewise attempts to grant ad valorem tax exemptions without a constitutional basis.

(b) The raceway's arguments would require this Court to recede from prior precedent and ignore the differences between the 1885 and 1968 constitutions.

A fatal flaw in the raceway's and amici's arguments is that this Court would have to recede from its prior precedent and ignore the differences between the 1885 and 1968 constitutions in order to declare that the property is entitled to an ad valorem tax exemption based upon the 1994 amendment to section 196.012(6). The 1885 Constitution provided that: "[t]he property of all corporations . . . shall be subject to taxation unless such property is held and used exclusively for religious, scientific, municipal, educational, literary, or charitable purposes." Art. XVI, § 16, Fla. Const. (1885). The 1968 Constitution now provides that: "[a]ll property owned by a municipality and used exclusively by it for municipal or public purposes shall be exempt from taxation." Art. VII, § 3, Fla. Const. (1968).

Article VII, section 3, was adopted specifically to ensure that municipal property leased to private parties for non-public purposes is taxed in the same manner as private property used for non-public purposes. This principle represented a substantial departure from the pre-existing law of exemptions. While "the 1885 Constitution did not require the legislature to impose ad valorem taxes on private-use leaseholds in governmental property, decisions construing the 1968 Constitution make clear that taxation of such property is no longer discretionary." Lykes Bros., Inc. v. City of Plant City, 354 So.2d 878, 881 n. 14 (Fla. 1978). This change in the Constitution lead to a series of supreme court cases in which this Court overruled existing precedent based on the new Constitution.[2]

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[2]Compare, Daytona Beach Racing and Recreational Facilities Dist. v. Paul, 179 So.2d 349 (Fla.1965) (under 1885 Constitution, Daytona racetrack is exempt from ad valorem taxes), with Volusia County v. Daytona Beach Racing and Recreational Facilities Dist., 341 So.2d 498 (Fla. 1977) (under 1968 Constitution, Daytona racetrack not exempt from ad valorem taxes); Hillsborough County Aviation Auth. v. Walden, 210 So.2d 193 (Fla. 1968) (under 1885 Constitution, concession space leased at airport was tax exempt), with Walden v. Hillsborough County Aviation Auth., 375 So.2d 283 (Fla. 1974) (under 1968 Constitution, concession space leased at airport was not tax exempt); State v. Escambia County, 52 So.2d 125 (Fla. 1951) (Santa Rosa Island property leased for residential and commercial use could be exempted from taxation under 1885 Constitution), with Archer v. Marshall, 355 So.2d 781 (Fla. 1978) (Santa Rosa Island property leased for residential and commercial use could not be exempted from taxation under 1968 Constitution).

The change in the tax exempt status of the Daytona racetrack illustrates the revolution in tax exemption law caused by the 1968 Constitution. Prior to the 1968 Constitution, this Court held that the Daytona Beach Raceway was entitled to a tax exemption even though it was owned by an incorporated local government and leased to a for-profit developer.

The raceway was exempt, this Court reasoned, because of "its manifest public purpose as a community recreational asset and business stimulant." Paul, 179 So.2d at 349. The racetrack "harmonized with customs of the City of Daytona Beach where automobile racing was conducted along the beach of the Atlantic Ocean opposite the city for many years." Paul, 179 So.2d at 355. Under such a generalized understanding of public purpose, the legislature would have the authority to exempt property like the Sebring racetrack, even though a private party was using it for profit-making purposes.

Paul, however, was repudiated by the drafters of the 1968 Constitution. Under the new constitution, this Court subsequently held that the raceway was subject to ad valorem taxation. This Court explained the constitutional change stating:

> [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*

> *Racing & 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."

Volusia County, 341 So.2d at 501. Under the new constitutional provisions, "[o]perating an automobile racetrack for profit is not even arguably the performance of a 'governmental-governmental' function." 341 So.2d at 502.

Like the Daytona speedway, the raceway argues it serves as "a community recreational asset and business stimulant . . . that harmonizes with the customs" of Sebring. Paul, 179 So.2d at 353. As this Court made clear in Volusia County, such generalized public purposes cannot justify a tax exemption under the 1968 Constitution when a private party which is "purely proprietary and for profit" is using the property "to make profits for its stockholders." 341 So.2d at 501.

The 1968 Constitution's impact on exemption law also is illustrated by the change in the tax exempt status of the leased properties on Santa Rosa Island. On Santa Rosa Island, the government leased numerous parcels to individuals who then built private homes and businesses on them. In 1947, the legislature granted these leased properties a tax exemption. This Court held that this exemption was

constitutional under the 1885 Constitution. State v. Escambia County, 52 So.12 125 (Fla. 1951).

In 1971, however, the legislature removed the tax exemption and began taxing the properties. This commencement of taxation on governmental properties leased for residential and commercial purposes was held constitutional under the 1968 Constitution. Williams v. Jones, 326 So.2d 425 (Fla. 1976); Straughn v. Camp, 293 So.2d 689 (Fla. 1974), appeal dismissed, 419 U.S. 891 (1975).

The Williams decision is particularly significant because it established the "governmental-governmental" versus "governmental-proprietary" test to determine what constitutes an "exclusive public" use as those terms are used in the 1968 Constitution. This Court held that:

> The exemptions contemplated under Sections 196.012(5) and 196.199(2)(a), Florida Statutes, related to "governmental-governmental" functions as opposed to "governmental-proprietary" functions. With the exemption being so interpreted all property used by private persons and commercial enterprises is subject to taxation . . . . Thus all privately used property bears a tax burden in some manner and this is what the Constitution mandates.

Williams, 326 So.2d at 433 (emphasis added). This formulation continues to be the constitutional touchstone for tax exemptions. See Sebring Airport Auth.; Volusia County.

In 1976, however, the legislature attempted to pass a special act that purported to require that each taxpayer's rent be reduced by the amount of ad valorem taxes paid on the leased property. This Court held this law unconstitutional, stating that:

> The Legislature is without authority to grant an exemption from taxes where the exemption has no constitutional basis. 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 such is unconstitutional since such exemption is not within the provisions of our state constitution. It is fundamentally unfair for the Legislature to manipulate assessment standards and criteria to favor certain taxpayers over others.

Archer v. Marshall, 355 So.2d 781, 784 (Fla. 1978) (citations omitted).[3]

The facts in Archer present facts similar to the legislature's attempt in the 1994 amendment to bootstrap the Sebring raceway into a tax exemption after the

[3]In the same year, this Court declared unconstitutional a related law that required the government that owned Santa Rosa Island to make direct reimbursement of moneys paid for ad valorem taxes to the taxpayers who were leasing certain properties. Reasoning that "the Florida Constitution requires that all property used for private purposes bear its just share of the tax burden for the support of local government and education, with certain exceptions specifically enumerated in the constitution," this Court held that this act violated "Article VII, section 3, . . . Florida Constitution (1968)." Am Fi Investment Corp. v. Kinney, 360 So.2d 415 (Fla. 1978).

courts have already ruled that no exemption is allowed. Using the governmental-governmental versus governmental-proprietary test, this Court in Williams held that the Santa Rosa Island properties were not entitled to a tax exemption under the "exclusive" municipal use language of the 1968 Constitution. This Court then struck down the legislature's attempt to evade the constitutional limitations on exemptions in Archer.

In the instant case, this Court originally held that the definition of public purpose in section 196.012(6), applied only to governmental/governmental functions. As the court stated:

> Serving the public and a public purpose, although easily confused, are not necessarily analogous. A governmental-proprietary function occurs when a nongovernmental lessee utilizes governmental property for proprietary and for-profit aims. We have no doubt that Raceway's operation of the racetrack serves the public, but such service does not fit within the definition of a public purpose as defined by section 196.012(6). Raceway's operating of the racetrack for profit is a governmental-proprietary function; therefore, a tax exemption is not allowed under section 196.199(2)(a).

Sebring Airport Auth., 642 So.2d at 1073-1074. Now, the raceway argues that the 1994 amendment–which provides a more expansive definition of public purpose–allows an exemption for the same use of the property. The governmental/governmental test, however, "is what the constitution mandates."

Williams, 326 So.2d at 453. As in Archer, therefore, this Court should strike down the legislature's attempt to create this exemption from ad valorem taxation.

This Court also has observed the differences between the 1885 and 1968 constitutions with regard to the classification of property pursuant to Article VII, Section 4 of the 1968 Constitution. See Valencia Center, Inc. v. Bystrom, 543 So.2d 214 (Fla. 1989); Interlachen Lakes Estates, Inc. v. Snyder. 304 So.2d 433 (Fla. 1973).

In Interlachen Lakes Estates, this Court examined the constitutionality of a statute which required that platted lands unsold as lots "shall be valued for tax assessment purposes on the same basis as any unplatted acreage of similar character until 60 per cent of such lands included in one plat shall have been sold as individual lots." Interlachen Lakes Estates, 304 So.2d at 434. This Court observed that the statute's effect was "to give the subdivision developer a tax break by treating his unsold lots as unplatted for tax valuation purposes until he sells sixty per cent of his lots, while all of the purchasers of his lots are not so favored." 304 So.2d at 433.

In striking down the statute as unconstitutional, this Court observed that the 1968 constitution required just valuation for all property for ad valorem taxation except that the legislature was permitted to (a) classify by general law agricultural land or land used exclusively for non-commercial recreational purposes

to be assessed solely on the basis of character or use, and (b) specify by general law that property held for sale as stock in trade or livestock may be valued at a specified percentage of value. Because the Rose law attempted to create a standard of valuation for another class of property, this Court applied the rule of construction *expressio unius est exclusio alterius* and held that the legislature lacked the authority to establish separate standards of valuation for any classes of property not specifically set forth in the constitution. As this Court stated:

> 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.
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> 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.

Interlachen Lakes Estates, 304 So.2d at 434-435 (emphasis added).

In Valencia Center, this Court relied upon its previous decision in Interlachen Lakes Estates and held that a statute creating favored tax treatment for property subject to pre-1965 leases was unconstitutional "because the legislature cannot establish different classes of property for tax purposes other than those enumerated in . . . the constitution." 543 So.2d at 216. Notably, the procedural posture of Valencia Center also is similar to the instant case. There, during a continuing controversy over the proper assessed value of a shopping center encumbered by a long term below market rental rate lease, the legislature passed a statute requiring the property appraiser to assess based upon rents received under the pre-1965 lease. The statute would have overturned the appraiser's assessment.

When weighed against the long line of this Court's decisions construing the 1968 constitution as prohibiting the legislature from (1) exempting from ad valorem taxation any uses of property by governmental lessees that do not constitute governmental/governmental purposes or (2) exempting any classes of property not specifically enumerated in the constitution, the raceway misplaces its

reliance upon Poe v. Hillsborough County, 695 So.2d 672 (Fla. 1997). To begin with, Poe is a bond validation case and its determination of what constitutes a public purpose is inapplicable to ad valorem tax exemptions. As Poe observed, a bond issue may be validated if it serves a "paramount public purpose," i.e., where the public purpose is predominant and private use only incidental. 695 So.2d at 675-676. The predominant use/incidental use test formerly had been adopted by this court as appropriate in ad valorem tax exemption cases in Dade County v. Pan American World Airways, Inc., 275 So.2d 505 (Fla. 1973). The predominate public use test set forth in Pan American, however, is no longer good law. St. John's Associates v. Mallard, 366 So.2d 34, 37 (Fla. 1st DCA 1978)(The predominant public use test, in light of the more recent decisions in Straughn, Williams, and Volusia County "no longer has continuing efficacy and we must look instead to the use actually made of the property leased to determine its tax exempt status."); see also Volusia County, 341 So.2d at 502 n.5 (holding that Pan American has been statutorily superceded). As Justice Ervin stated in his dissent in Pan American: "It is also important to recognize that the concept of 'public purpose' justifying the issuance of revenue bonds, does not in itself require exemption from taxation." Pan American, 275 So.2d at 515 (Ervin, J., dissenting).

Moreover, the Tampa Bay Buccaneers' use of the stadium and practice facilities involved in Poe subjects the property to ad valorem tax pursuant to Article VII, Section 10 of the 1968 Florida Constitution. Section 10(c) specifically provides that "If any project so financed, or any part thereof, is occupied or operated by any private corporation, association, partnership or person pursuant to contract or lease with the issuing body, the property interest created by such contract or lease shall be subject to taxation to the same extent as other privately owned property."

II. Florida voters recently rejected Constitutional Revision No. 10, which would have granted the legislature the precise powers the raceway argues it already possesses.

In November 1998, Florida voters rejected proposed constitutional amendment No. 10 that would have granted the legislature the precise powers that the raceway claims the legislature already possesses. Proposed Constitutional Revision No. 10 would have added the following language to article VII, section 3:

> All property owned by a municipality not otherwise exempt from taxation or by a special district and used for airport, seaport, or public purposes, as defined by general law, and uses that are incidental thereto, may be exempt from taxation as provided by general law.

Florida Dept. of State, at *Proposed Constitutional Amendments and Revisions to Be Voted On November 3, 1998* 31 (June 23, 1998) (emphasis added). In an article by the Constitution Revision Commission and introduced by its Chairperson, a member of the Commission explained the legal effect of this proposed amendment as follows:

> The proposed amendment removes the determination of "public purpose" from the judicial arena and places it within the legislative branch. If adopted, it will allow the Legislature to determine when activities undertaken by private persons on property owned by cities or special districts serves a public purpose so as to warrant a property tax exemption.

M. Barnett and F. Maglione, Revision 10: *Proposing Solutions to the Property Tax Structure*, LXXII, No. 9, Florida Bar Journal 54, 44 (Oct. 1998). See D. Kearney, D. Ben-David & A. Martinez, *A Preview of Constitutional Revision* LXXII, No. 6 Florida Bar Journal 20, 26 (June 1998) (Commission's general counsel states that purpose of Revision 10 was to change the Court's "relatively stringent" definition of "public purpose.").

Of the thirteen proposed constitutional amendments submitted to the voters, Amendment 10 was the only one rejected at the polls. By this action, Florida's voters have indicated their intent that the constitution should not give the legislature the power to expand the definition of "public purpose" to include the for-

profit use of municipal property. See e.g. Burke v. Charlotte County, 286 So.2d 199, 200 (Fla. 1973) (quoting with approval lower court order stating "[t]hat attempts to amend the provision of the Constitution and substitute the words 'directly' and 'primarily' for the word 'exclusively' were defeated . . . showed the intent of the framers of this provision of the Constitution... .") In light of this recent vote, this Court should not now grant the legislature the power to declare which uses of property constitute a governmental, municipal, or public purpose when Florida voters have indicated that the legislature should not have such power.

CONCLUSION

Based upon the aforementioned arguments and authorities, this Court respectfully is requested to affirm the district court's decision and declare that the 1994 amendment to section 196.012(6) is unconstitutional.

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; **LARRY E. LEVY, ESQUIRE**, The Levy Law Firm, 1828 Riggins Road, Tallahassee, Florida 32308; **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.

Loren E. Levy